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SEPARATION OF POWERS AND THE NATIONAL LABOR RELATIONS BOARD: SELECTED READINGS

PREPARED FOR THE

SUBCOMMITTEE ON SEPARATION OF POWERS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

BY

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SUBCOMMITTEE ON SEPARATION OF POWERS

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IN THE SENATE OF THE UNITED STATES,
Agreed to October 13, 1972.

Senate Concurrent Resolution 98

Resolved by the Senate (the House of Representatives concurring), That the manuscript entitled "Separation of Powers and the National Labor Relations Board: Selected Readings", prepared for the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary by Doctor James R. Wason of the University of Maryland, formerly specialist in labor economics and relations, Economics Division, Legislative Reference Service, the Library of Congress; and the Congressional Research Service and the Library of Congress, in cooperation with the staff of the Subcommittee on Separation of Powers, be printed as a Senate document.

SEC. 2. There shall be printed for the use of the Senate Committee on the Judiciary one thousand additional copies of the document authorized by section 1 of this concurrent resolution.

Attest:

FRANCIS R. VALEO,
Secretary of the Senate.
W. PAT JENNINGS,
Clerk of the House of Representatives.

INTRODUCTION BY SENATOR SAM J. ERVIN, JR., CHAIRMAN, SENATE SUBCOMMITTEE ON SEPARATION OF POWERS

In 1968 the Subcommittee on Separation of Powers undertook a study of the role played by administrative agencies in our constitutional structure. As an outgrowth of that study, the subcommittee in 1969 published Senate Document No. 91–49, "Separation of Powers and the Independent Agencies: Cases and Selected Readings," a collection of documents dealing with the separation of powers aspects of administrative agencies.

While this document dealt in general with the role of the "headless fourth branch" of Government, the subcommittee has paid specific attention to the National Labor Relations Board. Extensive hearings were conducted in 1968, and a comprehensive report on the Board was issued in 1970. In the course of its investigation of the NLRB, the subcommittee compiled the present collection of selected readings on the history and role of the Board in the administration of the labor statutes.

This collection actually constitutes a second volume to the 1969 document. The research was completed by Dr. James R. Wason in cooperation with the subcommittee staff while he was a specialist in labor economics and relations with the Economic Division of the Legislative Reference Service, the Library of Congress. Dr. Wason, who now is on the staff of the University of Maryland, has brought the collection up to date with a section on developments from 1968, the time at which he completed his basic research.

The subcommittee owes a great debt to Dr. Wason. The two collections, on administrative agencies in general and the NLRB in particular, represent a balanced approach to the subject, for he has selected cases and readings which present a diversity of opinion on the controversies surrounding the independent agencies. His work will serve as a ready reference for everyone interested in this complex aspect of the separation of powers doctrine.

In addition, the subcommittee is indebted to Lester S. Jayson, Director of the Congressional Research Service of the Library of Congress, for his generous assistance in this and other phases of the subcommittee's work.

As I said in my introduction to the 1969 document, I believe that all Members of Congress and other citizens will find this and the earlier collection to be invaluable aids toward an understanding of the unresolved constitutional and administrative issues surrounding the independent agency system.

SAM J. ERVIN, JR.,
Chairman, Subcommittee on Separation of Powers.

FOREWORD

This collection of background documents concerning the procedural, as opposed to the substantive, history of the National Labor Relations Board was substantially completed in 1968. It was prepared to provide necessary background information for the use of the Subcommittee on Separation of Powers in connection with hearings being held at that time. Those hearings concerned the exercise of the functions delegated to the independent Federal regulatory agencies by the Congress and initially focused on the National Labor Relations Board.

In the time which has elapsed since 1968, the administrative problems of the Board noted then have persisted. No substantial procedural changes have been made by the Board in its operations, although many small changes, designed to expedite its processes, have been made. The handling of decisions on a case-by-case basis, without use of substantive administrative regulations, has continued, inviting litigation.

Over this same interval, the caseload of the Board has continued to increase. The number of unfair labor practice cases filed with the Board is now between 30,000 and 40,000 annually. The number of cases awaiting decision by the Board each year has grown to something like 1,200. In the fiscal year 1971 the Board handed down decisions in 836 unfair labor practice cases; the figure for the year 1972, just past, was 866 such cases. The efforts of the Board to expedite outflow, which are now approaching finite limits, cannot forever offset the effects of a procedure which does nothing to discourage inflow.

In preparing the collection for publication at this time, no changes have been made in the materials originally collected or in their presentation, save to omit materials of limited interest or now obsolete. A new selection of materials appearing since the completion of the original collection appears at the end under the heading, "The Ervin Subcommittee and After".

The compiler wishes to acknowledge his indebtedness to those copyright holders who have kindly extended permission for the reproduction of materials in this collection. He also wishes to thank the Chief of the Economics Division, Congressional Research Service, Library of Congress, and his staff for their many kindnesses in assisting him in updating this compilation for publication at this time.

JAMES R. WASON,
University College, University of Maryland.

AUGUST 1972.

LETTER OF TRANSMITTAL

LIBRARY OF CONGRESS,
LEGISLATIVE REFERENCE SERVICE,
November 13, 1968.

This collection provides background materials to satisfy the current interest in the National Labor Relations Board and its administration of the National Labor Relations Act. The focus is on procedural matters and relationships, with substantive problems covered only incidentally. A comparable collection of documents illustrative of substantive matters considered by the Board would be many times more voluminous.

In selecting materials an attempt has been made to follow a historical sequence but, at the same time, to give the materials presented a cumulative value without unnecessary duplication. As a result, neither criterion has been strictly observed. The user of these materials is thus warned that the information sought may not necessarily appear exactly where historical sequence might dictate its placement.

Another objective has been to provide a general background of documents on the separation-of-powers concept, considered as the central concept in the conflict over the role of discretion in administrative law, while at the same time providing materials on the National Labor Relations Act and the National Labor Relations Board, only one example of this conflict. Again, we have contented ourselves with selecting documents of the time, which we hope can be considered as having been selected with a view to being both informative and balanced.

The inclusion of any statement or reference implies neither approval nor disapproval by the Legislative Reference Service of any opinions expressed therein.

The Legislative Reference Service sincerely thanks those copyright holders who have kindly extended permission for the reproduction of texts in this compilation.

The bibliographical notes which precede each section are intended primarily to serve as guides and to provide cross-references to the materials which follow. However, they may be read profitably as a sequence.

The selection of cases and readings has been made by James R. Wason, specialist in labor economics and relations, who has also prepared the introductory notes to each section.

LESTER S. JAYSON,
Director, Legislative Reference Service.

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Separation of Powers and the National Labor Relations Board: Selected Readings

A. TO THE PASSAGE OF THE WAGNER ACT (1935)

In the background of the Wagner Act is the National Industrial Recovery Act, a basic legislative expression of the New Deal. The history of the New Deal is an oft-told tale; we have been content here to include two chapters from Irving Bernstein's book on *The New Deal Collective Bargaining Policy* (item 1).

The National Industrial Recovery Act and, more particularly, the experience under that Act between 1933 and 1935 in administering its famous section 7(a) are other matters. It is precisely in this period of a scant two years that the continuing bent of Federal regulatory labor law toward a judicial rather than an administrative approach was occasioned, largely by contemporary circumstances.

The idea of an *independent* labor board arose out of the conflict over control of labor relations between the Department of Labor and the National Industrial Recovery Administration. The judicialized, case-by-case, procedure arose from the birth of the Board as a dispute-settling body. These decisions were made, seemingly, in response to the necessities of the substantive labor problems facing America and the New Deal administration in 1933 and 1934. Once made, a course had been set from which turning back would prove difficult.

Section 7(a) is presented in its setting: Title I of the National Industrial Recovery Act (item 2). The essence of the law may be obtained by reading sections 3 and 7. The latter should be read in its entirety, not subsection 7(a) alone, for many readers may not know, without reading subsection 7(b), that the NIRA empowered the President to give agreements arrived at through collective bargaining the effect of law in an entire "trade, or industry or subdivision thereof".

The problems of administering section 7(a) led to the establishment of the first of the two predecessor agencies of the present National Labor Relations Board, the National Labor Board. Unlike successor boards, however, this board was tri-partite, having members representing management, labor and the public.

The record of this body is set forth in the first of the excerpts from The Brookings Institution study by Lewis L. Lorwin and Arthur Wubnig (item 3). Set up to settle disputes over the interpretation of the President's Re-Employment Agreement, the National Labor Board later assumed responsibility for interpretation of the labor sections of the NRA Codes. By the force of circumstances, "the NLB evolved into a sort-of quasi-judicial body. Its primary intention, however, was not so much to act like a court of law as it was to evolve a set of principles and devices—a theory of labor relations—which would appeal to employers and workers alike because of rationality and justice."

As Lorwin and Wubnig show, the NLB, having only the powers of persuasion and publicity to enforce its decrees, broke down under the pressure of employer resistance to union recognition and the threat of the withdrawal of labor's support due to its inability to enforce its settlements. Its prime mission had been to end labor disputes. As a result, it had stressed the ending of strikes as the initial step toward dispute settlement. Its inability to secure settlements or to enforce the terms of settlements secured soon led to a reluctance on the part of the unions involved to end strikes, to threats to resume strikes and, finally, to refusals by the unions to end strikes at all.

The passage of Public Resolution No. 44 (item 5) in June of 1934 essentially was a holding action, taken because of the failure of the 73d Congress to agree on permanent legislation to establish a comprehensive Federal labor-relations program. In the context of 1934, with the future of the National Industrial Recovery Administration becoming increasingly cloudy, it is difficult to see, at least in retrospect, how the Congress could have done much more.

This history is a part of the legislative history of the Wagner Act, as Resolution No. 44 was a substitute for S. 2926, the first Wagner bill, and, more particularly for the National Industrial Adjustment bill, S. 2926 in the form reported by the Senate committee. The account given by Lorwin and Wubnig (item 4, chapter 9) may be supplemented by the account in chapter 3 of Cortner's *The Wagner Act Cases* (item 6). This has the advantage of research into the background of the Wagner Act in the generation since 1935. Lorwin and Wubnig were so contemporary that they based their reporting of the legal situation of the first NLRB at the time of the *Schechter* decision, for ex-example, on interviews with the legal staff of the first Board, then still in existence.

These two sources also give an account of the operations of the first National Labor Relations Board, appointed pursuant to Public Resolution No. 44. For the passage of the Wagner Act we again rely on Cortner, as being the most recent source (item 6, chapter 4). Attention is also directed to the sources cited in Cortner's footnote references, especially to the chapters in Bernstein (item 1), not here included.

For the detail of the Congressional consideration of the Wagner Act reference is made to the three committee reports, Senate Report No. 573 (item 7), House Report No. 1147 (item 8), and the report of the committee of conference, House Report No. 1371 (item 9). All except the last contain a substantial amount of administrative and judicial, as well as Congressional, background material.

One continuing dispute was over whether the permanent Board should be an independent agency or be a part of the Department of Labor. The version of S. 1958 reported by the House committee placed it in the Department of Labor, as the Senate committee had done in reporting S. 2926 the previous year. However, it did so with some reluctance and with efforts to limit the control exercised over it by the Secretary of Labor (item 59, section on the "National Labor Relations Board"). Reading the case for independence of the Board, one can note in the asserted claim of the then chairman of the old NLRB, Francis Biddle, that a "quasi-judicial board dealing with labor relations" requires independence if it is to be impartial, a major reason

why the bent of the Board under the Wagner Act toward a case-by-case approach rather than toward a regulatory approach persisted. A regulatory approach would have compromised the case for independence.

One should compare the objections to placing the Board in the Labor Department made by Mr. Biddle with those made, in a lengthy minority report appended to the House report, by Representative Vito Marcantonio. Approaching the matter from the side of labor, rather than from that of the Board, he concludes in the familiar terms of the pre-New Deal labor movement:

> . . . The [Labor] Department was not established to handle all the industrial relation (sic) problems of the Government. It was not established to covet impartial or quasi-judicial functions, or to interpret laws of Congress. It was founded, as is too often forgotten now, as a department for labor, and "to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment. . . ." I believe that labor would have fared better under the codes if the Department had remained true to its function as a militant organ for working people, rather than attempting to appear as a labor relations bureau of the Federal Government, representing all interests alike, and overzealous to guard itself against supposed encroachments. The efforts to secure control over an impartial quasi-judicial board is a definite step by the Department away from activities which can make it most useful to the working people of America.

It is likely that Mr. Biddle's advocating a more impartial position by the Board was given greater weight by the Congress as a reason for not placing the Board in the Labor Department than was Representative Marcantonio's desire for less impartiality by the Department of Labor. The Board was established as, and has remained, one of the "independent regulatory agencies" of the Federal Government.

1. (Source: Irving Bernstein, chs. I, II, and III of *The New Deal Collective Bargaining Policy*, Berkeley and Los Angeles, Calif., University of California Press [1950])

I. THE CONDITION OF THE UNION MOVEMENT

In a few years following the first inauguration of Franklin D. Roosevelt public policy with respect to collective bargaining crystallized. The right of employees to organize and bargain collectively through representatives of their own choosing was underwritten by the federal government in Section 7(a) of the National Industrial Recovery Act, in Public Resolution No. 44, in the 1934 amendments to the Railway Labor Act, in the Guffey Act, and in the Wagner Act. From this legislative foundation union membership advanced from less than three million in 1933 to almost fifteen million in 1946.[1]

In retrospect these statutes appear as a natural product of the early New Deal. At the time, however, their enactment appeared far from inevitable. As an observer on the scence wrote, "We who believed in the [Wagner] Act were dizzy with watching a 200-to-1 shot come up from the outside." [2] It is necessary, therefore, to examine with care the historical antecedents. The purpose of this chapter is to analyze the position of trade unions in the United States in the period immediately preceding the New Deal. The following chapter seeks to trace the historical emergence of the concepts that were to take shape in the New Deal statutes.

The trade union movement at the advent of the New Deal was weak and ineffective as a consequence of secular tendencies which set in after World War I and as a result of the Great Depression. An amateur analyst graphically noted that "the American Federation of Labor, and the Railway Union, constitute but a volstead per-centage of the employee [*sic*] of these United States." [3] In diagnosing the Federation in 1932, Louis Adamic found it beset with a host of ailments and his prognosis was not more cheerful.

> The body is undoubtedly a sick body. It is ineffectual—flabby, afflicted with the dull pains of moral and physical decline. The big industrialists and conservative politicians are no longer worried by it. Indeed, the intelligent ones see in it the best obstacle—temporary at least—to the emergency of a militant and formidable labor movement. . . . The ten year decline of the whole organization, I think, has already gone too far to be rejuvenated by anybody.[4]

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[1] Leo Wolman, *Ebb and Flow in Trade Unionism* (New York: 1936), p. 34; Bureau of Labor Statistics, Bull. No. 909, *Extent of Collective Bargaining and Union Recognition* (1946), p. 1.

[2] Malcolm Ross, *Death of a Yale Man* (New York: 1939), p. 170. Cf. also Twentieth Century Fund, *Labor and the Government* (New York: 1935), p. 63.

[3] William Cattingham to Perkins, July 4, 1933, National Archives, Labor Department, 167/2283.

[4] Louis Adamic, "The Collapse of Organized Labor," *Harper's Mouthly Magazine*, CLXIV (1932), 167, 171. For similar contemporary analyses, cf. Louis Stanley, "The Collapse of the A.F. of L.. —" *The Nation*, CXXXI (1930), 367, and Lyle W. Cooper, "The American Labor Movement in Prosperity and Depression," *American Economic Review*, XXII (1932), 641.

Union membership declined from 5,047,800 in 1920 to 2,973,000 in 1933, a loss of 2,074,800 members—1,605,200 in the years 1920–1929 and 469,600 during the depression. By 1933 membership retrogressed to the level of 1917 and, if the growth of the labor force is considered, fell to that of 1910.[5] Most severe losses were suffered in the early twenties due mainly to unemployment accompanying the postwar depression. Decline later in the decade stemmed principaly from the retreat of the Mine Workers, bitter struggle between right and left within the Ladies Garment Workers, and shrinkage in the number employed in manufacturing, particularly skilled workers.[6] The defection of less than half a million in the depression years is surprisingly small in view of the volume of unemployment. "That the loss was not larger can be explained only by the fact that so much had already surrendered since 1920." By 1930 only 10.2 per cent of nonagricultural workers were organized as contrasted with 19.4 a decade earlier.[7]

Unions, in addition, covered only fragments of the working population primarily in the traditional crafts with only a few penetrations of basic industries such as coal, construction, and railroads. In manufacturing and the mechanical industries extensive inroads had been made into printing, clothing, and shoe manufacturing. There was, however, little membership in the majority of the industries in this category, for example, steel, automobiles, electrical equipment, rubber, oil, and cement. Among clerical employees only postal and railroad groups were organized. Unionization of professional workers was confined to small units of actors, draftsmen, and teachers as well as the powerful musicians. In domestic and personal service only barbers and hotel and restaurant employees revealed significant organization.[8]

The union movement demonstrated little interest or effectiveness in organizing the unorganized. Fainthearted attempts were made to unionize the automobile industry and the South, while steel remained inviolate after the defeat of the 1919 strike. By 1930 the AFL even ceased to form international unions out of federal locals in the same industry. The aggressive morale needed for organization was absent, nor were funds available to contest the large corporations. Many labor leaders were more concerned with maintaining a hold on existing crafts and spent their energies on jurisdictional disputes."

Contemporary observers generally agreed that the quality of union leadership deteriorated. A letter, cited as typical of several written by frank AFL spokesmen, described the leaders as "about played out and . . . mostly labor politicians, anyhow." It went on to characterize officeholders as derelict in their obligations to the membership, while organizers "are either burned out or never had that passion for the movement which is necessary to stir and inspire others." Of the top echelon of the Federation it was said ". . . the high officials seem unable to formulate policies to meet the great problems of today. They are merely carrying over the minds of earlier years." Without direction from above, city central bodies and state federations were "life-

[5] Wolman, *opt. cit.*, p. 16, 33–34.
[6] Sumner H. Slichter, "The Current Labor Policies of American Industries," *Quarterly Journal of Economics*, XLIII (1929), 427.
[7] Wolman, *op. cit.*, pp. 40–41,, 112–19.
[8] *Ibid.*, pp. 118–21.
[9] Lewis L. Lorwin, *The American Federation of Labor, History, Policies and Prospects* (Washington: 1933), pp. 279–80; H. M. Douty, "The Trend of Industrial Disputes, 1922–1930," *Journal of the American Statistical Association*, XXVII (1932), 171–72; Adamic, *op. cit.*, p. 171; Stanley, *op. cit.*, pp. 367–68.

less." [10] Symptomatically, in Middletown a promising young leader gave up the union movement and became a minor functionary in the dominant political machine.[11] Adamic concluded that the Federation's Executive Council and the leaders of state federations and international unions "have exhibited intellectual, intestinal, and moral inadequacy, if not total bankruptcy, as leaders of labor and social-minded men." [12]

In collective bargaining the limited measuring rods of real wages, hours, and strikes indicate that on balance members of labor organizations gained little more than unaffiliated employees.[13] The figures compiled by Professor Paul H. Douglas reveal that real hourly earnings of employees in selected union manufacturing industries and those of employees in predominantly unorganized manufacturing industries rose the same amount, 32 percent, between 1914 and 1926. Organized employees in the building trades and coal did moderately better than the manufacturing employees. In full-time real weekly earnings, however, the unionized manufacturing workers gained 25 percent between 1914 and 1926 as compared with an increase of only 18 percent for unorganized manufacturing employees. The affiliated building tradesmen, coal miners, and railroad workers advanced 31, 30, and 21 percent respectively.[14]

With regard to hours of work, on the other hand, unorganized employees achieved greater advances than union workers. Hours in Douglas's nonunion manufacturing group declined from an average of 56.6 per week in 1918 to 52.2 in 1926, or 4.4 hours. In the union manufacturing industries weekly hours decreased from 47.2 to 45.9, or only 1.3 hours. The former was an 8.4 percent drop as compared with 2.8 percent for the latter. If the unorganized manufacturing industries are compared with the building trades and coal, the advantage is even more impressive. Hours in construction declined less than 1 percent between 1918 and 1926, while coal miners worked virtually the same hours at both ends of the period.[15]

The period 1921–1932 proved to be remarkably quiescent in use of the strike weapon. To the extent that strike activitiy measures an affirmative bargaining policy the disuse into which the strike fell may be regarded as a sign of waning union vitality. The table (p. 5)

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[10] Adamic, *op. cit.*, p. 168.

[11] Robert S. and Helen Merrell Lynd, *Middletown, a Study in Contemporary American Culture* (New York: 1929), p. 80.

[12] Adamic, *op. cit.*, p. 172. Similar views were expressed by Stanley, *op. cit.*, p. 368; Twentieth Century Fund, *op. cit.*, pp. 7–8. Weak leadership was given as a principal reason for the failure to organize steel. Carroll R. Daugherty, Melvin G. deChazeau, and Samuel S. Stratton, *The Economics of the Iron and Steel Industry* (New York: 1937), II, 937, 945.

[13] This analysis assumes that unions can raise the real wages of their members as compared with unorganized workers. The assumption is by no means universally accepted. Recent investigations, however, tend to substantiate this view both with regard to comparison between organized and unorganized industries and between union and nonunion jobs within the same industry. Cf. Arthur M. Ross, *Trade Union Wage Policy* (Berkeley, Calif.: 1948) chap. vi, and Joseph Shister, *Economics of the Labor Market* (Philadelphia: 1949), p. 186, n.

[14] *Real Wages in the United States, 1890–1926* (Cambridge, Mass.: 1930), pp. 98, 104, 135, 164, 120, 127, 137, 162, 168. These data have been subjected to methodological criticism primarily on the grounds of comparing percentage increases. A contrast of absolute changes leads to the opposite conclusion: between 1890 and 1926 average hourly earnings in the unionized group rose 68 cents, while those of the nonunion category increased only 34 cents. Cf. Ross, *op. cit.*, pp. 128–32.

[15] Douglas, *op. cit.*, pp. 112–17, 136, 163. These conclusions must be qualified to the extent that the unorganized were in this period catching up with gains made earlier by unions. The industries primarily responsible for bringing the nonunion category down, men's clothing and steel, were affected by trade unionism: the activities of the Amalgamated Clothing Workers and the steel strike of 1919 had the result of reducing hours.

shows the drop in the national strike-load during the 1920's and the depression as contrasted with 1910 and 1920.[16]

The weakness of the AFL permitted the creation of a left-wing dual-union movement. In the 1920's the Communist line called for "boring from within" existing organizations. In 1929 this policy was reversed with the formation of the Trade Union League. It urged "the organization of new and revolutionary industrial unions in industries where there are no unions and in industries where the existing unions are corrupt and impotent." [17] A number of industrial organizations were formed, including the National Miners Union, the National Textile Workers, the Needle Trades Workers International Union, the Marine Workers Industrial Union, the Auto Workers Union, and the Steel and Metal Workers Industrial Union. TUUL sought to organize the unskilled and semiskilled in the mass production industries. Most success was attained, however, in unionized industries, such as coal, clothing, and textile. By 1934 the TUUL reached a peak membership of 125,000.[18]

Year	Strikes	Workers involved
1910	3,334	824,000
1920	3,411	1,463,000
1925	1,301	428,000
1926	1,035	330,000
1927	707	330,000
1928	604	314,000
1929	921	289,000
1930	637	183,000
1931	810	342,000
1932	841	324,000

The causes of the decline of the union movement after 1920 derived from the psychological and socialogical motivations of workers, the play of economic forces, the structural weaknesses of the AFL, and the antiunion policies of employers which were protected by the law. "The average working stiff is too indifferent and sour, or selfish. . . ." a union leader wrote.[19] Postwar prosperity with its rising standard of living and materialism nurtured individualistic rather than concerted tendencies among workers. Even those who remained members were apathetic. In Middletown, for example, the Molders found it necessary to impose fines on absentees in order to get the membership together. Prosperous workers identified themselves socially with the middle class, engaging in emulative spending and sending their children to college. They came to believe that they were "getting ahead" and that there was a place for them or their progeny in an expanding future. "The desire for steady employment and higher earnings became more dominant in the minds of the workers than the feeling for industrial freedom and independence." [20] New devices, the auto-

[16] John I. Griffin, *Strikes, a Study in Quantitative Economics* (New York: 1939), pp. 38–39, 43–44. Douty has made this point even more effectively by establishing a relationship between the volume of strikes and the number of industrial workers, thereby correcting for the growth of the labor force. The disputes index number of 100 in 1916–1921 fell to 34 in 1922–1925 and to 18 in 1926–1930. Douty, *op. cit.*, p. 170.

[17] *Handbook of American Trade-Unions*, Bureau of Labor Statistics, Bull. No. 618, p. 14.

[18] *Ibid.*, pp. 13–16; Lorwin, *op. cit.*, p. 269.

[19] Adamic, *op. cit.*, p. 168.

[20] Lorwin, *op. cit.*, p. 239; Lynds, *op. cit.*, pp. 78, 80; Douty, *op. cit.*, pp. 171–172; Cooper, *op. cit.*, p. 643.

mobile, the radio, and the movies, absorbed their time and scattered their interests with a consequent sapping of the vitality of unionism. One organizer declared that "the Ford car has done a lot of harm to the unions." [21] Since unions contributed little to their improved status, workers saw no point in joining.

Economic forces contributed to the same result. In 1926 the wage earner in manufacturing purchased thirty per cent more with his average annual earnings than he bought in 1914. Two-thirds of this increase in real wages was effected after the Armistice, largely in 1922 and 1923.[22] It stemmed principally from a sharp rise in productivity in a period—after 1922—of relative price stability. This accelerated application of new invention incidentally diluted the skills or made technologically unemployed those most likely to organize. That great boon to unionization, a rise in the cost of living, did not put in an appearance.[23]

A feature of the era was the trustification and concentration of American industry. The structure and policies of the AFL were geared to small-scale operations and were most effective in industries characterized by diversity of control, such as construction, printing, and soft coal. They were hardly able to cope with the aggregations of capital which had taken form by 1929 and the unions, in effect, drifted into an eddy outside the main stream of American economic life.

"The huge corporation . . . has come to dominate most major industries if not all industry in the United States." [24] By 1930 almost 200 nonbanking corporations had assets of over $100 million and fifteen exceeded one billion. The combined assets of the 200 largest were nearly half the corporate wealth of the country and totaled $81 billion. In 1929 they received 43.2 per cent of the net income of nonbanking corporations. The rate of concentration among the largest was half again that of smaller corporations. With concentration appeared a tendency for ownership and control to be divorced, the latter being exercised by a few with interlocking relationships among them. Berle and Means concluded: "The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state. . . ." [25]

A common aspect of these combinations was the virtual absence of unionism among their employees. The very fact of size created an imbalance of bargaining power with the individual employee, permitting the corporation to fix the terms of the employment contract unilaterally. It could resist organization by transferring production from one plant to another and by putting pressure upon smaller concerns within its orbit of supply or distribution. The merger process for the employer reduced competition from low-wage firms.[26] These enterprises had an almost unanimous opposition to unionism. As a result, organization was virtually nonexistent in industries where combination was

[21] Lynds *op. cit.*, pp. 80, 254.
[22] Douglas, *op. cit.*, p. 244.
[23] *Ibid.*, p. 590; Douty, *loc. cit.*; Wolman, *op. cit.*, pp. 36–37; Cooper, *op. cit.*, p. 684.
[24] A. A. Berle, Jr., and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: 1932), p. 44.
[25] *Ibid.*, p. 357. For the extent of concentration by industry, cf. Harry W. Laidler, *Concentration of Control in American Industry* (New York: 1931), pp. 435ff.
[26] Myron W. Watkins "Trustification and Economic Theory," *American Economic Review*, XXI, supp. (1931), pp. 59–61.

marked: steel, automobiles, aluminum, rubber, electrical equipment, telephones, glass, tobacco, and baking.[27]

The prosperity of the 1920's was uneven and in both its unfavorable and favorable aspects militated against unionism. Unemployment in no year of the decade fell below 1,500,000.[28] The worker had to calculate before striking that there would be someone to take his job. Business expanded largely outside the organized industries, for example, in automobiles, chemicals, public utilities, distribution, and the services. On the other hand, several unionized industries were depressed, such as coal, clothing, and textiles (in New England). Furthermore, there was a fugitive movement in textiles and coal to the nonunion South and of clothing to unorganized communities.[29]

The craft structure of most AFL unions had evolved in small-scale enterprises in the nineteenth century and was poorly adapted to an age of mass production. Mechanization diluted or obliterated crafts and lowered the ratio of skilled to semiskilled and unskilled workers. The craftsman became a rarity and even then his trade often failed to fit the unions' jurisdictional framework.[30] The Federation failed to conform structurally to the new era in large part because of the character of its leadership. Those in power feared the loosing of forces beyond their control.[31]

The direct antiunion practices of employers protected by law perhaps constituted the most formidable road block to organization, a conclusion supported by the fact that millions of workers joined unions after these policies were made illegal by the New Deal. It was not true, however, as sometimes charged, that the law was tilted in favor of employers. Labor relations law, statutory and, to a lesser extent, decisional, was characterized by a spirit of toleration. In theory there was essential equality. Workers might lawfully organize and bargain collectively, while employers with equal legality might frustrate freedom of association and refuse to bargain. In the realities of the market place this hypothetical balance gave the employer the advantage.[32] As Leiserson has noted:

> The law recognized the equal freedom of the employers to destroy labor organizations and to deny the right of employees to join trade unions. An employer could coerce or threaten his employees to keep them from organizing. He could discharge them if they joined a union, and he could refuse to hire anyone who was a member. He could decline to deal with any union of his employees or to recognize the organization or any of its officers or agents as representatives of the employees. He was free to organize a company union of his own and force his employees to join it. It was not illegal for him to employ detectives to spy on his employees in order to find out whether they talked unionism among themselves, and he could send his spies into the labor organization to become members and officers so that they might be in a better position to report union activities to him and recommend effective disciplinary action designed to stop such activities. Under such circumstances, to speak of labor's right to organize was clearly a misuse of terms. All that the employees had was a right to try to organize if they could get away with it; and whether they could or not depended on the relative economic strength of the employers' and employees' organization.[33]

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[27] *Ibid.*, p. 61; Laidler, *op. cit.*, p. 457.

[28] Meredith B. Givens, cited in John R. Commons and associates, *History of Labour in the United States* (New York: 1935), III, 141–42.

[29] Wolman, *op. cit.*, pp. 35–38.

[30] *Ibid.*, pp. 36–38; Cooper, *op. cit.*, pp. 649–50; Daugherty *et al.*, *op. cit.*, p. 195.

[31] Adamic, *op. cit.*, pp. 168–71.

[32] Edwin E. Witte, *The Government in Labor Disputes* (New York: 1932), pp. 230–31; Calvert Magruder, "A Half Century of Legal Influence upon the Development of Collective Bargaining," *Harvard Law Review*, L (1937), 1078.

[33] William M. Leiserson, *Right and Wrong in Labor Relations* (Berkeley, Calif.: 1938), pp. 24–27.

In a yellow-dog contract the worker agreed as a condition of employment not to join a union or attempt to organize his fellow-employees. It became prominent in the New England textile industry in the 1870's and after World War I was generally used in the coal, hosiery, street railway, and shoe industries. Although 16 states outlawed yellow-dogs the statutes were evaded and were finally declared unconstitutional.[34] The Hitchman case legalized injunctions restraining union organizational activities on the ground of inducing breach of (yellow-dog) contract.[35] In West Virginia the Mine Workers were virtually barred from the state by an injunction obtained by 316 coal companies enforcing their contracts.[36]

The labor injunction first appeared in the 1880's and became common after 1900. The usual variety was the temporary restraining order, often granted *ex parte* without notice or hearing. Typically the employer filed a complaint that a strike, actual or prospective, was an unlawful interference with the conduct of his business. If in the court's judgment the danger of injury was imminent, it issued an order prohibiting the union from striking. Witnesses were seldom called and there was no trial by jury, while the court's action was reviewable only on restricted grounds. During the period of strike suspension the employer was free to undermine the union. Resentment arose from the expansion of a simple judicial device "to an enveloping code of prohibited conduct, absorbing *en masse*, *executive* and police functions and affecting the livelihood, and even lives, of multitude." [37]

The Norris-LaGuardia Act of 1932 made the yellow-dog contract unenforceable in the federal courts and established safeguards for the issuance of injunctions in labor cases. Similar legislation was enacted in many of the states.[38]

The simplest and probably commonest devices of the employer to destroy a union were discrimination against and discharge of members. In more highly developed form a group of firms maintained a blacklist of workers whom they would fire or refuse to hire. The effectiveness of these practices "in hindering successful organization is hardly open to dispute." [39] They were condemned in the 1902 and 1915 reports of the industrial commissions which recommended remedial legislation.[40] The courts, however, upheld the employer's right to refuse to hire and to discharge at will on the grounds that it was repugnant to compel him to enter an unwilling personal relationship. As a result legislation protecting the employee against discrimination based on membership was held invalid.[41]

Industrial espionage, developed after the Civil War, was another antiunion employer practice. One union leader testified, ". . . there is no

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[34] *Coppage v. Kansas* (1915), 236 U.S. 1.

[35] *Hitchman Coal & Coke Co. v. Mitchell* (1917), 245 U.S. 229.

[36] *United Mine Workers v. Red Jacket Consolidated Coal & Coke Co.* (1927), 18 Fed. (2d) 839, cert. den., 275 U.S. 536. Cf. Joel I. Seidman, "The Yellow-Dog Contract," *Quarterly Journal of Economics*, XLVI (1932), 349; "Employer Interference with Lawful Union Activity," *Columbia Law Review*, XXXVII (1937), 820–21.

[37] Felix Frankfurter and Nathan Greene, *The Labor Injunction* (New York: 1930), p. 200.

[38] *U.S. Stat. at Large*, XLVII, 70; Osmond K. Fraenkel, "Recent Statutes Affecting Labor Injunctions and Yellow-Dog Contracts," *Illinois Law Review*, XXX (1936), 854.

[39] *Columbia Law Review*, XXXVII (1937), 817; "Violations of Free Speech and Rights of Labor," Sen. Rept., 75th Cong., 1st sess., No. 46, pt. 3 (Dec. 21, 1937), p. 8 hereafter cited as *La Follette Comm. Rep.*; National Labor Relations Board *Governmental Protection of Labor's Right to Organize* (Washington: 1936), pp. 15–16.

[40] *Report of the Industrial Commission*, 1902, pp. 890–93; *Report of the Commission on Industrial Relations*, p. 90.

[41] *Adair v. United States* (1908), 208 U.S. 161; Magruder, *op. cit.*, pp. 1082–84; *Columbia Law Review*, XXXVII (1937), 817–20.

gathering of union members large enough to be called a meeting that is small enough to exclude a spy." [42] The La Follette Committe uncovered a list of corporations using espionage that "reads like a blue book of American industry," while the NLRB estimated the number of spies in 1936 as 40 to 50 thousand. The Pinkerton agency alone, one of some 200, employed over 1,200 spies and operated in 93 unions in about one-third of which agents held office. The annual income of three agencies during the 1920's was about $65 million.[43] Espionage was supplied by detective agencies, employers' associations, and corporations themselves. The La Follette Committee concluded that it was the most efficient system to prevent unions from forming, to weaken them once they gained a foothold, and to wreck them when they tried to test their strength.[44]

This technique called for placing spies and *agents provocateurs* in the plant and the union. Key objectives were: to secure the names of members and advance strike plans, to precipitate calling of a strike, and to discredit leadership with the membership. Spy reports were useful throughout the campaign against the union: in forming the blacklist, in discrimination and discharge, in breaking strikes, in initiating the company union, and in supplying affidavits for an injunction.[45] There were no effective legal safeguards. Federal legislation did not exist, while state statutes were unenforceable. "For all practical purposes espionage remains unchecked despite legislation." [46]

Strikebreaking and espionage were linked policies. "Spies precede strikes; strikeguards and strikebreakers accompany them. The connection between the two forms of service is convenient for the employer who wishes to destroy a union, and therefore lucrative for the agency that supplies them." [47] Private armies to suppress unions existed only in the United States, growing out of a history of employer antipathy to collective bargaining and of turbulence in industrial relations. Prior to 1900, corporations recruited strikebreakers themselves, but thereafter detective agencies and employer associations professionalized the service. By 1910 distinct occupational types developed, at first, immigrants enlisted for their gullibility, but later, "strikebreakers by calling," primarily the socially maladjusted and criminals. The lowest echelon consisted of strikebreakers, "finks," who replaced strikers. Above them were strikeguards, "nobles," who carried arms and "protected" loyal workers and property, often deputized as police officers. Another type was the propagandist, or "missionary," who posed as a neutral and spread defeatism. At the top were the strike lieutenants, who organized and executed the operation. All looked with contempt upon "scabs," those who permanently replaced strikers. The strikebreaker was unqualified by character or training to labor, his function being to shock the morale of the strikers and intimidate them into returning to work. Violence was a consequence of strikebreaking since workers detested the intruders and an encounter was apt to be a spark which set off the charged atmosphere.[48]

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[42] *La Follete Comm. Rep.*, pt. 3, p. 8.
[43] *Ibid.*, pp. 22, 26–28; NLRB, *op. cit.*, p. 15; *Columbia Law Review*, XXXVII (1937), 839.
[44] *La Follette Comm. Rep.*, pt. 3, pp. 9, 17.
[45] *Ibid.*, pt. 3, pp. 45–69; *Columbia Law Review*, XXXVII (1937), 838.
[46] *Columbia Law Review*, XXXVII (1937), 840.
[47] *La Follette Comm., Rep.*, "Strikebreaking Services" (Jan. 26, 1939), p. 35.
[48] *Ibid., passim*; "Strikebreaking," *Fortune*, XI (Jan. 1935), 58–60, 89.

There were no effective statutory restrictions upon strikebreaking. There was no federal legislation, while the courts upheld the strikebreaker's "right to work." State "Pinkerton" laws prohibiting importation of armed guards from other states were evaded by shipping guards and arms separately or by recruiting within the state. The La Follette Committee reported, ". . . the detective agencies engaged in furnishing strikeguards today ignore these statutes." [49]

Very large employers, particularly in steel, and those with operations in isolated communities, as in coal and metal mining, developed the private police system. These police were originated in pioneering days by the railroads to protect property because public forces were inadequate. Even at the start, however, they defended the employer's interests with no final accountability to the public. Like espionage and strikebreaking this system was marked by "a long and bloodstained history." There were no legal safeguards and, in fact, Pennsylvania, Maryland, and South Carolina statutes specifically legalized company police.[50]

When private police operated within a company town the result was virtual peonage. U. S. Steel, for example, in the communities it dominated sealed its workers against outside influences. They lived in company houses, received utilities from the Corporation, and were subject to surveillance in their social activities. Housing, electricity, and water became instruments of labor policy. A union organizer entering such a town was soon spotted. The operation of these towns was not only legal but law officers were often controlled by the companies.[51]

The fact that some of these practices ultimately involved force led to industrial munitioning. It began prior to 1890 and thereafter became a large business. Sales correlated with antiunion employer policies and organizational strikes; steel, for example, provided the largest market. The weapons, tear and sickening gas, shells and guns to discharge them, and machine guns, were usually purchased in anticipation of a strike. The munitions companies followed labor difficulties in their sales campaigns, while the detective agencies often acted as commission agents. Frequently private purchasers supplied public officers with weapons prior to a dispute. There was no federal regulatory legislation. Several states required licenses for gas or machine guns but they were easy to obtain because the laws set no standards for issuance.[52]

Company unions were sometimes established to resist unionism, usually during an organizational drive or strike or after breaking a strike. Employers had the added purpose of improving personnel relations through machinery to air employee grievances. Finally, after World War I, company unionism became the fashion and some firms introduced it on that note.[53] Though introduced at the turn of the century few plans existed prior to 1915. Their number increased during and after World War I when employers were concerned with the development of unionism. In the late twenties and during the depression they declined as the independent organizations weakened.[54]

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[49] *La Follette Comm. Rep.*, pp. 14–17; *Columbia Law Review*, XXXVII (1937), 833–34.
[50] *La Follette Comm. Rept.*, pt. 2, "Private Police Systems," pp. 1–4, 6, 11.
[51] *Ibid.*, p. 4; "U.S. Steel III: Labor," *Fortune*, III (1936), 136, 138, 142.
[52] *La Follette Comm. Rept.*, pt. 3, "Industrial Munitions," *passim*.
[53] Bureau of Labor Statistics, Bull. No. 634, *Characteristics of Company Unions, 1935*, pp. 80–81; National Industrial Conference Board, *Collective Bargaining through Employee Representation*, pp. 12–13.
[54] National Industrial Conference Board, *op. cit.*, pp. 6–10, 16.

> Of company unions the Bureau of Labor Statistics found that, the great majority . . . were set up entirely by management. Management conceived the idea, developed the plan, and initiated the organization. . . . The existence of a company union was almost never the result of a choice by the employees in a secret election in which both a trade union and a company union appeared on the ballot.[55]

Even in cases where employees took the initiative, it was impossible "to conceive of the establishment or the continued existence of a company union in the face of opposition from management." [56] The employer's technique of introduction varied from a statement of approval to firing those who joined a trade union or refused to join the company union.[57]

Company unions were limited to the employees of a single employer in both membership and representation. Some required and others permitted membership and the employer supplied financial support. Representatives were elected by the employees and time spent by them was paid for by the employer. Representatives were neither aware of nor had control over conditions in the industry as a whole. They met at stated intervals with management usually to discuss individual grievances. Occasionally, arbitration was permitted if they failed to agree. Management, however, reserved the right to hire and fire, strikes were prohibited, and representatives were allowed no voice in the basic determination of wages and hours. Company unionism therefore was the denial of collective bargaining.[58]

It was more common among large than among small employers. A survey in 1933 found company unions in seventy per cent of plants with over 10,000 workers and in only fourteen per cent of those with fewer than fifty.[59] Large corporations found the company union useful in opposing trade unionism and in bridging the gulf to employees.

The legality of company unions was protected except on the railroads. The affirmation of freedom of association in the Railway Labor Act of 1926 was interpreted by the Supreme Court to make a company union unlawful.[60] As will be pointed out, this decision was honored more in the breach than in the observance.

Opposition to unionism was the main purpose of some employer associations. They organized by industry (the National Metal Trades Association), by area (the Associated Industries of Cleveland), to contest a particular strike (so-called "citizens' committees"), and as federations (the National Association of Manufacturers). They began to develop on a broad scale at the turn of the century. The Industrial Relations Commission in 1915, remarking on this growth, pointed out that, "the prime function of the hostile associatitons is to aid their members in opposing the introduction of collective bargaining." [61]

The NMTA, organized in 1899, represented hundreds of employers in metal fabricating industries. The declaration of principles affirmed: management's sole right to conduct a business, to refuse to

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[55] Bureau of Labor Statistics, *op. cit.*, p. 199.
[56] Twentieth Century Fund, *op. cit.*, p. 67.
[57] Bureau of Labor Statistics, *op. cit.*, pp. 86–89.
[58] *Ibid.*, pp. 60–72, 99–100, 108–11, 200–03; Twentieth Century Fund, *op. cit.*, pp. 66 ff., 96 ff.
[59] National Industrial Conference Board, *Individual and Collective Bargaining under the N.I.R.A.*, p. 18.
[60] *Texas & New Orleans R.R. Co. v. Brotherhood of Railway & Steamship Clerks* (1930), 281 U.S. 548.
[61] *Report of the Commission on Industrial Relations*, p. 188.

deal with strikers, to discharge with absolute freedom; and unilateral determination of wages and apprenticeship rules by the employer. To effectuate these policies NMTA engaged in espionage, strikebreaking, and blacklisting. Its spy net was in operation by 1906 and three years later it had a blacklist of over 200,000 names. Certificates of merit were awarded employees who continued to work during a strike. NMTA rules required that members obtain its approval of agreements with their employees and prohibited resignation during a stoppage with penalties for violations. If a member faced a strike, NMTA experts assumed complete control over the strikebreaking operation.[62]

The NAM operated at the legislative and opinion-forming levels. In 1937 it represented, through allied groups, over 30,000 manufacturers with nearly 5,000,000 employees. Formed during the depression of 1893, it did not primarily concern itself with labor party policy until the AFL drive of 1897–1903. NAM's declaration of labor principles, adopted in 1903, closely resembled that of the NMTA. It opposed legislation in conflict with the declaration and for many years was the leading spokesman for industry on labor questions. The NAM was thoroughly recognized in 1932 and 1933; large employers took a more active role in its direction.[63]

In personnel policy the 1920's proved to be a decade of paternalism for many corporations. This policy, "welfare capitalism," may be regarded as the indirect practices of employers to check unionism. Employees received a financial stake in business through stock ownership, profit-sharing, and bonuses. Some were protected against the hazards of life by old-age pensions, accident and life insurance, and medical and nursing care. Many firms provided housing or its financing. Personnel management burgeoned, while new plants provided better and safer working conditions, as well as cafeterias, social halls, and athletic fields. In a few cases vacations were introduced and relief was provided during unemployment. The social functions of the union, in other words, were assumed by the factory.[64]

Employers had several motives for this paternalism, perhaps most important being the desire to prevent labor trouble by removing its causes. In addition, they perceived a relationship between the worker's morals and his productive efficiency. Finally, some felt a social responsibility for their employees since bargaining hardly existed. Welfare capitalism retarded unionism in the areas it failed to penetrate, but had little effect upon the decline in membership or the shrinkage in the number of strikes. Its efficacy in winning the loyalty of workers depended basically upon how well capitalism worked. In the sunny year of 1929, Professor Sumner H. Slichter wrote, "Modern personnel methods are one of the most ambitious social experiments of the age, because they aim, among other things, to counteract the effect of modern technique upon the mind of the worker, to prevent him from becoming class conscious and from organizing trade unions." [65]

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[62] *La Follette Comm. Rep.*, pt. 4, "Labor Policies of Employers Association. National Metal Trades Association."

[63] *Ibid.*, pt. 6, "Labor Policies of Employers Associations. The National Association of Manufacturers."

[64] Lynds, *op. cit.*, p. 78; Slichter, *op. cit.*, p. 397; Lorwin, *op. cit.*, pp. 236–39; Twentieth Century Fund, *op. cit.*, p. 59.

[65] *Op. cit.*, p. 432.

The dikes of paternalism against the spread of unionism were swept away in the flood of the Great Depression. National income plummeted 40 per cent, from $81 billion in 1929 to $49 billion in 1932. Wages sustained the heaviest losses, 60 per cent, as compared with 57 for dividends, 55 for rents and royalties, 41 for salaries, and 3 for interest. In these years wage payments dropped from $17 billion to under $7 billion. The industrial groups hit hardest were those into which unionism had made inroads—construction, 72 per cent; mining, 61; manufacturing, 54; and transportation, 40.[66]

Shrinkage in income accompanied a precipitous decline in employment. It was estimated that there were over 15,000,000 unemployed in early 1933.[67] Between 1929 and 1933 employment contracted 77 per cent in construction, 69 in metalliferous mining, 64 in bituminous coal, 46 in anthracite, and 43 in manufacturing and on the railroads. Encouraged by "share-the-work" programs, short days, short weeks, and other varieties of irregularity and dilution were introduced. A study of representative firms in 25 industries revealed that hours worked per week declined from 48.4 in 1929 to 34.9 in 1932, or 28 per cent.[68]

While those employed suffered a reduction in wages, real wages did not decline to the same extent due to the lowered cost of living.[69] The depression, however, created distortions within the wage structure, disparities growing up between competing plants. Wage cuts varied widely and concerns that cut deepest gained competitively in the shrinking market. Substandard rates, not revealed in the averages, became common, for example, 10 cents per hour. Industrial homework spread and women and children replaced adult males. In the face of such conditions, it was almost impossible for unions to maintain scales.[70]

The depression accentuated the secular tendencies to decline already manifest in the union movement. The total loss of close to half a million members came entirely from the groups strongest in 1929, the building trades and transportation and communication.[71] Unemployment among members was very severe, rising within the AFL from 8.2 per cent in 1929 to 25.3 in 1933. In addition, between 1931 and 1933 proportion of AFL members working part time ranged from 19 to 21 per cent.[72] The major effort of the Federation to resist wage reductions collapsed by the spring of 1930.[73]

The impact of depression on the union movement can best be seen in the histories of individual unions, the United Mine Workers, International Ladies Garment Workers, and International Typographical Union being illustrative. Decline in coal began in the mid-twenties and by 1932 the bituminous area was "a badly frightened country. . . . Its livelihood was gone." [74] In West Virginia miners worked only

[66] Simon Kuznets, *National Income*, 1929–32, National Bureau of Economic Research, Bull. No. 49 (June 7, 1934), pp. 3, 5, 9.
[67] The AFL estimated 15,635,000, the National Industrial Conference Board 15,439,000. Cited in Royal E. Montgomery, "Labor," *American Journal of Sociology*, XLVII (1942), 932.
[68] Meredith B. Givens, *Employment during the Depression*, National Bureau of Economic Research, Bull. No. 47 (June 30, 1933), pp. 2, 4.
[69] Leo Wolman, *Wages during the Depression*, National Bureau of Economic Research, Bull. No. 46 (May 1, 1933), pp. 2–3.
[70] Twentieth Century Fund, *op. cit.*, p. 4.
[71] Wolman, *Ebb and Flow*, p. 41.
[72] *53rd Convention American Federation of Labor*, 1933, p. 87.
[73] Lorwin, *op. cit.*, pp. 289–90.
[74] Ross, *op. cit.*, p. 91.

two to four days a week with net earnings from 80 cents to $1.00 a day, while coal sold at 75 cents to $1.25 a ton, often below the cost of production. John L. Lewis wrote to President Hoover, "The fare of the workers and their dependents is actually below domestic animal standards." [75]

The effect was that the "union was nigh unto death, except in the fields west of Indiana, and in the Pennsylvania anthracite region." [76] Membership in the UMW dropped precipitously; District 5 in western Pennsylvania, for example, had only 293 dues-paying members out of 45,000 coal diggers in 1930. The union's financial position was critical and most of the district organizations went under. The UMW, in addition, was racked with factionalism and dual-unionism. A bitter battle raged between Lewis and Farrington over control of District 12 in Illinois, fought with fists, injunctions, and rival conventions, with Lewis emerging the victor. An insurgent group called out 30,000 anthracite miners in 1931 and was put down only after denunciation by the international and a costly struggle. The Communist National Miners Union raided several locals and kept the fields in turmoil with strikes.[77] The executive officers informed the 1932 convention, "Never in the history of organized labor . . . has the task of reserving the economic standards and social welfare of its membership been so difficult as is the case today." [78]

The Ladies Garment Workers sank to the lowest point reached since emerging as a nationwide organization in 1910. Membership dropped to 40,000; the ILG was heavily in debt; and in many trades there was no more than a skeleton organization.[79]

In Chicago, for example, the cloak and suit and raincoat organizations disintegrated as the result of bankruptcies and the exodus of shops to nonunion towns. In dresses, wages were cut and hours increased so that by 1930 only a fraction of the firms had contracts. The cloak industry, the core of ILG strength, insisted on a return to piecework to save the market. After the largest firm locked its employees out and announced its removal to Gary the union agreed not only to give up week work but also accepted a ten per cent wage cut. Drastic salary cuts for officers in 1932 proved inadequate. Manufacturers violated contracts and imposed further wage reductions in early 1933. In the face of internal despondency and growing factionalism it seemed that the union would disappear.[80]

The Typographical Union weathered the depression with a minimum of distress, facing no dual-unionism and little loss of membership. Unemployment, however, was very severe and earnings of members declined from $180 million in 1929 to $123 million in 1933. For the first three years of the depression the ITU succeeded in holding the wage line but in 1933, 760 locals accepted decreases while only 78 maintained the same rates. Share-the-work devices were used and employed members were taxed to support those without jobs. The pension

[75] *United Mine Workers Journal* (Jan. 1, Feb. 1, 1932).
[76] David J. McDonald and Edward A. Lunch, *Coal and Unionism, a History of the American Coal Miners' Union* (Silver Spring, Md.: 1939), p. 182.
[77] *Ibid.*, pp. 183–85, 190, 192; McAlister Coleman, *Men and Coal* (New York: 1943), pp. 138–41.
[78] *United Mine Workers Journal* (Feb. 1, 1932).
[79] Joel Seidman, *The Needle Trades* (New York: 1942), p. 188.
[80] Wilfred Carsel, *A History of the Chicago Ladies Garment Workers Union* (Chicago: 1940), pp. 197–206.

system was strained as older men, who had continued work after becoming eligible, applied for benefits. In 1933, $650,000 was expended in excess of income and the balance was soon to be exhausted.[81]

New Deal intervention to protect the right of wage earners to bargain collectively was grounded on the assumption that they were unable adequately to organize themselves. The weakness of the union movement, the product of secular decline combined with depression, was clear in 1933. At this time, however, the organizations began to shape policies based upon officially established principles that were to lead to the revitalization of the movement.

[81] *76th Session International Typographical Union* (1931), pp. 2–5, 35; *77th Session International Typographical Union* (1932), pp. 1, 24; *International Typographical Journal*, LXXXIII, supp., Aug. 1933, pp. 1–5, 30, 35, 66, 108; Bureau of Labor Statistics Bull. No. 675, *Union Wages, Hours and Working Conditions in the Printing Trades*, June 1, 1939, p. 7.

II. SOURCES OF IDEAS

The fundamental principles embodied in the New Deal collective bargaining legislation may be summarized as follows:

1) Employees shall have the right to self-organization and may designate representatives of their own choosing for the purpose of collective bargaining.
2) Conversely, employers shall not interfere with, restrain, or coerce employees in organizing or selecting representatives.
3) Representatives for collective bargaining may be determined by an election conducted by secret ballot; those elected by the majority shall represent all the employees.
4) The employer shall recognize and deal with the representatives designated by his employees.

These ideas had been officially expressed on repeated occasions prior to March 4, 1933—in reports of industrial commissions, court decisions, rulings of administrative bodies, and legislation. The New Deal, in effect, gathered up the historical threads and wove them into law.

This line of policy began with the landmark decision of the Supreme Judicial Court of Massachusetts in 1842 in *Commonwealth* v. *Hunt* in which the right of workers to associate was established. The Boston Journeymen Bootmakers' Society was charged with being an unlawful conspiracy since it practiced the closed shop. The court rules that combination in itself was not conspiracy and that the tests of legality were the purposes and the means employed. The maintenance of labor conditions through the closed shop met these standards.[1]

After the Pullman Strike in 1894, President Cleveland appointed a commission to inquire into its causes. It found that the company did not recognize the right of its employees to combine and that wages and working conditions were fixed unilaterally. Hence the commission urged employers to accept unions, also recommending that the yellow-dog contract be made illegal.[2]

In 1898 Congress attempted to eliminate discrimination, particularly antiunion contracts, on the railroads. Sec. 10 of the Erdman Act provided that

> Any employer subject to the Act. . . . who shall require an employee, or any person seeking employment as a condition of such employment to enter into an agreement . . . , not to become or remain a member of any labor . . . organization; or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor . . . organization, . . . is hereby declared to be guilty of a misdemeanor. . . .[3]

Labor difficulties at the turn of the century led to an exhaustive study and report by the Industrial Commission in 1902. It concluded that collective bargaining was beneficial to workers, employers, and the public and could not exist in the absence of strong labor organizations.

[1] *Commonwealth* v. *Hunt* (1842), 4 Metcalf, 111.
[2] *Report on the Chicago Strike of June–July 1894*, United States Strike Commission (Washington: 1894), xxvi, xlvii, liv.
[3] *U.S. Stat. at Large*, XXX, 424. This provision was declared unconstitutional in *Adair* v. *United States* (1908), 208 U.S. 161.

The commission therefore proposed legislation to restrict the injunction and to prohibit employment of strikeguards and the blacklist.[4]

In 1914 in the Clayton Act, Congress declared that labor organizations as such were not to be considered illegal combinations in restraint of trade under the antitrust laws. The courts were limited in their authority to issue injunctions in labor disputes unless necessary to prevent irreparable injury and there was no proper remedy at law.[5]

The Commission on Industrial Relations in 1915 urged the right of workers to organize and condemned interferences by employers, arguing that antiunion policies constituted a major cause of unrest. A constitutional amendment was recommended to guarantee freedom of association to be followed by legislation to prohibit unfair labor practices.[6]

The principles proposed by management and labor during World War I, imposing equal rights and obligations on both, served as the policy base for the first National War Labor Board. They agreed that:

1) The right of workers to organize in trade-unions and to bargain collectively, through chosen representatives, is recognized and affirmed. This right shall not be denied, abridged, or interfered with by the employers in any manner whatsoever.

2) The right of employers to organize in associations or groups and to bargain collectively, through chosen representatives, is recognized and affirmed. This right shall not be denied, abridged, or interfered with by the workers in any manner whatsoever.

3) Employers shall not discharge workers for membership in trade-unions, nor for legitimate trade-union activities.

4) The workers, in the exercise of their right to organize shall not use coercive measures of any kind to induce persons to join their organizations, nor to induce employers to bargain or deal therewith.[7]

The NWLB in several hundred cases not only asserted the right of association and disallowed restraining practices, but also evolved the election to determine representatives and flirted with requiring the employer to bargain. Despite its equalizing authority, the board's awards were concerned exclusively with employer unfair practices, reflecting the nature of the market. Employers were forbidden to discriminate against workers for union membership or activity; employees discriminatorily discharged were reinstated with compensation for time lost; blacklists and yellow-dog contracts were forbidden; peaceful striking was held no bar to reemployment; and employees could not be required to join company unions. Where no union existed the board determined representatives by a secret ballot election, usually directing the workers to elect a fixed number from each department who in turn selected a plant committee. Where the board itself conducted the election it stipulated that management deal with the representatives, all of whom were employees.[8]

In 1921 Chief Justice Taft, formerly co-chairman of NWLB, declared that labor unions

were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. . . . Union was essential to give laborers

[4] *Final Report of the Industrial Commission* (Washington: 1902), XIX, 844, 890–93.
[5] *U.S. Stat. at Large*, XXXVIII, 735. The injunction exemption was nullified in *Duplex Printing Press v. Deering* (1926), 254 U.S. 443.
[6] *Final Report of the Commission on Industrial Relations* (Washington: 1915), *passim*. The report was signed by four of the nine members of the commission.
[7] *National War Labor Board*, Bureau of Labor Statistics, Bull. 287, p. 32.
[8] *Ibd.*, pp. 52–67.

an opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. . . . The right to combine for such a purpose has in many years not been denied by any court.[9]

Since the Transportation Act of 1920 did not deal adequately with collective bargaining, the Railroad Labor Board the following year found it necessary to erect the entire structure of principles.

The right of railway employees to organize for lawful objects shall not be denied, interferred with, or obstructed. The right of such lawful organization to act toward lawful objects through representatives of its own choice, whether employees of a particular carrier or otherwise, shall be agreed to by management. No discrimination shall be practiced by management as between members and non-members of organizations or as between members of different organizations, nor shall members or organizations discriminate against non-members or use other methods than lawful persuasion to secure their membership. Espionage by carriers on the legitimate activities of labor organizations or by labor organizations on the leigtimate activities of carriers should not be practiced. The right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by management. This right of participation shall be deemed adequately complied with if and when the representatives of a majority of the employees of each of the several classes directly affected shall have conferred with the management. . . . The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class.[10]

The Railway Labor Act of 1926 codified these decisional precepts except for the election and majority rule. Section 2 read as follows:

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier and its employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, reespectively, by the carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner, as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization, or designation of representatives, by the other.[11]

The Supreme Court, in upholding the disestablishment of a company union in the railway clerks case in 1930, unanimously sustained the validity of the statute. Chief Justice Hughes declared,

Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme. . . . The entire policy of the act must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained. There is no impairment of the voluntary character of arrangements for the adjustment of disputes in the imposition of a legal obligation not to interfere with a free choice of those who are to make such adjustments. On the contrary, it is of the essence of a voluntary scheme, if it is to accomplish its purpose, that this liberty should be safeguarded.

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[9] *American Steel Foundries v. Tri-City Central Trades Council* (1921), 257 U.S. 184. The Chief Justice's remarks here were *obiter dictum*. The decision actually sustained an injunction restraining unlawful picketing on the grounds of intimidation.

[10] H. D. Wolf, *The Railroad Labor Board* (Chicago : 1927), pp. 184–86.

[11] *U.S. Stat. at large*, XLIV, 577.

The legality of cellective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized. . . . 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 interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitution right of either, was based on the recognition of the rights of both.[12]

The policy declaration of the Norris-LaGuardia Act of 1932, based upon the Tri-City case, the Railway Labor Act, and the decision sustaining it,[13] reads as follows:

Whereas under prevailing economic conditions developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own chosing, to negotiate the terms and contracts of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.[14]

The labor provisions of the Bankruptcy Act of March 3, 1933, the terminal point in the pre-New Deal line of policy, were suggested by the railway unions and sponsored by Senator George W. Norris. Sec. 77(p) and (q) provided that no one receiving bankrupt railroad property might

deny or in any way question the right of employees . . . to join the labor organization of their choice . . . [or] interfere in any way with the organizations of employees, or . . . use the funds of the railroad . . . in maintaining so-called company unions, or . . . influence or coerce employees in an effort to induce them to join or remain members of such company unions. [Or],

. . . require any person seeking employment . . . to sign any contract or agreement promising to join or to refuse to join a labor organization, and if such contract has been enforced . . . then the said judge . . . shall notify the employees . . . that said contract has been discarded and is no longer binding on them in any way.[15]

Before President Roosevelt took office the right of employees to associate and designate representatives had thus been asserted in *Commonwealth* v. *Hunt*, the 1894 report of the Strike Commission, the Clayton Act, the report of the Commission on Industrial Relations, the decisions of the NWLB, the American Steel Foundries case, the rulings of the Railroad Labor Board, the Railway Labor Act, the railway clerks case, and the Norris-LaGuardia Act. Similarly, the principle that employers shall not interfere with these rights was affirmed by the Strike Commission, the Erdman Act, the 1902 Industrial Commission, the Commission on Industrial Relations, the rulings of NWLB and the Railroad Board, the Railway Labor Act, the railway clerks case, the Norris-LaGuardia Act, and the Bankruptcy Act. NWLB and the Railroad Labor Board employed the secret ballot election and majority

[12] *Texas & New Orleans R. R. Co. v. Brotherhood of Railway and Steamship Clerks* (1930), 281 U.S. 548.

[13] 72d Cong., 1st sess., H.R., Hearings before Comm. on Jud. on H.R. 5315, *Defining and Limiting the Jurisdiction of Courts Sitting in Equity* (Feb. 25, 1932), p. 11.

[14] *U.S. Stat. at Large*, XLVII, 70.

[15] *Ibid.*, XLVII, 1467.

rule. The responsibility of the employer to deal with the representatives of his employees was declared by the Strike Commission, the Industrial Commission, the War Labor Board, the Railroad Board, and the Railway Labor Act.

The motive power in converting these principles into legislation came from the union movement and political leaders sympathetic with its aims. The right to organize and bargain was, in fact, the presumption of existence and unions had always struggled to assert them in dealings with employers.[16]

The next step, insistence that the *government* enforce these policies, required that the AFL rid itself at least in part of the philosophy of voluntarism. Gompers embedded in labor thinking the concept of self-help. "So long as we have held fast to voluntary principles," he declared, in what was in effect his last will and testament, ". . . we have made our labor movement something to be respected and accorded a place in the councils of our Republic." [17] Voluntarism was grounded on a deep suspicion of government for, as Gompers declared.

> The mass of the workers are convinced that laws necessary for their protection against the most grievous wrongs cannot be passed except after long and exhausting struggles; that such beneficent measures as become laws are largely nullified by the unwarranted decision of the courts; that the laws which stand upon the statute books are not equally enforced; and that the whole machinery of government has frequently been placed at the disposal of the employers for the oppression of the workers.[18]

The breakdown of voluntarism was a function of adversity, the unions coming to the government for assistance when hard times set in. The process began with those traditional pacemakers, the railway organizations and the miners, and finally encompassed the AFL itself. With the first this took shape in the Railway Labor Act, whose principal draftsman was Donald R. Richberg, counsel of the Railway Labor Executives Association. Disastrous defeat in the shop crafts strike of 1922 taught the unions to rely on legislation rather than strikes, resulting in the 1926 statute. The Act imposed the duty on both sides to exert every reasonable effort to reach agreement; each was given the right to organize and select representatives without interference; and a procedure was devised for handling disputes. "The keystone of this 'peace arch' lay in the provision guaranteeing freedom of association and the right of collective bargaining." [19]

The Mine Workers turned to the government as a result of the sickness of the coal industry in the late 1920's, having exhibited a fleeting interest as early as 1919. In 1928 the union instigated a congressional investigation of conditions in the fields and drafted the Watson-Rathbone bill. It proposed stabilization by producers' selling pools outside the antitrust laws with labor gaining an equalizing freedom to organize. It would be the obligation of operators and employees to bargain collectively; workers might select representatives without interference; the yellow-dog contract would be illegal; and the closed shop would be safeguarded. The bill, however, got nowhere.[20]

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[16] Cf. Samuel Gompers, "The President's Industrial Conference," *American Federationist*, XXVI (1919), 1041–44.

[17] *44th Convention American Federation of Labor, 1924*, p. 5.

[18] Quoted by G. G. Higgins, *Voluntarism in Organized Labor in the United States, 1930–1940* (Washington: 1944), p. 31.

[19] Donald R. Richberg, *The Rainbow* (Garden City, N.Y.: 1936), p. 51; Wolf, *op. cit., passim.*

[20] *United Mine Workers Journal* (Dec. 1, 1931).

As the depression racked the industry the union had essentially the same measure reintroduced in 1932, as the Davis-Kelly coal stabilization bill. Sec. 5 carried over the labor provisions with these additions: the right of assembly to discuss organized labor and collective bargaining; employees would not be required to purchase from company stores and would be free to select their own checkweighmen; and weights and scales would be open to public inspection. It would be inequitable, the UMW argued, for miners to work under individual and yellow-dog contracts while operators collectively fixed the price of coal. Further, since labor constituted a major cost factor, it was necessary to establish wage uniformity through collective bargaining to stabilize the industry.[21]

The seriousness with which the miners advocated governmental intervention is evident in Lewis' testimony:

> The coal industry needs the helping hand of the Federal Government. I say that reluctantly. I am one who for long years in the councils of the miners and operators of this country opposed any form of Government regulation. . . . I have reluctantly come to the conclusion that the industry itself is so impotent that it cannot and will not work out its own salvation. . . . The industry is beggared. Its people are in misery, and it petitions Congress for help.[22]

The Mine Workers in 1932–1933 took every occasion to press for federal assistance. Delegations headed by Vice-President Philip Murray called upon candidate Roosevelt repeatedly during the 1932 campaign to obtain a commitment to support collective bargaining in coal.[23] In hearings in January, 1933, on the Thirty-House bill the UMW proposed amendments outlawing the yellow-dog contract and guaranteeing the right of workers to select their own representatives.[24] The following month Lewis urged action to foster collective bargaining as a means of combating Communism and of preserving free institutions.[25]

The AFL moved at a slower pace and did not discard voluntarism in overt policy until the spring of 1933. The drift appeared in August 1931, however, when the Executive Council called for anti-injunction legislation representing the ideas of such staid leaders as Matthew Woll, John P. Frey, and Victor A. Olander.[26] When the Norris-LaGuardia Act became law, moreover, the council hailed the declaration of policy as "a most distinct step forward in the government attitude toward organizations of labor and collective bargaining."[27] Perhaps most dramatic was the reversal on unemployment insurance at the 1932 convention where the Executive Council, in defiance of the Gompers tradition of voluntary assistance, called for federal intervention in this field.[28]

At the same time, the AFL asked the government to expand its activity in the collective bargaining area. Green gave the labor provisions of the Davis-Kelly bill the Federation's blessing. In April

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[21] *Ibid.* (Feb. 1, 1932); *To Create a Bituminous Coal Commission,* 72d Cong., 1st sess., Sen., Hearings before Subcomm. on Mines on S. 2935 (Mar. 14–Apr. 22, 1932), pp. 1–3, 61.

[22] *To Create a Coal Commission,* Sen. Hearings, pp. 1346–47.

[23] David J. McDonald and Edward A. Lynch, *Coal and Unionism, a History of the American Coal Miners' Union* (Silver Spring, Md.: 1939), pp. 193–94. McDonald to the writer, Nov. 24, 1947.

[24] *Thirty-Hour Work Week,* 72d Cong., 2d sess., Sen., Hearings before Subcomm. on Jud. on S. 5267 (Jan. 5–19, 1933), pp. 288–89.

[25] *Investigation of Economic Problems,* 72d Cong., 2d sess., Sen., Hearings before Comm. on Finance pursuant to S. Res. 315 (Feb. 13–28, 1933), p. 300.

[26] *New York Times,* Aug. 15, 1931; AFL, *Weekly News Service,* Aug. 22, 1931.

[27] *52d Convention American Federation of Labor, 1932,* p. 66.

[28] Higgins, *op. cit.,* pp. 59–72.

1933 the AFL proposed an amendment to the Thirty-Hour bill to guarantee to workers the right to belong to unions and to bargain through freely chosen representatives.[29] At this time, however, the AFL's prime interest was unemployment, since the right to join a union did little good if the worker was on the streets. Moreover, the protagonists of voluntarism, though now a minority, were not to be ignored.[30]

Between Governor Roosevelt's nomination for the presidency in the summer of 1932 and his inauguration the following March the union movement did not seek a commitment on collective bargaining from him except in the limited area of coal. Although he and his advisers considered an extraordinary variety of legislative proposals, they gave little thought to encouraging unionism and collective bargaining.[31] Roosevelt's campaign, in fact, left the public largely unaware of the policies he would represent.[32] As Frances Perkins has noted,

> The New Deal was not a plan with form and content. It was a happy phrase he [Roosevelt] had coined during the campaign. . . . The notion that the New Deal had a preconceived theoretical position is ridiculous. The pattern it was to assume was not clear or specific in Roosevelt's mind, in the mind of the Democratic party, or in the mind of anyone else taking part in the 1932 campaign. There were no preliminary conferences of party leaders to work out details and arrive at agreements.[33]

The New Deal was made possible by Roosevelt's awareness of social evils, receptiveness to ideas, and willingness to employ the power of government in economic life. If this "constituted a national program, then a man's intention to build a house constitutes the work of the architect, of the contractor, and of the carpenters." [34]

Raymond Moley has shrewdly characterized Roosevelt as a "patron" of labor. He had a profound concern for the hardships imposed upon workers by depression, perceiving them as people in trouble rather than as tables of statistics. As governor of New York he had sponsored a program of social welfare, with AFL support, including ceilings on hours and minimum wages for women and children, workmen's compensation, factory inspection, relief and public works, and a study of unemployment insurance and old-age pensions.[35] These measures reveal a faith in direct legislation to assist the needy rather than a desire to nurture unionism as an instrument to raise their standards. There were, in addition, blank spots in the fields of his interest. He showed little concern with collective bargaining as contrasted with foreign affairs, finance, and military and naval policy. The details bored him and he relied, therefore, on the advice of his experts.[36]

For his own education and to prepare material for campaign addresses, the Governor established the "brain trust" under Moley.

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[29] *To Create a Coal Commission*, Sen. Hearings, pp. 76–78; *Thirty-Hour Bill*, 73d Cong., 1st sess., H.R., Hearings before Comm. on Labor on S. 158 and H.R. 4557 (Apr. 25–May 5, 1933), pp. 66, 69.

[30] Shishkin interview; Slichter, *op. cit.*, p. 272.

[31] Frank interview.

[32] Walter Millis, "Presidential Candidates," *The Yale Review, XXI* (1932), 13–15; Oswald Garrison Villard, "The Democratic Trough at Chicago, *The Nation, CXXXV* (1932), 27.

[33] Frances Perkins, *The Roosevelt I Knew* (New York: 1946), pp. 166–67.

[34] Raymond Moley, *After Seven Years* (New York: 1939), pp. 13–14; Ernest K. Lindley, *The Roosevelt Revolution, First Phase* (New York: 1933), p. 11.

[35] Moley, *op. cit.*, p. 13; Perkins, *op. cit.*, chaps. vii and viii; *The Public Papers and Addresses of Franklin D. Roosevelt*, ed. by Samuel I. Rosenman (New York: 1938), I, 83–84, 90–91, 104–105, 123.

[36] Richberg, Keyserling, Wyzanski interviews.

Specialists recruited largely from Columbia University formulated policies for agriculture, the tariff, finance, international debts, power, relief, the railroads, governmental economy, and presidential power. No expert in the labor relations field was called in except Donald Richberg, who worked exclusively on the railways. The brain trusters themselves, with the exception of Rexford G. Tugwell, exhibited little concern with trade unions.[37] Tugwell was disturbed by their submissiveness, by their acquiescence in rule by business, and he criticized the AFL's craft structure, the backwardness of its leadership, and its failure to employ the services of experts.[38]

The 1932 campaign evoked little discussion of unionism. The spirit of the Democratic platform was supplied by the elder statesmen of the Wilson era and emphasized a balanced budget, sound currency, encouragement of competition and small business, less intervention by the federal government, and the repeal of prohibition, but did contain a plank, at AFL insistence, favoring shorter hours.[39] Except for the Boston address of October 31st, none of Roosevelt's major speeches dealt primarily with the problems of workers. Its preparation involved the only important rift within the brain trust. Berle and Tugwell urged a direct attack upon business abuses and a broad affirmative program, while Moley, General Johnson, Senator Key Pittman, and Senator James F. Byrnes cautioned moderation. Roosevelt sided with conservative counsel and indulged largely in generalities. On the positive side, however, he pledged direct relief and public works for the destitute, supported the Wagner employment service bill, and reasserted the platform statement on hours. No mention was made of collective bargaining[40] but in minor speeches at Indianapolis and Terre Haute he promised to call a conference of miners and operators and, if they were able to agree on a stabilization program, to recommend legislation.[41]

Although not a member of the brain trust, Frances Perkins was one of Roosevelt's closest advisers on labor matters, particularly where they impinged upon social welfare. She had worked on factory safety, women in industry, workmen's compensation, and related problems for over twenty years and was his industrial commissioner in the State Department of Labor. Roosevelt's regard for her is revealed in the fact that he named her Secretary of Labor in the face of vigorous AFL opposition. When offered the post, she outlined a broad prospective program which received his approval. It covered unemployment relief, public works, minimum wages and maximum hours, unemployment and old-age insurance, abolition of child labor, and an employment service. Again, a collective bargain policy was notably absent for Miss Perkins had little confidence in the union movement as an instrument of social advancement.[42]

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[37] Moley, *op cit.*, pp. 15 ff. Cf. also, A. A. Berle, Jr., and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: 1932); Hugh S. Johnson, *The Blue Eagle from Egg to Earth* (New York: 1935); Unofficial Observer, *The New Dealers* (New York: 1934); Lindley, *loc. cit.*; Rexford G. Tugwell, *The Industrial Discipline and the Governmental Arts*, New York: 1933).

[38] Tugwell, *op. cit.*, pp. 5–6, 133, 157.

[39] Walter Lippmann, *Interpretations, 1931–1932*, ed. by Allan Nevins (New York: 1932), pp. 308–10; Irving Bernstein, "Labor and the Recovery Program, 1933," *Quarterly Journal of Economics*, LX (1946), 272.

[40] Moley, *op. cit.*, pp. 66–63; *Roosevelt Public Papers*, I, 84–55.

[41] Lawrence Dwyer to Roosevelt, Mar. 9, 1933, Berle to Marvin McIntyre, Apr. 10, 1933 White House, O.F. 175, Coal; McDonald to the writer, Nov. 24, 1947.

[42] Perkins, *op. cit.*, pp. 150–52; Frances Perkins, "Eight Years as Madame Secretary," *Fortune*, XXIV (1941), 77; Wyzanski interview

The man who was to provide the principal link between the unions and the New Deal was Senator Robert F. Wagner of New York, who had the former's complete confidence. Wagner had been an outstanding progressive in the New York Assembly and Senate (1905–1918) and sponsored the resolution, following the Triangle shirtwaist fire, that created the Factory Investigation Commission. The commission under his chairmanship laid the basis for a notable factory code and workmen's compensation law. As a judge he is credited with granting the first injunction to a union restraining an employer from interfering with lawful activities.[43] With his law partner and later legislative secretary, Simon H. Rifkind, he was instrumental in preparing a key case assaulting the Hitchman doctrine, the New York Court of Appeals holding a yellow-dog contract unenforceable and no basis for an injunction.[44] This in turn led him to prevail upon Senator Norris, chairman of the Judiciary Committee, to seek expert assistance in formulating the anti-injunction bill. By 1933, in fact, Wagner was recognized as the member of Congress most active in the labor field, having sponsored measures dealing with unemployment compensation, public works and relief, employment exchanges, and a census of those out of work.[45]

In Wagner's view there was an essential relationship between collective bargaining and democracy. He observed that,

> The development of a partnership between industry and labor in the solution of national problems is the indispensable complement to political democracy. And that leads us to this all-important truth: there can no more be democratic self-government in industry without workers participating therein, than there could be democratic government in politics without workers having the right to vote. . . . That is why the right to bargain collectively is at the bottom of social justice for the worker, as well as the sensible conduct of business affairs. The denial or observance of this right means the difference between despotism and democracy.[46]

[43] Oswald Garrison Villard, "Pillars of Government, Robert F. Wagner," *Forum & Century*, XCVI (1936), 124–25; I. F. Stone, "Robert F. Wagner," *The Nation*, CLIX (Oct. 28, 1944), 507; Owen P. White, "When the Public Needs a Friend," *Collier's*, XCIII (June 2, 1934), 18, 60; Perkins, *The Roosevelt I Knew*, pp. 17, 22.

[44] *Interborough Rapid Transit Co. v. Green* (N.Y., 1928), 131 Misc. 682. For its significance, cf. Felix Frankfurter and Nathan Greene, *The Labor Injunction* (New York: 1930), pp. 40–42, 270–72, and Homer F. Carey and Herman Oliphant, "The Present Status of the Hitchman Case," *Columbia Law Review*, XXIX (1929).

[45] Rifkind interview; Keyserling to the writer, June 11, 1948.

[46] Quoted by Leon H. Keyserling, "Why the Wagner Act?" *The Wagner Act: After Ten Years*, ed. by Louis G. Silverberg (Washington: 1945), pp. 12–13.

III. FIRST STEP: SECTION 7(a)

The prime problem facing the new administration on March 4, 1933, was the stimulation of business with a consequent reduction in the number of the unemployed. Among the hundreds of proposals advanced to achieve these purposes four received the support of important interest groups and leaders and were incorporated in varying degrees in the New Deal's basic revival measure, the National Industrial Recovery Act. The first called for the spread of available employment by compulsory shortening of hours, urged by the AFL and such public officials as Senator Hugo L. Black of Alabama and Governor John G. Winant of New Hampshire. The creation of jobs and mass purchasing power through public works was the second, proposed by the AFL, many economists, and Senators Wagner, Robert M. La Follette, Jr., of Wisconsin, and Edward P. Costigan of Colorado. The third would suspend the antitrust laws, permitting businessmen through trade associations to regulate prices, production, and labor standards. It was pressed by the Chamber of Commerce, the NAM, independent business leaders like Bernard M. Baruch, General Johnson, Gerard Swope, and Dr. Meyer Jacobstein, and was conditionally acceptable to organized labor. The final proposal, backed by unions, particularly the Mine Workers, urged a guarantee of the right of workers to organize and bargain collectively.[1]

The shorter hours group seized the initiative on December 21, 1932, when Black introduced the Thirty-Hour bill. It would have barred interstate commerce to articles produced in establishments "in which any person was employed or permitted to work more than five days in any week or more than six hours in any day." [2] In hearings before a Senate subcommittee in January, 1933, AFL President William Green described the measure as a fundamental attack upon the depression by spreading work and reducing technological unemployment. Though doubtful as to its constitutionality, he warned that the Federation might call general strikes to obtain passage.[3] Philip Murray for the miners, however, pointed out that employers would lower wages if hours were reduced. Since the bill faced the formidable constitutional hurdle of the child labor case,[4] he proposed that labor protect its wages by collective bargaining, suggesting an amendment to prohibit shipment in commerce of articles in whose manufacture "it is made a condition of employment that the workers engaged in such manufacture or production shall not belong to, remain, or become a member of a labor organization, or in which they shall be denied the right to collectively bargain for their wages through chosen representatives of their own." [5]

[1] Irving Bernstein, "Labor and the Recovery Program, 1933," *Quarterly Journal of Economics*, LX (1946), 270–71; *Staff Studies*, National Archives, NRA, pp. 113–18.
[2] *Cong. Record*, LXXVII, pt. vi, 5901.
[3] *Thirty-Hour Work Week*, 72d Cong., 2d sess., Sen., Hearings before Subcomm. on Jud. on S. 5267, pt. 1 (Jan. 5–19, 1933), pp. 2–22.
[4] *Hammer v. Dagenhart* (1918), 247 U.S. 251.
[5] *Thirty-Hour Work Week*, Sen. Hearings, pp. 288–97.

Industry except for a few hosiery employers denounced the Black bill as unconstitutional and bad economics.[6]

On March 30, after Roosevelt had summoned Congress into special session, the Judiciary Committee reported the bill favorably with a reservation on constitutionality.[7] When Senate debate began on April 3, it became evident that the measure would be passed. The Administration would then be presented with a recovery program without having taken a hand in its formulation. After a hurried White House cnference, Senate majority leader Joseph T. Robinson on April 5th therefore introduced an amendment to raise maximum hours to 36 per week and 8 per day. The Administration amendment was defeated 48 to 41, however, and the following day the Senate adopted the bill, 53 to 30.[8]

The President was exercised since he regarded it as unconstitutional and so rigid as to be economically unworkable. Wagner felt it inadequate for recovery, while Raymond Moley and General Johnson, regarding the bill as "utterly impractical," recommended that it be killed. Roosevelt decided, nevertheless, to support the Secretary of Labor's efforts to gain flexibility in amendments addressed on April 25th to the House Labor Committee.[9] These changes, approved by several cabinet members but not submitted to the AFL, called for a sliding scale of hours, from thirty to forty weekly with a maximum of eight daily, as well as minimum wages. In both cases tripartite boards with union representation where possible would make determinations.[10]

Green then told the committee that the AFL would accept the amendment on hours, but only because it represented an Administration policy. Minimum wages, however, were rejected except for women and children since the AFL felt that minima tended to become maxima and thereby reduced skilled rates. Inasmuch as tripartite boards could not possibly represent workers in the absence of unions, he proposed an amendment: "Workers . . . shall not be denied by their employer the free exercise of the right to belong to a *bona fide* labor organization and to collectively bargain for their wages through their own chosen representatives."[11] Industry vigorously opposed the Secretary's amendments.[12]

On May 10th the committee issued a unanimous report, conceding fully to organized labor with respect to collective bargaining. A tripartite Trade Regulation Board, chaired by the Secretary of Labor, would license firms to engage in commerce which were affiliated with trade associations that made agreements with unions, or unaffiliated but in compliance with such contracts, or willing to accept board regulations regarding wages, conditions, and limitations on production. Licensees would maintain the five-day week and six-hour day and pay wages sufficient for standards of decency. A license would be denied

[6] *Ibid.*, pp. 190 ff., 272–73.
[7] Sen. Rep. No. 114, 73d Cong., 1st sess. (Mar. 30, 1933).
[8] *Cong Record*, CXXVII, pt ii, 1178–99 1244–1350; Raymond Moley *After Seven Years* (New York: 1939) p 186.
[9] Frances Perkins, *The Roosevelt I Knew* (New York: 1946), pp. 192–96; Moley, *op. cit.*, p. 186; Rifkind interview.
[10] C. F. Roos, *NRA Economic Planning* (Bloomington, Ill.: 1937), p. 40; AFL, *Weekly News Service*, Mar. 4, 1933; *Thirty-Hour Bill*, 73d Cong., 1st sess., H.R. Hearings before Comm. on Labor on S. 158, H.R. 4557 (Apr. 25–May 5, 1933), pp. 2–18, 26.
[11] House Hearings, *Thirty-Hour Bill*, p. 66.
[12] *Ibid.*, pp. 91–92, 199, 511, 707, 713.

for articles in the production of which children or enforced labor were employed, nor would one be issued to a firm in which

> any worker who was a signatory to any contract of employment prohibiting such worker from joining a labor union or employees' organization, was employer, or any goods, articles, or commodities [were] produced by any person whose employees were denied the right to organization and representation in collective bargaining by individuals of their own choosing.[13]

The Black bill was doomed even before the committee reported since Roosevelt had thrown his full weight behind an Administration substitute. Despite a direct appeal by the AFL Executive Council, he withdrew support on May 1, burying the report in the Rules Committee. The President had concluded that the endorsement of industry, denied to the Black bill, was vital. Hence activity on the Administration bill proceeded under forced draft.[14]

The President, in fact, in March, 1933, had asked Wagner, the Congressional focal point of recovery planning and a trusted adviser as well, to shape a legislative policy. During the previous fall Jacobstein had suggested the trade association idea to halt deflation and, to examine this plan, the Senator called together a representative group in April. Leading members, in addition to Wagner, Rifkind, and Jacobstein, were: Harold Moulton of the Brookings Institution; Virgil D. Jordan of the National Industrial Conference Board; M. C. Rorty, an industrial economist; Fred I. Kent of the Bankers Trust Company; James H. Rand, Jr., of Remington-Rand; the trade association attorney David L. Podell; W. Jett Lauck, economist of the Mine Workers; and Representative M. Clyde Kelly, cosponsor of the coal bill. Convinced after several sessions that the group was too large and represented irreconcilable elements, Wagner appointed a drafting committee consisting of Moulton, Jacobstein, Podell, and Lauck. Their measure provided for self-regulation of business through trade associations, a public works program, and a guarantee of the right to bargain collectively. Moulton, Jacobstein, and Podell emphasized the first; the Senator insisted upon the second; and Lauck, with Wagner's support, backed the miners' leading demand. This last they justified on the ground that businessmen would have unfettered control over wages and hours unless labor organized as a counterbalance. Jerome N. Frank, Counsel of the Agricultural Adjustment Administration, and John Dickinson, Assistant Secretary of Commerce, then joined the group, but only the former interested himself in the labor provision.[15]

On April 11th Roosevelt instructed Moley to work on a recovery measure without informing him of the activities already under way. Laden with other responsibilities, Moley on April 25th passed on the assignment to General Johnson, who cared only about a program of self-regulation for business. Although neither regarded labor policy as relevant to recovery, the AFL's political strength demonstrated in the Black bill compelled a concession. Hence they called on Donald R. Richberg, who drafted a collective bargaining statement based upon his experience with the Railway Labor Act and the Norris-

[13] H.R. Rep. No. 124, 73d Cong., 1st sess. (May 10, 1933).
[14] *Staff Studies*, National Archives, NRA, p. 120; Moley, *op. cit.*, p. 187; *Cong. Record*, LXXVII, pt. vi, 5805; AFL, *Weekly News Service*, May 6, 1933.
[15] Jacobstein, Lauck, Rifkind, Frank interviews; Roos, *op. cit.*, pp. 38–39.

LaGuardia Act, emphasizing freedom of association in the designation of bargaining representatives.[16]

Early in May the President summoned both groups to the White House where they agreed to include the trade association formula, a guarantee of collective bargaining, and public works. By this combination he hoped to win the support of business and labor, since he regarded the backing of both as necessary for the success of the program. A drafting committee, consisting of Budget Director Lewis W. Douglas, Wagner, Johnson, Richberg, Dickinson, Assistant Secretary of Agriculture Rexford G. Tugwell, and Secretary Perkins, started to work on a unified bill, but after several meetings the last three dropped out, leaving the final drafting to Douglas, Wagner, Johnson, and Richberg. An NAM delegation appealed to Roosevelt to revise the labor section drastically. He referred them to the committee, which, under Wagner's influence, refused to make the change.[17]

Sec. 7(a) of the National Industrial Recovery bill, submitted to Congress by the President on May 17, 1933, required that

> Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions:
> 1) that employees shall have the right to organize and bargain collectively through representatives of their own choosing,
> 2) that no employee and no one seeking employment shall be required as a condition of employment to join any organization or to refrain from joining a labor organization of his own chosing, and
> 3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other working conditions approved or prescribed by the President.[18]

Since wages, hours, and working conditions were already determined by bargaining in some industries, 7(b) empowered employers and employees to reach agreements which, when approved by the President, would have the force of codes of fair competition. Where collective bargaining did not exist, Sec. 7(c) authorized the President to fix maximum hours, minimum rates, and other conditions which would then have the effect of codes.

Immediately preceding the hearings of the House Ways and Means Committee on May 18th, an emergency conference of the AFL in Washington voted to insist on changes in both clauses (1) and (2) of 7(a).[19] On May 19th Green proposed to the committee that the first, after guaranteeing to employees the right to organize, should continue, "and shall be free from the interference, restraint, or coercion of employers of labor or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[20] This language, taken verbatim from the Anti-injunction Act,

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[16] Moley, *op. cit.*, pp. 187–88; Hugh S. Johnson, *The Blue Eagle from Egg to Earth* (Garden City, N.Y.: 1935), pp. 201–03; Donald R. Richberg, *The Rainbow* (New York: 1936), p. 196; John T. Flynn, "Whose Child Is the NRA?" *Harpers Magazine*, CLXIX (1934), 390–92; Lauck interview. Richberg insists that he had not seen the Wagner version prior to drawing his own. Richberg interview; Richberg to N. von Hoershelman, Sen. 26, 1933, National Archives, NRA, No. 3706.

[17] Richberg, Frank, Jacobstein interviews; Roos, *op. cit.*, pp. 39–40; Richberg, *op. cit.*, pp. 107–09; *Violations of Free Speech and Rights of Labor*, 76th Cong., 1st sess., Sen., Hearings before Subcomm. on Edu. and Labor on S. Res. 266, pt. 17, 7414, hereafter cited as *La Follette Comm. Hearings*

[18] 73d Cong., 1st sess., H.R. 5664 (May 17, 1933).

[19] 53d *Convention American Federation of Labor, 1933*, p. 41.

[20] *National Industrial Recovery*, 73d Cong., 1st sess., H.R., Hearings on H.R. 5664 before Comm. on Ways and Means (May 18–20, 1933), p. 117.

aimed to buttress these rights against employer restrictions. He also recommended that in the second clause "company union" be substituted for "organization," to read, "that no employee and no one seeking employment shall be required as a condition of employment to join a *company union*, or to refrain from joining a labor organization of his own choosing." [21] The intent was to safeguard the closed shop, which might be defined as "any organization," thereby outlawing agreements in which membership in a trade union was a condition of employment. He did not, however, suggest rewording the first clause for the same purpose. With these amendments the AFL offered to endorse the bill without qualification.[22]

Henry I. Harriman of the Chamber of Commerce did not discuss the labor provisions in his testimony. In fact, no representative of industry objected to Sec. 7(a) or the AFL's amendments. The Federation and the Chamber, indeed, had agreed privately that the former would accept the trade association features in return for the Chamber's pledge to accept the labor section, the NAM refusing to accede.[23] Senator Wagner, speaking for the Administration before the committee, supported the AFL proposals. On May 23d the Ways and Means Committee reported the bill out with Sec. 7(a) in the AFL form.[24]

The House adopted the recovery bill in only two days, debate being limited by the cloture rule and amendments restricted to those introduced by the committee. There was no discussion of the labor provisions or, with one minor exception, of the AFL amendments. The House on May 26th passed the bill with 7(a) in the committee's form by a vote of 325 to 76.[25]

The hearings of the Senate Finance Committee between May 22d and June 1st marked a sharp change in the attitude of employers, acquiescence giving way to disapproval as the initiative passed from the Chamber to the NAM. In a press statement NAM President Robert L. Lund denounced Sec. 7, declaring that employers would be required to deal with Communistic and racketeering organizations and that employee welfare plans might be destroyed.[26] He called an emergency meeting in Washington which on June 3d, despite Johnson's restraining efforts, proposed amendments "to make it clear that there is neither the intention nor the power to reorganize present mutually satisfactory employment relations, nor to establish any rule which will deny the right of employers and employees to bargain individually or collectively." [27]

James A. Emery, appearing for the NAM before the committee, charged that 7(a) would deprive Americans of their precious liberty to associate or not associate by requiring that workmen join labor organizations. Employment relations would be molded into a single form, the trade union, despite the fact that three times as many workers were members of employee representation plans (company unions). Sec. 7(a) would disrupt existing satisfactory relationships and retard re-

[21] *Ibid.*, p. 118. Italics mine.
[22] *Loc. cit.*
[23] Jacobstein, Shishkin interviews.
[24] *National Industrial Recovery*, House Hearings, pp. 122, 137; H.R. Rep. No. 159, 73d Cong., 1st sess. (May 23, 1933).
[25] *Cong. Record*, LXXVII, pt. iv, 4220–21; pt. v, 4373.
[26] *New York Times*, May 18, 1933.
[27] *Ibid.*, May 31, June 4, 1933; *La Follette Comm. Hearings*, pt. 17, 7561–63.

covery. If, however, the committee believed that some statement was essential, Emery urged this substitute language:

> 1) that employers and employees shall have the right to organize and bargain collectively in any form mutually satisfactory to them through representatives of their own choosing,
>
> 2) that no employee and no one seeking employment shall be required as a condition of employment to join or refrain from joining any legitimate organization, nor shall any persons be precluded from bargaining individually or collectively.[28]

The stiffening of attitude appeared also in a letter from Harriman which, in contrast with his earlier silence, now recommended amendments to support the open shop.[29]

Spokesmen for the steel industry in particular opposed 7(a). Charles R. Hook of ARMCO warned that it endangered "the happy relationship which has existed between employer and employee in this country," and supported the NAM amendments to undermine the closed shop and protect the company union.[30] "The industry," Robert P. Lamont of the Iron and Steel Institute declared, "stands positively for the open shop." The steel companies, though prepared to deal with their own employees, refused to bargain with "outside organizations of labor or with individuals not its employees." Accordingly, the industry "most strongly objects" to 7(a) or even to language which "implies" that it might have to deal with unions. "If this position is not protected," he warned, "the industry is positive in the belief that the intent and purpose of the bill cannot be accomplished."[31]

John L. Lewis opposed the NAM amendments for both his union and the AFL. After assailing industry's reversal during the hearings, he charged that despite its protestations steel management practiced a "closed shop" by barring employment to union members. Although the bill virtually required employers to organize in trade associations they sought to deny their employees the less than equal right to associate in unions. Offering solace to industry, Lewis pointed out that 7(a) would not destroy company unions if the employees wished to remain members, but only forbade an employer to require membership as a condition of employment.[32]

Senator David I. Walsh of Massachusetts then proposed an amendment to clause (2) of 7(a), supported by the AFL, so as to read [amendment italicized], "no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, *organizing or assisting* a labor organization of his own choosing." He pointed out that yellow-dog contracts not only prohibited employees the right to join but also denied them the right to engage in these related activities. The committee accepted this language.[33]

The committee report of June 5th accepted industry's position with respect to "existing saisfactory relationships" in clause (1). A proviso proposed by Senator Champ Clark of Missouri won unanimous adoption and the endorsement of Richberg (who suggested "satisfactory") and Johnson. The amended clause read [changes italicized],

> That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the inter-

[28] *National Industrial Recovery*, 73d Cong., 1st sess., Sen., Hearings before Comm. on Fin. on S. 1712 and H.R. 5755 (May 22–June 1, 1933), p. 288.
[29] *Ibid.*, p. 408.
[30] *Ibid.*, p. 389.
[31] *Ibid.*, pp. 394–95.
[32] *Ibid.*, pp. 404–07.
[33] *Cong. Record* LXXVII, pt. v, 4799.

ference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in *self-organization* or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. *Provided, That nothing in this Title shall be construed to compel a change in existing satisfactory relationships between the employees and employers of any particular plant, firm, or corporation, except that the employees of any particular plant, firm, or corporation shall have the right to organize for the purpose of collective bargaining with their employer as to wages, hours of labor, and other conditions of employment.*[34]

This amendment not only sanctioned company unions but might have been construed to negate Sec. 7(a) entirely. The AFL denounced it at a later date, declaring itself opposed to the bill in that form.[35]

The Clark proviso, however, had been adopted on June 8th without debate when Senator Norris hastened into the chamber to insist upon reconsideration. After emphasizing its significance, he won the courtesy of full debate and a roll call. The proviso in his judgment legalized employer-dominated unions and nullified the preceding language. Employers might organize company unions, thereby creating "satisfactory" conditions, with the purpose of thwarting free association. Wagner voiced an additional fear lest it condone the yellow-dog contract. Clark, decrying these views as exaggerations, emphasized that Richberg, a leading labor lawyer, had approved the proviso. Senator Burton K. Wheeler of Montana expressed incredulity, while La Follette pointed out that the attorney had acted in a private capacity rather than for the railway organizations. Norris' intervention bore fruit in the roll call: the proviso was defeated, 46 to 31.[36] The issue squarely tested the strength of those who supported the trade union as against those who preferred an equal status for it and the company union.

Wheeler then proposed a fourth clause to prohibit employers from transporting employees "from one State, county, city, or place to another for the purpose of taking the place of men out on strike," charging that strikebreaking was the chief cause of bloodshed in labor difficulties. The amendment, however, was rejected without a roll call.[37]

The conference committee of the House and Senate made no changes in 7(a) and the President signed the National Industrial Recovery Act on June 16, 1933.[38] The labor section read:

> Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective barganing or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.[39]

The impetus for including it in the Act came from the union movement, spearheaded by the Mine Workers. The principles of 7(a), in

[34] Sen. Rep. No. 114, 73d Cong., 1st sess. (June 5, 1933).
[35] AFL, *Weekly News Service, June 10, 1933; 53d Convention American Federation of Labor, 1933*, p. 16.
[36] *Cong. Record*, LXXVII, pvt. v, 5279–84.
[37] *Ibid.*, p. 5284.
[38] H.R. Rep. No. 243, 73d Cong., 1st sess. (June 10, 1933); S. Doc. No. 76, 73d Cong., 1st sess.; *New York Times*, June 17, 1933.
[39] *U.S. Stat. at Large*, XLVIII, 195.

fact, closely resembled those in the Watson-Rathbone and Davis-Kelly coal bills.[40] The individuals most responsible for its inclusion and form were Lauck, Wagner, Rifkind, and Richberg. Secretary Perkins, though influential in shaping the wage and hour and public works features, took no hand in Sec. 7(a).[41] The amendments introduced in committee were the work of the American Federation of Labor.[42]

The press displayed singular little interest in 7(a) during its legislative history. This was probably because the period was short—May 17th to June 16th; industry opposition did not crystallize until the Senate hearings; and the implications of the provision were not immediately apparent. Of fifteen newspapers eleven failed to comment.[43] The only approving paper was the Democratic *Cleveland Plain Dealer*, and it opposed the AFL amendments for fear they would outlaw the company union.[44] The *New York Herald Tribune*, *Chicago Tribune*, and *Los Angeles Times*, all Republican, were opposed.[45] Within the limited articulate area an embryonic line of opposition was discernible.

The AFL achieved in the Recovery Act, in one form or another, its leading legislative demands. In addition to 7(a), it won a public works program and the prospect of shorter hours through the codes and collective bargaining.[46] As Dan Tobin of the Teamsters later wrote, "I was in Washington in conference together with other Labor men during the discussion of this legislation . . . and the Bill went through about as good, and even better, than we expected it would go through the Senate."[47] The *New York Times* observed with amazement and concern that organized labor "has suddenly jumped into . . . sudden power."[48] Green described 7(a) as a "Magna Charta" for labor, while Lewis compared it with the Emancipation Proclamation.[49] Industry, though successful in obtaining exemption from the antitrust laws, grudgingly paid the price of the labor section. The NAM committed itself, however, to a program of firm opposition, promising to "fight energetically against any encroachments by Closed Shop labor unions."[50]

Sec. 7(a), a short and seemingly clear declaration of policy in a statute otherwise marked by complexity, lifted the lid of Pandora's box. The haste and inexperience from which it was derived were breeding grounds of ambiguity; it raised more questions than it provided answers. Latent antagonism between unions and employers gained a point of focus and a furious battle was to rage for two years

[40] John L. Lewis, "Labor and the National Recovery Administration," *Annals of the American Academy of Political and Social Science*, CLXXII (1934), 58; David J. McDonald and Edward A. Lynch, *Coal and Unionism, a History of the American Coal Miners' Union* (Silver Spring, Md.; 1939), p. 194; McAlister Coleman, *Men and Coal* (New York: 1943), p. 148.

[41] Frances Perkins, "Eight Years as Madame Secretary," *Fortune*, XXIV (September, 1941), 78–79; Frank interview.

[42] Shishkin interview.

[43] *Atlanta Constitution*, *Baltimore Sun*, *Boston Herald*, *Des Moines Register*, *New York Evening Journal*, *New York Post*, *New York Times*, *New York World-Telegram*, *Philadelphia Evening Bulletin*, *St. Louis Post-Dispatch*, and *Washington Post*. The *Baltimore Sun*, however, opposed NIRA as a whole, June 8, 1933, while the *New York World-Telegram* approved of the bill in its entirety, June 10, 1933.

[44] June 2, 1933.

[45] June 1, June 8, June 10, 1933.

[46] Bernstein, *op. cit.*, p. 288.

[47] Tobin to McIntyre, Dec. 11, 1933, White House, O.F. 142, AFL.

[48] May 7, 1933.

[49] William Green, "Labor's Opportunity and Responsibility," *American Federationist*, XL (1933), 693; Lewis, *op. cit.*, p. 58.

[50] *La Follette Comm. Hearings*, pt. 17, 7549, 7561.

over its interpretation. The President, his advisers, and Congress, to win the support of both management and labor for the recovery program, had committed themselves probably without realizing it, to a broad policy of intervention in collective bargaining that was to lead far beyond 7(a).

Of the four principles outlined in chapter ii, Sec. 7(a) affirmed only the first two, namely, the right of employees to organize and designate representatives and, conversely, the obligation of employers not to interfere with that right. The latter was made explicit in one respect with direct prohibition of the yellow-dog contract. The third and fourth; that is, the means of determining representatives and the duty of the employer to recognize and deal with them, did not appear. Nor did 7(a) establish a procedure for enforcement. In going only part way the statute left itself open to attack from all quarters. The Railway Labor Act, by contrast, was being shaped into an inclusive structure.

2. (National Industrial Recovery Act, Title I, 48 Stat. 198 [1933])

CHAPTER 90

AN ACT

June 16, 1933. [H.R. 5755] [Public, No. 67.]

To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes.

National Industrial Recovery Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—INDUSTRIAL RECOVERY.

TITLE I—INDUSTRIAL RECOVERY

Appropriation for. *Post*, p. 275.

DECLARATION OF POLICY

Declaration of policy.

SECTION 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.

Administrative agencies.

ADMINISTRATIVE AGENCIES

President authorized to establish.

Appointments.

SEC. 2. (a) To effectuate the policy of this title, the President is hereby authorized to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the

provisions of the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, to fix the compensation of any officers and employees so appointed.

Cooperation of Federal and State officers, etc.

(b) The President may delegate any of his functions and powers under this title to such officers, agents, and employees as he may designate or appoint, and may establish an industrial planning and research agency to aid in carrying out his functions under this title.

Delegation of functions.
Industrial planning and research agency.
Establishment authorized.

(c) This title shall cease to be in effect and any agencies established hereunder shall cease to exist at the expiration of two years after the date of enactment of this Act, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended.

Termination of agencies, etc.

CODES OF FAIR COMPETITION

Codes of fair competition.

Sec. 3. (a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: *Provided*, That such code or codes shall not permit monopolies or monopolistic practices: *Provided further*, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared.

Approval by the President.

Provisos.
Monopolies, etc., not permitted.
Right of persons affected to be heard.

Imposition of conditions for protection of consumers, etc.

Exceptions and exemptions.

(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transac-

Approved code to be standard of fair competition.
Violations deemed unfair practices.

tion in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended.

Vol. 39, p. 717.

Jurisdiction of district courts to restrain violations.

(c) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition approved under this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

Establishment of compulsory code by President.

Notice and hearing required.

(d) Upon his own motion, or if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent in any trade or industry or subdivision thereof, and if no code of fair competition therefor has theretofore been approved by the President, the President, after such public notice and hearing as he shall specify, may prescribe and approve a code of fair competition for such trade or industry or subdivision thereof, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of this section.

Effect of code.

Importation of competitive articles affecting maintenance of code.

(e) On his own motion, or if any labor organization, or any trade or industrial organization, association, or group, which has complied with the provisions of this title, shall make complaint to the President that any article or articles are being imported into the United States in substantial quantities or increasing ratio to domestic production of any competitive article or articles and on such terms or under such conditions as to render ineffective or seriously to endanger the maintenance of any code or agreement under this title, the President may cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this subsection, and if, after such investigation and such public notice and hearing as he shall specify, the President shall find the existence of such facts, he shall, in order to effectuate the policy of this title, direct that the article or articles concerned shall be permitted entry into the United States only upon such terms and conditions and subject to the payment of such fees and to such limitations in the total quantity which may be imported (in the course of any specified period or periods) as he shall find it necessary to prescribe in order that the entry thereof shall not render or tend to render ineffective any code or agreement made under this title. In order to enforce any limitations imposed on the total quantity of imports, in any specified period or periods, of any artice or articles under this subsection, the

Investigation by Tariff Commission.

Notice and hearing.

President to prescribe terms, etc., for admission of articles. Limitation of total admitted quantity.

President may forbid importations unless importer license obtained.

President may forbid the importation of such article or articles unless the importer shall have first obtained from the Secretary of the Treasury a license pursuant to such regulations as the President may prescribe. Upon information of any action by the President under this subsection the Secretary of the Treasury shall, through the proper officers, permit entry of the article or articles specified only upon such terms and conditions and subject to such fees, to such limitations in the quantity which may be imported, and to such requirements of license, as the President shall have directed. The decision of the President as to facts shall be conclusive. Any condition or limitation of entry under this subsection shall continue in effect until the President shall find and inform the Secretary of the Treasury that the conditions which led to the imposition of such condition or limitation upon entry no longer exists.

Administration of terms, etc., imposed by President.

Decision conclusive. Conditions and limitations, effective period.

(f) When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense.

Violations of provisions of code.

Penalty.

AGREEMENTS AND LICENSES

Agreements and licenses.

SEC. 4. (a) The President is authorized to enter into agreements with, and to approve voluntary agreements between and among, persons engaged in a trade or industry, labor organizations, and trade or industrial organizations, associations, or groups, relating to any trade or industry, if in his judgment such agreements will aid in effectuating the policy of this title with respect to transactions in or affecting interstate or foreign commerce, and will be consistent with the requirements of clause (2) of subsection (a) of section 3 for a code of fair competition.

Authority of President to enter trade agreements.

Ante, p. 196.

(b) Whenever the President shall find that destructive wage or price cutting or other activities contrary to the policy of this title are being practiced in any trade or industry or any subdivision thereof, and, after such public notice and hearing as he shall specify, shall find it essential to license business enterprises in order to make effective a code of fair competition or an agreement under this title or otherwise to effectuate the policy of this title, and shall publicly so announce, no person shall, after a date fixed in such announcement, engage in or carry on any business, in or affecting interstate or foreign commerce, specified in such announcement, unless he shall have first obtained a license issued pursuant to such regulations as the President shall prescribe. The President

Licenses. Issue of, to business enterprises when unfair practices in trade or industry.

Engaging in business without license prohibited.

Revocation of license.

may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. Any order of the President suspending or revoking any such license shall be final if in accordance with law. Any person who, without such a license or in violation of any condition thereof, carries on any such business for which a license is so required, shall, upon conviction thereof, be fined not more than $500, or imprisoned not more than six months, or both, and each day such violation continues shall be deemed a separate offense. Notwithstanding the provisions of section 2(c), this subsection shall cease to be in effect at the expiration of one year after the date of enactment of this Act or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended.

Finality of revoking order.

Penalty for violation.

Expiration of authority.

Ante, p. 196.

Antitrust laws not applicable to codes, agreements, etc.

SEC. 5. While this title is in effect (or in the case of a license, while section 4(a) is in effect) and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the antitrust laws of the United States.

Businesses exempt. Limitations upon application of title.

Nothing in this Act, and no regulation thereunder, shall prevent an individual from pursuing the vocation of manual labor and selling or trading the products thereof; nor shall anything in this Act, or regulation thereunder, prevent anyone from marketing or trading the produce of his farm.

LIMITATIONS UPON APPLICATION OF TITLE

Statements of trade, etc., associations before benefits to accrue.

SEC. 6. (a) No trade or industrial association or group shall be eligible to receive the benefit of the provisions of this title until it files with the President a statement containing such information relating to the activities of the association or group as the President shall by regulation prescribe.

Rules and regulations.

(b) The President is authorized to prescribe rules and regulations designed to insure that any organization availing itself of the benefits of this title shall be truly representative of the trade or industry or subdivision thereof represented by such organization. Any organization violating any such rule or regulation shall cease to be entitled to the benefits of this title.

Investigations by Federal Trade Commission.

(c) Upon the request of the President, the Federal Trade Commission shall make such investigations as may be necessary to enable the President to carry out the provisions of this title, and for such purposes the Commission shall have all the powers vested in it with respect of investigations under the Federal Trade Commission Act, as amended.

Conditions required in codes, agreements, and licenses.

SEC. 7. (a) Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

Employer-employee wage and hours of work agreements.

(b) The President shall, so far as practicable, afford every opportunity to employers and employees in any trade or industry or subdivision thereof with respect to which the conditions referred to in clauses (1) and (2) of subsection (a) prevail, to establish by mutual agreement, the standards as to the maximum hours of labor, minimum rates of pay, and such other conditions of employment as may be necessary in such trade or industry or subdivision thereof to effectuate the policy of this title; and the standards established in such agreements, when approved by the President, shall have the same effect as a code of fair competition, approved by the President under subsection (a) of section 3.

Effectiveness of approved agreements. *Ante*, p. 196.

Code authorized, when mutual agreement not approved.

(c) Where no such mutual agreement has been approved by the President he may investigate the labor practices, policies, wages, hours of labor, and conditions of employment in such trade or industry or subdivision thereof; and upon the basis of such investigations, and after such hearings as the President finds advisable, he is authorized to prescribe a limited code of fair competition fixing such maximum hours of labor, minimum rates of pay, and other conditions of employment in the trade or industry or subdivision thereof investigated as he finds to be necessary to effectuate the policy of this title, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of section 3. The President may differentiate according to experience and skill of the employees affected and according to the locality of employment; but no attempt shall be made to introduce any classification according to the nature of the work involved which might tend to set a maximum as well as a minimum wage.

Effectiveness.

Terms construed. "Person." "Interstate and foreign commerce"; "interstate or foreign commerce."

(d) As used in this title, the term "person" includes any individual, partnership, association, trust, or corporation; and the terms "interstate and foreign commerce" and "interstate or foreign commerce" include, except where otherwise indicated, trade or commerce among the several States and with foreign nations, or between the District of Columbia or an Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States.

Application of Agricultural Adjustment Act. Provisions not repealed.

APPLICATION OF AGRICULTURAL ADJUSTMENT ACT

SEC. 8. (a) This title shall not be construed to repeal or modify any of the provisions of title I of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes", approved May 12, 1933; and such title I of said Act approved May 12, 1933, may for all purposes be hereafter referred to as the "Agricultural Adjustment Act."

Citation.
Ante, p. 31.

Delegation of functions authorized.

(b) The President may, in his discretion, in order to avoid conflicts in the administration of the Agricultural Adjustment Act and this title, delegate any of his functions and powers under this title with respect to trades industries, or subdivisions thereof which are engaged in the handling of any agricultural commodity or product thereof, or of any competing commodity or product thereof, to the Secretary of Agriculture.

Oil regulation. Regulation of oil-pipe lines. Executive Orders Nos. 6199, July 11, 1933; 6204, July 14, 1933. Transportation rates to be fixed.

OIL REGULATION

SEC. 9. (a) The President is further authorized to initiate before the Interstate Commerce Commission proceedings necessary to prescribe regulations to control the operations of oil pipe lines and to fix reasonable, compensatory rates for the transportation of petroleum and its products by pipe lines, and the Interstate Commerce Commission shall grant preference to the hearings and determination of such cases.

Transportation monopolies. Proceedings against.

(b) The President is authorized to institute proceedings to divorce from any holding company any pipe-line company controlled by such holding company which pipe-line company by unfair practices or by exorbitant

rates in the transportation of petroleum or its products tends to create a monopoly.

Prohibition on transportation of oil in interstate, etc., commerce of quantity in excess of State, etc., limitation.

(c) The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both.

Post, p. 1057.

Penalty.

RULES AND REGULATIONS

Rules and regulations. Prescribed by President.

Sec. 10. (a) The President is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of this title, and fees for licenses and for filing codes of fair competition and agreements, and an violation of any such rule or regulation shall be punishable by fine of not to exceed $500, or imprisonment for not to exceed six months, or both.

Penalty for violations.

Amendment of orders.

(b) The President may from time to time cancel or modify any order, approval, license, rule, or regulation issued under this title; and each agreement, code of fair competition, or license approved, prescribed, or issued under this title shall contain an express provision to that effect.

3. (Source: Lewis L. Lorwin and Arthur Wubnig, chs. IV, V, and VIII of *Labor Relations Boards,* Washington, D.C., The Brookings Institution [1935])

CHAPTER IV. RISE AND DECLINE OF THE NATIONAL LABOR BOARD

No machinery for handling labor disputes was included in the first set-up of the NRA. There were several reasons for that. First, the law itself was silent on the subject of strikes or lockouts. Second, those who assumed direction of the NRA in June 1933 had their minds fixed on the single objective of getting industries under codes as fast as possible. Third, ever since 1925 the United States had experienced industrial peace, and possibilities of acute industrial strife between labor and management seemed remote. Fourth, it was believed by many that labor would have little to strike for, since the codes would fix maximum hours and minimum wages, abolish child labor, and improve working conditions generally. And fifth, few if any of the authors of Section 7(a) had a clear idea as to its precise meaning or possible effects on industrial relations.

Before long, however, it became clear that the NIRA had given a new turn to industrial relations, a turn which was of major importance to the recovery program itself. Within a month after the passage of the act, Section 7(a) as incorporated into the President's Re-Employment Agreement (PRA) was the storm center of many strikes, and threatened to cause many more.[1] There was serious danger that the whole re-employment campaign would collapse under the growing pressure of labor disputes.

To allay this unrest and to bring about a state of industrial relations favorable to the success of the re-employment campaign, the National Labor Board was created on August 5, 1933. Originally intended as an agency for mediating labor disputes arising under the PRA, the Board soon expanded its functions to dealing with disputes arising under the codes, although it had no express authority to do so until December 16, 1933. At the same time the Board took upon itself the exercise of quasi-judicial functions, that is, of interpreting Section 7(a) in the light of the circumstances of particular disputes. In its quasi-judicial functions, once again assumed without an express grant of authority, the NLB soon overshadowed the NRA itself as an interpreter of the statute.

The activities of the National Labor Board thus form the second stage in the history of collective bargaining under Section 7(a). In

[1] Employers subscribing to the PRA had to agree to observe the requirements of Sec. 7(a).

view of their importance, we shall consider these activities and their effects in some detail in the chapters which immediately follow. To begin with, we shall describe briefly the main events in the life of the Board, from its origin to its demise. This will serve as an introduction to a more detailed analysis of its operations and their results.

THE STRIKE WAVE OF JULY 1933

The Recovery Act was hardly a month old when progress toward re-employment was endangered by the sudden outburst of strikes. The curve of industrial disputes, which had been at a low level during 1930–32, suddenly turned sharply upward. The newspapers began to talk of a strike wave. There was some exaggeration in this talk. The statistics for strikes beginning in July 1933 show [2] that of the total of 125,088 workers involved, 111,587 were concentrated in four industries: 68,026 were clothing workers, principally in New York and other Eastern metropolitan markets; 25,643 were textile workers, mainly hosiery workers in eastern Pennsylvania; 11,245 were miners, for the most part workers in the captive coal mines of western Pennsylvania; and 6,671 were motion picture and theatrical workers, principally in the Hollywood studios.[3] Thus both the industrial and the geographical scope of the July strikes was limited, most of the disputes occurring in industries peculiarly subject to them. Nevertheless, there were elements in the situation which suggested the reawakening in labor ranks of an aggressive temper hardly calculated to further the "united action of labor and management" contemplated by the Recovery Act.

Three principal factors were responsible for the strike movement of July 1933. First, there was the business "boomlet" caused by anticipation of the effects of the Recovery Act, processing taxes, and the monetary policies of the government. Anticipating higher costs and prices, employers were "stepping up" production, and as a result trade unions felt in a position to make demands with respect to wages and hours. Second, there was the factor of seasonality. For reasons which we need not examine here, strikes in the United States commonly reach a peak in the late spring and remain at a relatively high level during the summer months.

The third factor, and this was fundamental, was the impact of Section 7(a) upon the attitudes both of trade unions and of employers.

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[2] The strike statistics of 1932–33 show that December 1932 was a month of extraordinarily few industrial disputes. No more than 35 disputes involving 3,425 workers began during that month. The total of man-days lost in disputes during the month was 40,492. These low figures show what amounts to a virtual cessation of open conflicts between employers and employees. In part, this may be explained by the seasonal factor; in part, by the extensive unemployment due to the depression. In January 1933 the number of man-days lost in disputes rose rapidly to a total of 240,912, an increase of some 500 per cent over December. In February there was a recession but in March the figure advanced sharply again to 445,771. This advance may have been due to the upward spurt in production and prices which began shortly after the bank holiday. The number and severity of industrial disputes continued to increase in April (535,039 man-days lost) and May (603,723 man-days lost). In June, the month of the enactment of the NIRA, the figure declined to 504,362. In July and August, however, the upward swing of the curve was resumed at an extremely rapid rate. Man-hours lost reached 1,375,574 in July and 2,377,886 in August. No fewer than 201 disputes involving 125,088 workers began during July. In August 152 disputes involving 141,193 workers began in the course of the month. See *Monthly Labor Review*, Vol. 37, No. 4, October 1933, p. 869.

[3] The same, p. 870.

Organized labor, represented by the A. F. of L., had been hard hit by the depression; its membership and financial resources had been greatly depleted and morale was low. The promise of Section 7(a), which the unions interpreted to mean that the government was behind them, resulted in a vigorous organization drive.[4] At the same time, some of the stronger unions were determined to play an active part in code making in the hope that the codes would incorporate the usual terms of collective trade agreements, and would help to extend unionism into areas hitherto open shop.

The trade union campaign met with a vigorous counter-offensive on the part of employers. In part this offensive took the form of reviving old and establishing new company unions and of determined opposition to the recognition of outside labor organizations. In part it took the form of fighting the efforts of some of the unions to shape the labor provisions of the codes. Given such an atmosphere, industrial conflicts were bound to grow in number, extent, and severity.

THE CREATION OF THE BOARD

Under the impulse of the July strikes, the idea that the NRA should establish code machinery for maintaining industrial peace under the PRA and the codes came to the fore. The first steps toward the establishment of such machinery were taken forthwith upon the approval of the pioneer code, cotton textile.[5] The idea of creating similar machinery was also projected for the needle trades, where the unions were on the verge of a general strike. Early in August 1933 a mediation board was proposed to adjudicate labor disputes in the soft coal industry.

At the same time, the Industrial and the Labor Advisory Boards of the NRA were engaged in conferences for the establishment of more general machinery applicable to industry at large. At these conferences, it would appear, the idea of a National Labor Board was first advanced. Several proposals were worked out which it was agreed to place before the President. On August 5, 1933 these proposals were approved by the President, who told the press that he was not certain as to the best permanent form for carrying on mediation under the NRA. He suggested the possibility, however, that a single board might later be replaced by separate boards in the various codified industries.[6]

The President's statement announcing the establishment of the National Labor Board contained two parts: first, it set forth the

[4] Some of the unions most active in this drive which made the greatest gains in membership were the United Mine Workers, International Ladies' Garment Workers, United Textile Workers (especially the American Federation of Full Fashioned Hosiery Workers), and (outside the A. F. of L. at the time) the Amalgamated Clothing Workers of America. On even more striking development was the mushroom growth of A. F. of L. federal unions among workers in the automobile, rubber, chemical, and some other industries. During July and August 1933 alone, the A. F. of L. issued 340 new charters to local trade and federal labor unions directly affiliated with the Federation.

[5] See Chap. XV.

[6] For this and other statements by the President, see *New York Times*, Aug. 6, 1933.

joint proposal of the Industrial and Labor Advisory Board;[7] and second, it gave the President's approval.[8] In accordance with the recommendations of the Industrial and Labor Advisory Boards, the powers and jurisdiction of the National Labor Board were defined in the following terms:

> This Board will consider, adjust and settle differences and controversies that may arise through differing interpretations of the President's Re-Employment Agreement and will act with all possible dispatch in making known their findings. In return, employers and employees are asked to take no distributing action pending hearings and final decision. This Board will promptly proceed to establish such central and local organizations as it may require to settle on the ground, such differences as arise in various parts of the country.

The President, it should be stressed, did not issue a formal executive order on August 5, 1933. Thus the exact administrative status of the National Labor Board was vague and uncertain until December 16, 1933, when the first executive order bearing upon the NLB was issued. The Board's powers were limited by the statement to "differences and controversies" arising out of the President's Re-Employment Agreement. This limitation notwithstanding, the Board went ahead in the sequel to dealing with "differences and controversies" which arose out of approved codes. When dealing with labor difficulties the Board was

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[7] "The country in the past few weeks has had remarkable evidence of co-operation in the common cause of restoring employment and increasing purchasing power. Industrial codes are being introduced, considered, and put into effect with all possible dispatch, and the number of firms coming under the President's Re-Employment Agreement is inspiring.

"This gratifying program may be endangered by different interpretations of the President's Re-Employment Agreement by some employers and employees.

"The Industrial and Labor Advisory Boards jointly appeal to all those associated with industry—owners, managers, and employees—to unite in the preservation of industrial peace. Strikes and lockouts will increase unemployment and create a condition clearly out of harmony with the spirit and purpose of the Industrial Recovery Act. Through the application of the act the government is sincerely endeavoring to overcome unemployment through a nation-wide reduction in the hours of work and to increase purchasing power through an increase in wage rates. This objective can only be reached through co-operation on the part of those associated with industry. In order to develop the greatest degree of co-operation and the highest type of service on the part of management and labor, we urge that all causes of irritation and industrial discontent be removed so far as possible: that all concerned respect the rights of both employers and employees; avoid aggressive action which tends to provoke industrial discord and strive earnestly and zealously to preserve industrial peace pending the construction and adoption of industrial codes applicable to all business, large and small. Exceptional and peculiar conditions of employment affecting small employers and others whose business circumstances merit special consideration will be handled with due regard to the facts of the situation and with the desire to achieve increased employment and purchasing power.

"This appeal is made to the sound judgment and patriotism of all our people in the belief that even the most vexatious problem can be settled with justice and expedition where employers and employees act in accord with the letter and spirit of the National Recovery Act, without fear that any just rights will thereby be impaired. In that way only can the Re-Employment Agreement be made to apply with fairness pending the adoption of the codes."

[8] "Of importance to the recovery program is the appeal to management and labor for industrial peace, which has just been sent to me for approval.

"With compelling logic, it calls upon every individual in both groups to avoid strikes, lockouts, or any aggressive action during the recovery program.

"It is a document on a par with Samuel Gomper's memorable wartime demand to preserve the status quo in labor disputes—and in addition to the signature of the President of the American Federation of Labor it carries the signature of every great labor leader and every great industrial leader on the two advisory boards of the Recovery Administration. It is an act of economic statesmanship. I earnestly commend it to the public conscience.

"This joint appeal proposes the creation of a distinguished tribunal to pass promptly on any case of hardship and dispute that may arise from interpretation or application of the President's Re-Employment Agreement. The advantages of this recommendation are plain and I accept it and hereby appoint the men it proposes whose names will carry their own commendation to the country."

to "consider, adjust and settle" them. On the basis of this somewhat vague grant of powers, the Board later proceeded not only to mediate and conciliate in disputes between employers and employees, but also to hand down a number of formal "decisions." The statement did not expressly say that the Board was empowered to adjudicate on cases involving Section 7(a).[9] The Board nevertheless took it upon itself to exercise quasi-judicial functions so far as concerned rulings on the statute. And in exercising these functions, it did not distinguish between PRA and code cases.

In sum, the NLB soon transcended all the limitations inherent in the statement of August 5, 1933. It did so upon its own initiative, although by the force of events rather than by conscious choice. From August 5 to December 16, 1933, in other words, the NLB assumed a multitude of responsibilities without being granted express power to assume them. It informally expanded its jurisdiction to include mediating in every conceivable type of strike situation, to cover code labor disputes as well as PRA labor disputes, and to comprehend the interpretation of Section 7(a) as well. Later in its history the Board's position was at length regularized by a series of executive orders. But until these orders were handed down by the President, the express commission of the NLB was extremely vague and its formal powers extremely amorphous.

To membership on the National Labor Board, the President appointed three "labor" representatives;[10] three "industy" representatives;[11] and an impartial chairman.[12] The "labor" members were named on the recommendation of NRA's Labor Advisory Board; the "industry" members on the recommendation of the Industrial Advisory Board. Despite occasional changes in the personnel of its membership, the NLB at no time in its history deviated from the original pattern of structure: equal voice to bi-partisan interests plus a decisive public voice. This structural fact was of primary importance to the Board's operative ability. The bi-partisan composition was to prove an advantage in the work of mediating and conciliating labor disputes; but it was to hinder the Board for some time in its evolution into a quasi-judicial tribunal which sought to "lay down the law" of Section 7(a).

FIRST STEPS

Confronted with an ominous strike situation, the National Labor Board had to act quickly and as best it could. An executive secretary, Dr. William M. Leiserson, was appointed at once. Several special mediators were secured; an office and a field staff were quickly got together. Because the number of strikes was too large for its small staff, the Board entered into arrangements to co-operate with the Conciliation Service of the United States Department of Labor, and with similar services in the labor departments of some of the states. For the time being, also, a number of disputes were left to mediation by the

[9] Because all employers subscribing to the PRA bound themselves to observe the requirements of Sec. 7(a), it might be argued that the NLB was indirectly empowered to adjudicate on cases wherein the statute was at issue.

[10] Dr. Leo Wolman, chairman of the Labor Advisory Board; William Green; John L. Lewis.

[11] Walter C. Teagle, chairman of the Industrial Advisory Board; Gerard Swope; Louis E. Kirstein.

[12] Senator Robert F. Wagner.

local NRA boards which were springing up throughout the country as the President's Re-Employment Agreement drive progressed.[13]

The first big task of the Board was mediation in the widespread strike in the hosiery mills of Berks County, Pennsylvania, more particularly in the environs of the city of Reading. Within a week after its establishment, the Board succeeded in settling this strike by an agreement which came to be known as the "Reading Formula." This was an auspicious beginning. The Reading Formula set a precedent. For many months thereafter the Board's line of policy in regard to industrial relations was determined by the principles implicit therein. In view of the importance which this formula thus acquired in the work of the Board, it is necessary to review briefly its formulation and meaning.

By 1929 the American Federation of Hosiery Workers,[14] under aggressive and militant leadership, had organized about 50 per cent of the fast-growing hosiery industry, principally in the mills situated around Philadelphia. The union then held contracts with some of the largest manufacturers. Between 1929 and 1933, like many other unions it suffered substantial losses in membership and morale. To retrieve lost ground and to conquer open-shop territory never before organized, chiefly around Reading, Pennsylvania, it engaged in an aggressive organizing campaign in June 1933. Refusal by employers to grant "recognition" or to bargain collectively with union representatives led to strikes. By July 5 all the full fashioned hosiery mills in Berks County, Pennsylvania were reported shut down. More than 10,000 workers were out on strike. The struggle continued throughout July and early August, growing in scope and intensity. It was accompanied by disturbances of the public peace.

Such was the controversy which the National Board undertook as its first problem. Telegrams were sent to leading employers and to the president of the union, asking them to submit the strike to the Board's mediation. Responses from both sides were favorable. In Washington on August 10 the Board held a hearing attended by 25 employers and numerous representatives of the union. As a result of this hearing, a tri-partite agreement among the employers, the union, and the Board was announced on August 11. It read as follows:

Agreement between the National Labor Relations Board and the hosiery manufacturers of Reading, Pennsylvania, and the representatives of the employees each agreeing with the National Labor Board but *not* with each other as follows: 1. The strike to be called off immediately and the employees to report to work as quickly as work is available. 2. The employees are to return to work without prejudice or discrimination. 3. Conditions of work and wages will be as agreed upon. 4. During the week beginning Tuesday, August 15, 1933, and throughout that week, employees on the payroll of the last day on which they worked at each company shall hold a meeting, elect their own chairman by secret ballot, and elect their representatives to deal with the management in working out agreements dealing with the relationships of employees and employer. 5. Each works will send to each employee on the payroll on the last day that he was at work a notice to that effect, which will entitle him to be present and vote at the meeting aforesaid. 6. This election is to be held under the supervision of the National Labor Board. 7. Any disagreement in interpretation arising will also be settled by

[13] For the organization of local NRA boards, see Charles L. Dearing and Others, *The ABC of the NRA*, 1934, Chaps. IV and V.

[14] Although technically a division of the United Textile Workers of America, in substance the union is autonomous. At the time of the Reading strikes in 1933, it was known as the American Federation of Full Fashioned Hosiery Workers. It later changed its name to the present form, when it extended its jurisdiction to include seamless hosiery workers.

the National Labor Board. S. Both employers and employees agree to accept the decision of the National Labor Board as final and binding.[15]

The Reading Formula comprehended four points which later became an integral part of the policy of the National Labor Board. First, the strike was to be called off at once. This was primarily a concession to employers. From the point of view of the Board, however, it was essential as a means to industrial peace and re-employment. Besides, the Board acted on the assumption that a truce must precede elections and negotiations, later steps in the formula.

Second, the striking workers were to be reinstated in their jobs without prejudice or discrimination. This was a safeguard to the employees. No former striker was to suffer a loss of his job for having participated in a walkout. But the qualifying condition that workers were to be rehired "as fast as work is available" opened the way to controversy, particularly if an employer did not act in good faith.

Third, an election was to be held by the employees for the purpose of designating representatives for collective bargaining. The election was to be held at a specific date; it was to be under the auspices of the Board; the balloting was to be secret; all workers on the payroll at the time the strike began, but none hired thereafter, were to be permitted to vote; workers were to be given adequate notice of the time and place of the election. Most important of all, the representatives chosen were to be authorized to negotiate with the employer with a view to executing agreements concerning wages, hours, and working conditions. This was the crux of the Reading Formula and the heart of the interpretation of Section 7(a) later elaborated by the Board in a series of rulings.[16]

Fourth, workers and employers consented to submit all differences arising under the agreement to the National Labor Board for final decision. This provision was similar to those commonly found, in trade union agreements, providing for voluntary abitration of grievances and differences thereunder.

In accordance with this agreement, elections were held in 45 Reading hosiery mills throughout the week beginning August 15, 1933. About 14,000 workers participated in the poll. The union elected its representatives in 37 mills having 13,362 workers. Eight mills with 720 workers elected non-union representatives.[17] But in 36 mills the management refused to work out agreements with the elected representatives. On September 27, accordingly, the Board handed down a decision wherein it ruled that the agreement called for the working out of written agreements between the representatives and the managements.[18] After some further difficulties, the employers complied with this decision, and many agreements were later made. Thus in its first big test, the National Labor Board succeeded in adjusting a serious strike by voluntary agreement. Moreover, the result of this adjustment was that a trade union achieved the equivalent of "recognition" in a previously non-union territory.[19]

[15] *NRA Release No. 285.*
[16] See Chaps. VI and VII.
[17] *NRA Release No. 510,* August 26, 1933.
[18] *NRA Release No. 942.* Senator Wagner stressed, however, that the decision did not purport to be a precedent on the necessity for written agreements between employers and representative labor organizations.
[19] But in the elections, it should be noted, individuals were chosen as representatives. They were listed on the ballot under the heading "union," without the union's being named.

During the first three months after its establishment, the National Labor Board was fairly successful in meeting the various tasks which it encountered. The Reading Formula supplied a workable basis for adjusting most of the disputes which came before the Board during this period. Adjustments by mutual agreement between contending parties were readily made; but little recourse was had to "decisions," and only one basic interpretation of Section 7(a) was deemed necessary.[20] Disputes involving hundreds of thousands of workers, and covering a wide range of industries—hosiery, wool and silk mills, dress and clothing shops, street railways, grain elevators, and machine shops—were successfully adjusted.

October 1933 was a turbulent month. Strikes in the Pennsylvania captive mine, in the silk mills at Paterson and Allentown, in the soft coal mines of Illinois, in the Detroit automobile tool and die shops, in the Ford plants at Edgewater (New Jersey) and Chester (Pennsylvania), in the Weirton, West Virginia plant of the Weirton Steel Company, all combined to create tension in industrial relations. Nevertheless the Board generally rose to the occasion. It initiated negotiations which eventuated in the settlement of the Paterson and Detroit labor troubles. On October 16, 1933 the Board brought about an agreement ending the Weirton strike, the essential element in the agreement being a provision for election under Board auspices of employee representatives for collective bargaining during the second week of December 1933.[21] On October 30, 1933 the value of the Reading Formula was recognized in the agreement by means of which President Roosevelt succeeded in ending the strike in the captive mines. The agreement called for the election of employee representatives under the auspices of the National Labor Board, the employers engaging themselves to bargain collectively with these representatives until bilateral contracts, containing provisions at least as favorable to the workers as those of the Appalachian Agreement of September 21, 1933, were executed.[22]

During the latter part of October the National Board began to establish regional boards at various centers of labor trouble throughout the country. The establishment of these regional boards followed a certain amount of jurisdictional difficulty with the NRA. For some time it was not altogether certain whether local labor disputes were to be handled by the Labor Board or by the NRA compliance boards established to administer the President's Re-eEmployment Agreement. By the end of September the Labor Board succeeded in establishing its exclusive jurisdiction in this field. In order to simplify

[20] The Berkeley Woolen Mills decision. *NRA Release* dated Sept. 6, 1933 (no number), wherein the Board ruled that workers were not restricted to fellow employees in their choice of representatives.

[21] See *NRA Release* dated Oct. 16, 1933 (no number). The agreement read: "It is agreed 1. That the strike . . . be called off immediately. 2. The striking employees are to be permitted to return to work without discrimination, prejudice, or physical examinations. 3. *An election will be held during the second week of December under the supervision of the National Labor Board, the procedure and methods of election to be prescribed by the Board.* 4. The employees shall be permitted . . . to select representatives of their own choosing, and the employers agree to bargain collectively with the representatives so selected. 5. In the event that any dispute arises out of this agreement . . . the same shall be submitted to the National Labor Board for decision." (Italics ours.) The agreement was signed by E. T. Weir, "representing Weirton Steel Company," William J. Long, "representing striking employees," and Robert F. Wagner, "chairman of NLB."

[22] See *New York Times*, Oct. 31, 1933.

the administrative tasks connected with such jurisdiction, the National Board proceeded to devise a nationwide system of regional boards.[23]

In terms of efficient operation, November 1933 marked what was perhaps the high point in the life of the National Labor Board. The strike movement was subsiding somewhat. Most of the spadework in the original adjustment of labor disputes was being transferred to the several regional boards. The National Board was free to devote most of its energies to major controversies and to questions of policy. On November 22 and 23, 1933 the Board conducted the most important series of elections in its history—those in the captive mines—approximately 14,000 workers participating therein.[24] The elections passed off in perfect order and quiet. For the time being it seemed that, thanks to the Board's application of Section 7(a), an ideal of industrial democracy was in process of realization in the field of industrial relations.

CRISIS

This hopeful outloow, however, was soon dispelled. The first signs of possible difficulties had occurred during October when a number of employers refused to appear at hearings called by the Board. Significant also was the fact that on November 1, 1933 the National Association of Manufacturers made a vigorous public attack on the Board.[25]

But the real crisis in the history of the Board came early in December in connection with two cases which were to be of outstanding importance for some time to come; namely, the so-called Weirton and Budd cases. On November 15, 1933, certain employees of the Weirton Steel Company filed an affidavit with the Board in which they charged that the company was "coercing" them into voting for the company union at the elections which were to be held in December.[26] Specifically, the employees charged that the company was circulating communications, presumably from buyers of Weirton products, in which these buyers said that they would refuse to purchase these products if the company dealt with the trade union. The National Labor Board referred these charges to the Pittsburgh regional board.

Early in December the issue was aggravated still further. The Weirton Steel Company then made it clear that it did not understand the agreement of October 16, 1933[27] to imply that the NLB was to conduct an election at which the workers would chose between representation by the Amalgamated Association of Iron, Steel, and Tin Workers and the employee representation plan. Instead the company took the stand that the agreement meant nothing more than that an

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[23] At the time the National Labor Board was finally abolished, regional boards were functioning in Atlanta, Boston, Buffalo Chicago, Cleveland Detroit, Indianapolis, Kansas City, Los Angeles, Minneapolis, Newark, New Orleans, New York, Philadelphia, Pittsburgh, St. Louis, San Antonio, San Francisco, Seattle, and Toledo.

[24] The United Mine Workers of America polled 10,000 votes and elected its representatives in 20 mines. "Inside" labor organizations polled 4,000 votes and elected their representatives in 9 mines. The overwhelming majority of the "inside" union votes was cast by workers employed in H. C. Frick properties. (*NRA Release No. 1905,* Nov. 24, 1933.)

[25] The statement in part was as follows: "Sound employment relationships must be established and maintained by mutual agreement between employer and employee in the light of local plant and community conditions. . . . The policies of the National Labor Board tend to prevent the prompt and peaceful settlement of industrial disputes and to prevent the development of sound systems of employment relations, thus increasing the number of such disputes. . . ." (*New York Times,* Nov. 2, 1933.)

[26] *New York Times,* Nov. 16, 1933.

[27] See p. 100.

election should be held—under the supervision of the NLB—at which the employees would designate representatives under the employee representation plan.

Hearings had been called by the Board on December 7, 1933, at which it became clear that the Company Plan Committee would not agree to the rules of the election as worked out by the NLB and would refuse to participate in any such referendum. The delegate of the Company Plan Committee was asked if his committee would flout the Board, to which he replied "yes." Asked further if he meant that it would flout the government, he replied "if that's the way you take it, yes." [28]

On December 11 Mr. Weir, chairman of the company, wrote to Senator Wagner that the company did not feel bound by the Labor Board's interpretation of the agreement of October 16. "The election," he declared, "will proceed in accordance with the rules adopted by the employees' organization" (that is, the company union). In reply Senator Wagner said: "The Board will see to it that the agreement will be carried out. We are determined to have a fair election. . . ." At an executive meeting of the Board on December 13, the Weirton case was considered in detail. Should injunction proceedings be instituted? Should criminal prosecution be undertaken? Should an appeal be made to General Johnson to intervene? Opinions of the members of the Board differed. When the company proceeded with its plans to hold its own elections, General Johnson on December 14 advised Mr. Weir by telegram that, "in my opinion you are about to commit a deliberate violation of federal laws, and that if you do so, I shall request the Attorney General to proceed against you immediately." That same day Senator Wagner asked the Attorney General to take charge of the case, and the NLB ordered a postponement of the election due the next day.[29]

Notwithstanding all this, the Weirton Company held elections on December 15, 1933 at its three plants—Weirton, West Virginia; Clarksburg, West Virginia; and Steubenville, Ohio. About 11,500 employees participated in electing representatives under the employee representation plan.[30] The National Labor Board began to prepare materials for an early court test against the company, and General Johnson, pending the completion of the Board's preparations, postponed action to deprive the company of the right to display the Blue Eagle.[31] Thus began a protracted legal controversy which had not yet ended when the Recovery Act was held unconstitutional by the United States Supreme Court in the Schechter case decision of May 27, 1935.[32]

The defiance of the Budd Manufacturing Company was first manifested by its refusal to comply with a decision of the Philadelphia regional board. This decision called for a settlement of a strike on condition that all strikers be re-employed, and ordered an election at which the workers might choose between representation by the United Automobile Workers Union (affiliated with the A. F. of L.) and an employee representation plan. When the case came before the National

[28] *NRA Release No. 2149.*

[29] *New York Times*, Dec. 12, and Dec. 14–15, 1933.

[30] The same, Dec. 16, 1933.

[31] Later efforts by the NLB to conduct a referendum were blocked by the company's refusal to permit he Board to use its property and by its further refusal to submit its payroll to the Board.

[32] On May 29, 1934 Federal Judge Nields refused to grant a preliminary injunction on *technical* grounds; on Feb. 27, 1935 he refused to issue an injunction on the *merits* of the case. An appeal to the U. S. Supreme Court remained to be taken by May 27, 1935.

Labor Board on December 7, 1933, officers of the company refused to attend the hearings. Mr. Budd wrote to the National Labor Board with reference to its suggestion that it might be desirable to mediate the strike: "Your kind offices are unnecessary since our plants are fully supplied with men." [33] Eight days later the National Labor Board handed down its decision in the Budd case, repeating in substance the recommendations of the Philadelphia Board.[34] In this decision for the first time the Board attempted to give a more specific interpretation of the meaning of "interference," "representatives of their own choosing," "company unions," and "collective bargaining." Compliance with the decision, however, was not forthcoming. From December 15 until well into the spring of 1934 the Budd case became one of the major tests of the Board's powers.

The effect of these two cases was felt immediately in the attitude of other employers toward the Board. Thus, after four months of activity, the Board had finally run into a refusal by employers to recognize its authority to interpret Section 7(a) and to settle disputes arising under the collective bargaining provisions of the Recovery Act.

The President was called upon to meet this critical situation, and on December 16, 1933 he issued an executive order [35] which for the first time gave the Board a definite administrative standing. The order provided that the National Labor Board "shall continue to adjust all industrial disputes, whether arising out of the interpretations or operation of the President's Re-Employment Agreement or any duly approved industrial code of fair competition, and to compose all conflicts threatening the industrial peace of the country". Thus the order confirmed the already established practice of the Board in acting as an *omnium gatherum* for labor disputes of every character. As if to give point to this confirmation of existing practices, the order "approved and ratified" all actions "heretofore taken by this Board in the discharge of its functions." Further, the order defined the functions of the Board as follows: settlement of labor disputes by mediation, conciliation, and (voluntary) arbitration: [36] establishment of bi-partisan local or regional boards; review jurisdiction over the determinations of such boards; and power to make administrative rules and regulations.

Despite the executive order of December 16, the Labor Board came close to collapse during the month of January 1934. The machinery of the Board began to creak; members failed to attend hearings; the handling of cases became chaotic, protracted, and indecisive. Rumor spread that Senator Wagner would resign. In the meantime, the Weirton and Budd companies continued their "defiance"; and the example once given was infectious. Not only the National Board, but even more so the regional boards, ran head-on into an attitude of stubborn resistance on the part of many employers. The National Board was forced into direct contact with the harassing cases of the Harriman (Tennessee)

[33] *New York Times*, Dec. 8, 1933.
[34] *NRA Release No. 2283*, Dec. 15, 1933. The decision is discussed at length in Chaps. VI and VII.
[35] No. 6511, No executive order accompanied the President's statement of Aug. 5, 1933. See p. 93.
[36] But the Board might decline cognizance of disputes in which an existing means of adjustment had not been explored.

Hosiery Mills[37] and the National Lock Company of Rockford, Illinois,[38] in both of which the Board was finally driven to have the Blue Eagles removed by the Compliance Division of the NRA.[39] Moreover, the strike situation was becoming ominous once more. There were labor troubles in the anthracite coal fields of eastern Pennsylvania; among restaurant employees and taxi drivers in New York; and the Weirton case seemed like a sore from which infection might spread to the steel industry as a whole. Despairing of any further progress with the Budd case, the Board on January 11, 1934, referred the matter to the National Compliance Board,[40] thus for the first time having formal recourse to the Compliance Division of the NRA. The Weirton case, however, remained in a deadlock.

In this impasse, and with more labor troubles threatening, the Board once again turned to the President for help. The President responded by issuing Executive Order No. 6580 of February 1, 1934. This order was intended to meet the situation brought to a head in the Weirton and Budd controversies. It empowered the Board to conduct elections of employee representatives for collective bargaining whenever the Board was requested to do so by a "substantial number" of employees entitled to the benefits of Section 7(a). Further, it was provided that majority rule should govern at these elections.[41] Finally, the order empowered the Board to report to the NRA Administrator "for appropriate action" an employer who refused to "recognize or to deal" with the authorized representatives of the employees.

Because of what were believed to be deficiencies in the prescribed procedure for compliance, Executive Order No. 6580 was amended on February 23, 1934.[42] The provisions bearing on the reference of cases to the Administrator were struck out. Instead, the Board was empowered to refer cases to the Compliance Division of the NRA and/or the Attorney General "whenever . . . [it] . . . shall find that an employer has interfered with the Board's conduct of an election or has declined to recognize or bargain collectively with the representatives of the employees . . . selected in accordance with Section 7(a) or has otherwise violated or is refusing to comply with said Section 7(a)." The Compliance Division of the NRA was instructed not to review the Board's findings, and was authorized to take "appropriate action based thereon." This provision definitely deprived the NRA of any review authority over the National Labor Board, and transformed the

[37] A hearing was held on January 4 and a decision handed down on January 10 (*NRA Release No. 2663*). The case came to the National Board because of failure to comply with a decision of the Atlanta regional board.

[38] Hearings on Jan. 24 and Jan. 25; decision on Feb. 21, 1934 (*NRA Release No. 3433*, dated Feb. 23). The case came to the National Board because the company had procured an injunction forbidding intervention by the Chicago regional board.

[39] The Harriman Blue Eagle was removed on Apr. 20, 1934 (*NRA Release No. 4570*). This led to the shutdown of the plant on June 25, 1934, which threw more than 650 workers out of employment. On July 20, 1934 the Blue Eagle was restored by virtue of an agreement with NRA (*NRA Release No. 6618*). The National Lock Blue Eagle was removed on May 22, 1934 (NRA Compliance Division data), after the Board had so recommended on May 16, 1934. (*NRA Release No. 5094.*)

[40] Thereafter the Labor Board never reopened the case. The National Compliance Board held a hearing *on the merits* on Jan. 24, 1934. After many false starts and misadventures, the case was finally settled by the NRA in accordance with the President's automobile settlement of Mar. 25, 1934. See Chap. XIII.

[41] "Thereafter the Board shall publish promptly the names of those representatives who are selected by a vote of at least a majority of the employees voting, and have thereby been designated to represent all the employees eligible to participate in such an election for the purpose of collective bargaining or other mutual aid or protection in their relations with their employer."

[42] By Executive Order No. 6612–A.

Compliance Division for certain purposes into an enforcement agency of the Labor Board.[43]

The executive order of February 1, while strengthening the formal administrative powers of the Board, brought into the open a conflict of opinion between General Johnson and Mr. Richberg on the one hand, and the Labor Board on the other. Many groups of organized employers [44] protested against the order on the ground that it violated the rights of minority groups, threatened the existence of company unions, and might lead to the establishment of the closed shop. Their protests were directed particularly against a statement (issued by the NRA in connection with the order) which spoke of company unions in disparaging terms.[45] On February 3, 1934, General Johnson and Donald R. Richberg issued a statment interpreting the order to mean that it made no change in the meaning of Section 7(a) as previously interpreted by them. The order, they contended, simply provided for a procedure whereby the majority of the employees could designate their representatives. But minority groups and individuals still retained intact their rights of bargaining separately with employers.[46] This interpretation was ambiguous; if it meant anything at all, it meant that the Labor Board's Reading Formula elections were pointless. For if minority groups were entitled to execute separate collective agreements notwithstanding the expression of a preference by the majority, then the majority was just where it was before any representatives were elected.

The Labor Board, aware of the consequences that might ensue from adopting the Johnson-Richberg interpretation, preferred to ignore it and to take the order at face value. On March 1, 1934, accordingly, the Board came out openly for majority rule for the first time. It ruled the Denver Tramway decision of that date that the representatives elected by the majority of workers were entitled to bargain collectively on behalf of all the employees.[47] This exhibited the Board in open variance with the chief officials of the NRA. It was all the more meaningful, therefore, that the executive order amendment of February 23 (not made public until March 3) took away from the Administrator such discretionary power over cases referred to him by the Labor Board as he had enjoyed by virtue of the order of February 1.

Fortified by the executive order of February 23, the Board, after some internal dissension as to what was the best course of action, decided to stake its prestige on a firm prosecution of the Weirton case. Consequently, on February 27 the Board turned the case over to the Department of Justice with a recommendation for immediate action.[48] At the same time, Senator Wagner introduced his Labor Dispute bill [49] intended to put the Board upon a permanent statutory basis and incorporating principles of industrial relations leading toward union recognition and collective agreements on the one hand

[43] Perhaps the principal reason for instructing the Compliance Division not to review the findings of the NLB was that in the Budd case the Compliance Division held a new hearing on the merits, after the NLB had issued its decision.

[44] Notably the Iron and Steel Institute and the National Association of Manufacturers.

[45] See *NRA Release No. 3078*, Feb. 1, 1934, further discussed in Chap. X. This statement was not authorized by Messrs. Johnson and Richberg; it crept in inadvertently, on the initiative, seemingly, of subordinate employees in the press section of the NRA.

[46] See *NRA Release No. 3125*, discussed further in Chap. X.

[47] *NRA Release No. 3589* (dated Mar. 3). Mr. du Pont, member for industry, dissented, writing an opinion based on the Johnson-Richberg interpretation. For further discussion, see Chaps. VI and VII.

[48] *NRA Release No. 3556*, Mar. 1, 1934.

[49] Cong. 2 Sess., S. 2926, Mar. 1, 1934. See Chap. IX.

and to the probability of extinguishing company unions on the other. Simultaneously with the announcement on March 3 of the February 23 amendment by executive order, a reorganization was consummated in the internal structure of the Board—a reorganization for the purpose of implementing it more adequately for effective administrative action.[50]

FINAL COLLAPSE

By the beginning of March the Board thus seemed to have surmounted a crisis, and to be ready to function thereafter as the unquestionably dominant factor in the governance of collective bargaining. Significantly the Board advanced to a more vigorous development of its theory of industrial relations. The Denver Tramway decision of March 1, 1934 was followed in rapid succession by the Hall Baking Company decision of March 8,[51] the Houde Engineering Company decision of the same date,[52] and the Republic Steel decision of March 16.[53]

The Board, however, was soon precipitated into a series of difficulties which ended its career. Troubles arising from the refusal of the Michigan automobile manufacturers to recognize the United Automobile Workers, an organization of A. F. of L. federal unions, plus the insistence of the manufacturers in maintaining company union plans, led in early March to the threat of a general strike in the automobile industry. Specifically, the A. F. of L. workers were eager in demanding an election of employee representatives to which the employers were opposed. The Labor Board intervened, held hearings[54] which failed to achieve a settlement, and saw the controversy pass from its hands into those of President Roosevelt and General Johnson.[55] Finally, on March 25, the White House announced an agreement settling the controversy. The main points of this agreement were (1) no provision was made for the election of employee representatives; (2) an Automobile Labor Board was established to adjudicate questions of representation and discriminatory discharge; (3) majority rule was ignored as a device to govern the selection of employee representatives; (4) it was provided that all organized groups among the employees were entitled to similar privileges with respect to collective bargaining; and (5) the possibility of establishing a system of works councils, based on proportional representation, was projected.[56] The automobile settlement apparently was in conflict with the Labor Board's interpretation of Section 7(a) and seemed to affirm the rulings of General Johnson and Mr. Richberg. Because the settlement, supported by the prestige of the President, apparently committed the government to a labor policy at variance with that worked

[50] Two vice-chairmen, Leon C. Marshall and S. Clay Williams, were appointed; three new members for industry were appointed to replace inactive members. The Board's final composition was: chairman, Senator Wagner; vice-chairman, Dr. Marshall and Mr. Williams; employer members, Messrs. Dennison, Draper, du Pont, Kirstein and Teagle; employee members, Mr. Berry, Mr. Green, Dr. Haas, Mr. Lewis, and Dr. Wolman.

[51] *NRA Release No.* 3716, March 9. Decision deals with union recognition and the execution of collective agreements.

[52] *NRA Release No.* 3705. Decision deals with the obligations of an employer to meet union officials even if the union refuses to divulge the names of the employees it professes to represent.

[53] *NRA Release No.* 3870. Decision deals with the effect on the rights of workers of company unions established prior to the enactment of Section 7(a).

[54] See *NRA Release No.* 3817, Mar. 14, 1934, and *No.* 3827, March. 15, 1934.

[55] General Johnson, it should be noted, was seeking to compose the dispute on his own account before the NLB hearings were concluded.

[56] The settlement is discussed at length in Chap. XIII.

out by the NLB, it was a staggering blow to the prestige and authority of the Board.

Following the March 25 settlement, the NLB lapsed into a lethargy and torpor from which it never emerged. It continued to go through the motions of dealing with labor disputes—mostly petty cases involving alleged discriminatory discharges of union workers. It made several theoretically important decisions and succeeded in persuading the NRA Compliance Division to remove the Blue Eagles of four recalcitrant employers.[57] But despite this appearance of activity, the Board was falling into an administrative paralysis. The main currents of industrial disputes were passing it by. And the Board received another staggering blow when on May 29, 1934 Federal Judge Nields in the Delaware District Court handed down a decision in which he rejected, on technical grounds relating to the Anti-Injunction Act, the government's request for a preliminary injunction against the Weirton Steel Company—an injunction which in substance would have compelled the company to permit an election to be held under the Reading Formula.[58] Thus the case on which the Board had staked its prestige, and which it regarded as a conclusive test of its interpretation of Section 7(a), was brought to a temporary stalemate.[59]

The spring and early summer of 1934 were months of mounting labor unrest. A strike in the Electric Autolite Plant, Toledo, Ohio brought to a culmination a series of sporadic walkouts in the automobile and automotive equipment industry—the settlement of March 25 notwithstanding. The Toledo strike was characterized by rioting and violence. For a time it threatened to develop into a general strike of all the A. F. of L. unions in the city. A critical situation also developed as the result of the walkout of union truck drivers in Minneapolis. Early in May the International Longshoremen's Association called a dock strike in San Francisco and other Pacific Coast ports. Other unions of maritime workers joined in the walkout. The port of San Francisco was shut until early July when an attempt was made to open it by force. This led to more rioting and later to a general strike involving virtually all the labor unions of the city.

For a time, also, it seemed likely that the Amalgamated Association of Iron, Steel and Tin Workers would bring about a general steel strike of equal magnitude with that of 1919. At a convention in April, the Amalgamated laid down a seven-point program. On the basis of this program, recognition demands were presented to the employers during the latter part of May. The employers, standing fast by their company union plans, ignored or rejected these demands; and the Amalgamated began to prepare for a strike to be called June 16. At the last minute, however, the strike call was suspended, upon the urging of William Green, who put before the union delegates certain pro-

[57] A. Roth and Co. of Chicago, Apr. 3, 1934; Harriman, Tenn. Hosiery Mills, Apr. 20, 1934; National Lock Co., Rockford, Ill., May 22, 1934; Milwaukee Electric Light and Railway Co., June 6, 1934. (Information based on records of the NRA Compliance Division.) On June 30, after the settlement of a strike, the Board recommended the return of the Milwaukee company's Blue Eagle (*NRA Release No.* 6166). On July 20 the Harriman Blue Eagle was returned pursuant to an agreement between the company and the NRA (*NRA Release No.* 6618).

[58] For text of the decision, see *New York Times*, May 30, 1934.

[59] Almost a year later, on Feb. 27, 1935, Judge Nields held: (1) That Sec. 7(a) was unconstitutional, and (2) that the Weirton Co. was not guilty of coercion, in any event. The election question was no longer an issue by that time. For text of decision, see *New York Times*, Feb. 28, 1935.

posals, regarded as quasiofficial, for the establishment of a Steel Labor Board.[60]

In all of these difficulties the National Labor Board no longer played the predominant role it had once enjoyed, although its representatives helped to settle the Toledo and Minneapolis strikes. Public attention was shifting from the activities of the Board to the enactment of legislation and the establishment of new agencies for the maintenance of industrial peace. The Labor Dispute bill which Senator Wagner introduced in the Senate to put the National Labor Board on a permanent basis was put aside; and, as a substitute therefor, Joint Resolution No. 44 was passed on June 16 and approved by the President on June 19.[61] The joint resolution, a stop-gap measure, empowered the President to create, for the duration of the Recovery Act, a board or boards vested with the authority to investigate labor disputes and to arrange and conduct elections.

The enactment of Joint Resolution No. 44 presaged the end of the National Labor Board, whose activities by that time had virtually come to a dead stop. On June 26 the President established the National Longshoremen's Board on the basis of the joint resolution, thus removing possible NLB jurisdiction over the outstanding labor dispute of the day.[62] On June 28 the President established the National Steel Labor Relations Board, also on the basis of the joint resolution, removing the labor troubles of the steel industry from the National Labor Board's scope.[63] On June 29, finally, the President established the National Labor Relations Board to take the place of the National Labor Board.[64] The old Board went out of existence and the new one entered upon the discharge of its functions on July 9, 1934.

Thus, approximately eleven months after its establishment, the National Labor Board passed from the scene. It had enjoyed a short "honeymoon" period of high hopes, followed by an attack of difficulties which led to crisis, protracted inner struggle, and administrative decomposition. Just when the Board had seemingly surmounted the worst of the crisis, it was laid low again by a blow from which it never recovered. But the proposed Labor Disputes bill led to the enactment of a measure which substituted for the NLB a successor tribunal which was to pursue a similar line of Section 7(a) interpretation.

Although not successful in the end, the National Labor Board made substantial contributions to the understanding of industrial relations. Its experience is significant for the light it throws on the problems of peace and labor relations in industry which the nation must continue to face, codes or no codes.

An examination of this experience and an evaluation of its significance are thus of importance as part of the story of collective bargaining under the New Deal and as a basis for future policy. Our task in the chapters immediately following will be to find out what the National Labor Board did to clarify the concept of collective bargaining and what contribution it made to the solution of the problems of industrial relations.

[60] These events are discussed in detail in Chap. XII.
[61] 48 Stat. L. 1183.
[62] Executive Order No. 6748.
[63] Executive Order No. 6751.
[64] Executive Order No. 6763.

CHAPTER V. THE NATIONAL LABOR BOARD IN ACTION

The work of the National Labor Board and the results accomplished were determined partly by the organization of the Board itself—its structure, powers, and procedures—partly by the nature of the disputes brought before it and the issues they involved, and partly of course by personal factors, in particular the initiative and ideas of its chairman. To follow more clearly the nature of the issues which the Board faced and the principles which it applied in settling them, it will be helpful to consider the Board's machinery and its methods of operation.

STRUCTURE OF THE NLB SYSTEM

The National Labor Board in Washington was the center of a nation-wide system which comprised, at the end, a score of regional and sub-regional labor boards. Six boards functioned in the Northeast; eight in the Mid-West and Northwest; three on the Pacific Coast; and three the Southern states.[1]

From its beginning to its end, the National Labor Board was constructed along "joint conference" lines. A given number of employer representatives was set off against an equal number of labor representatives. An impartial chairman—aided later by two vice-chairmen—had the decisive voice.[2] Decisions went by majority rule.

Important consequences flowed from the fact that the labor members of the Board were either A. F. of L. leaders or reputed sympathizers with organized labor, while the employer members came from the field of non-union business—mostly big business. The Board was thus of two minds on all fundamental issues. Senator Wagner sought, nevertheless, to avoid any public expressions of differences in viewpoint. His ideas was that the Board's influence depended largely on public opinion. To command public opinion, it would be well to make a display of unanimity. Such a display would exhibit the co-operation of management and labor in the interests of the recovery program.

Largely because of the influence of its chairman, it became the Board's practice at first to hand down unanimous decisions on all cases involving Section 7(a). The practice was not broken until the Denver Tramway decision of March 1, 1934.[3] As long as the practice lasted, the Board's ability to work out clearly defined policies and principles and to act decisively was somewhat hampered. The practice once broken, the Board could proceed to more positive and unequivocal interpretations of the statute. By this time, however, a chain of events which was later to strangle the Board was already under way.

[1] For list of regional boards, see Chap. IV, p. 101.

[2] Originally there were three employer and three labor representatives. In the end there were five members of each group. For membership lists, as of the Board's beginning and as of its end, see Chap. IV, p. 94 and p. 111.

[3] See Chap. IV, p. 110.

Each regional board, like the National Board, was composed on a "joint conference" basis. The employer members, as a rule, were chosen from the business leaders of the local community. The labor members were in most cases leaders of local A. F. of L. unions. The impartial chairmen were selected from among outstanding citizens of the local community, known for their interest in the public welfare.

The regional boards were dependent on the National Board both in policy and procedure. The National Board formulated the regulations for dealing with labor disputes; issued interpretations of moot points with regard to the meaning of Section 7(a); and determined whether the mediation of a given dispute was to be handled locally or in Washington. Largely instruments for the adjustment of local labor disputes, the regional boards were discouraged from making express statements that the company had or had not violated Section 7(a). They were, however, instructed to make findings of fact which would clearly indicate whether or not a violation had been committed. Occasionally, a regional board did hand down such a finding of guilt or innocence, or would attempt to construe Section 7(a). In general, however, it was the National Labor Board itself which exercised such functions.[4]

POWERS AND FUNCTIONS

By March 1934 the legal status of the National Labor Board had come to rest on four documents. First, there was the President's statement of August 5, 1933, which approved the proposal to create the Board. Second, there was the President's executive order of December 16, 1933, which fixed the scope of the Board's work more clearly than before and gave retroactive sanction to its activities since August 5. Third, there was the executive order of February 1, 1934, which gave the Board authority to conduct elections at which employees might choose representatives for the purpose of collective bargaining. And fourth, there was the executive order of February 23, 1934 which defined the Board's procedure for enforcing compliance.

These four documents each helped to determine the administrative status of the Board as a tribunal for dealing with labor disputes. This brings us to two questions: (1) with what sort of cases was the Board empowered to deal? and (2) in what way could the Board deal with such cases?

Types of cases

As evolved by the summer of 1934, the formal jurisdiction of the National Labor Board embraced four types of cases: (1) all labor disputes involving a strike or a lockout, whether arising under the PRA, under a code, or otherwise; (2) all disputes between employers and employees, whether individual or collective, involving charges of violations of Section 7(a), whether threatening or causing a strike or not; (3) all cases involving rulings handed down by a regional labor

[4] No sharp and clear lines were ever drawn, however, between regional board "decisions" and "recommendations." A large proportion of National Board cases originated in the defiance of employers of rulings—whether "recommendations" or "decisions"—handed down by a regional board. It should be kept in mind that true enforcement proceedings could not begin unless and until the *National Board* ruled that an employer had contravened the requirements of Sec. 7(a).

board;[5] and (4) all cases involving decisions handed down by joint industrial relations boards operating under codes of fair competition.[6]

With respect to cases under (1) and (2) the Board had "original" jurisdiction. In practice it exercised such jurisdiction only when there was no convenient regional board to which the controversy might be referred or when no joint industrial relations board had been established under the code.[7] It was entirely within the discretion of the Board, however, to decide whether or not it should exercise original jurisdiction in the event that a convenient regional board or an appropriate joint industrial relations board was available.

With respect to cases under (3) and (4) the Board had jurisdiction of "review." It might or might not exercise such jurisdiction at its discretion. In practice the Board would ordinarily sit in review upon rulings of one of its regional agencies, provided the regulations concerning appeals had been satisfied.

The nature of the Board's powers

The National Labor Board performed the functions (1) of mediation and conciliation, (2) of voluntary arbitration, (3) of quasi-judicial interpretation of Section 7(a), and (4) of conducting referendums for the choice of employee representatives. The primary activities of the Board were those of mediation and conciliation.[8] The Board's main efforts were to settle strikes, preferably by agreement between the parties concerned. The Board also sought to settle on a voluntary basis labor difficulties which had not yet reached the strike state. From time to time, the Board functioned also as a arbitrational body. Here its authority was confined to "voluntary" arbitration. It could make an enforceable award only when both parties to the dispute had jointly agreed to submit the issues to the Board for determination and to abide by the decision.[9]

The Board was not a court of law. Nevertheless most of its cases involved charges to the effect that some employer was violating Section 7(a). When disputes like these could not be settled by agreement, the Board assumed the power to make a theoretically enforceable decision. In all such decisions it sought to apply Section 7(a) to the facts of the case. Such interpretations, however, were not enforceable

[5] For jurisdiction in cases under (1) see paragraph one of the executive order of Dec. 16, 1933; for jurisdiction in cases under (2) see executive order of Feb. 1, paragraph two and executive order of Feb. 23; for jurisdiction in cases under (3) see Art. B and C, paragraph 2, executive order of Dec. 16, 1933.

[6] This claim was based on the executive order of Dec. 16, 1933. That order gave the Board power to "compose all conflicts threatening the industrial peace of the country." This power would appear to be general and unqualified and therefore superior to the limited power of any joint industrial relations board. Also paragraph 2 of the same order read that:

"The powers and functions of said Board shall be as follows:

"(a) To settle by mediation, conciliation, or arbitration all controversies between employers and employees which tend to impede the purposes of the National Industrial Recovery Act; provided, however, the Board may decline to take cognizance of controversies between employers and employees in any field of trade or industry where a means of settlement, provided for by agreement, industrial code, or federal law, has not been invoked."

Since the Board might "decline to take cognizance" of controversies where a means of settlement provided by an industrial code had not been invoked, presumably the Board had optional authority to intervene or not. The inference was that the Board's jurisdiction was superior to that of the means of settlement provided by an industrial code.

[7] It should be noted that the NLB made it a practice not to handle disputes arising for reasons other than alleged violations of Sec. 7(a), for in the absence of such violations, the NLB would be incapable of invoking such sanctions as it possessed. Regional boards, however, attempted to mediate all disputes.

[8] This was still more true of the regional boards.

[9] The executive order of December 16, which defined the powers of the Board, said nothing about voluntary or compulsory arbitration. Since, however, the NIRA did not limit the right to strike or to declare lockouts, it was taken for granted that the Board had no powers of compulsory arbitration.

in the same manner that a judicial interpretation by a court would have been.[10]

From the very beginning the Board was confronted with the question of how to determine who, in any given case, were the freely chosen representatives of the employees. Its solution of the question, as described elsewhere, was the Reading Formula, that is, in substance, secret elections. There was nothing in the Recovery Act which expressly authorized the holding of elections to determine the identity and authority of employee representatives. In evolving the election procedure, the Board was administering the statute in accordance with its own understanding of what Section 7(a) meant.[11]

The jurisdiction and powers of the Board were thus never quite clearly defined. This must be kept in mind in considering its problems and history.

PROCEDURES FOR SETTLING DISPUTES

The National Labor Board gradually developed procedures which became essential elements in the performance of its functions. To understand the work of the Board, it is necessary to have in mind a picture of these procedures in handling a labor dispute from inception to settlement, if possible, or, in any event, final disposal. Such a picture is presented here under three headings: procedure for settling disputes; types of adjustments; and the enforcement of decisions. In the present section, the first of these is taken up, while the others are dealt with in the two sections which follow.

In broad outline, the course of dealing with a labor dispute after the fall of 1933 was more or less standardized. Each regional board undertook to settle local disputes by voluntary agreement. If such a settlement was impossible, in cases wherein Section 7(a) was at issue, the regional board handed down a preliminary "decision" in which it recommended a formula for adjustment. If both parties were satisfied and complied, the case was ended. But if the decision was unacceptable, two possibilities were open: refusal to comply, usually on the part of the employer; and/or appeal from the decision. Each of these possibilities led to the third step, reference of the dispute to the National Board. Like the regional board before it, the National Board would first try to achieve a settlement by agreement and pass from this to the making of a decision. If the decision involved the employer's responsibility under Section 7(a), and he failed to comply, the Board would take whatever steps it could to enforce its ruling.

The Board was dominated by the idea that the best way to settle a dispute was by bringing about a voluntary agreement between the parties concerned. It, therefore, always strove to avoid every appearance of "taking sides" and of being vested with powers of enforcement or of coercion. The guiding principle of action was that the Board must not assume an attitude which might "spoil the chances" for an agreement.

Accordingly, the Board's procedure was to arrange informal conferences between employers and employees. At these conferences, the Board members stressed the points on which it seemed both sides could

[10] Not until the executive orders of February 1 and 23 could the Board be said to possess express authority to put a "decision" into effect.

[11] Sanction for such administrative activities was first contained in the executive order of February 1, 1934.

be of one mind. The Board members were also constantly on the alert to stop formal proceedings (that is, hearings) as soon as a possibility of reaching an agreement appeared. Only when all efforts to bring the contending parties together failed did the Board take the case "under advisement" preparatory to formulating a decision. And even then, the decision was usually phrased in cautious language, so as not to preclude the possibilities of a voluntary settlement by agreement in the future. More than that, the decision generally expressed the Board's idea as to the terms that should properly be included in any settlement by agreement. Only in extreme cases did the Board "lay down the law" of Section 7(a).

The National Labor Board had at its disposal a small staff of trained mediators and conciliators to assist in the settlement of labor disputes. Recourse could also be taken, and frequently was taken, to the staff of the Conciliation Service of the United States Department of Labor. The executive secretaries of the regional boards were also, as a rule, adept in the technique of mediation and conciliation. But the dependence was not altogether on the professional adjusters of labor disputes. The Board members, in the cases of both the national and regional tribunals, were supposed to throw the weight of their abilities and prestige behind the voluntary adjustment of employer-employee difficulties.

Hearings, as held by the NLB, may be described as informal discussions and administrative inquiries. Witnesses were not under oath; there was no power in the Board to compel by subpoena the attendance of persons or the production of records. The introduction of testimony, statements, and affidavits was not limited by the rules of evidence which hold in the courts; and because the primary intent of the hearing was to compose a dispute, not to make findings as to guilt or innocence, the Board did not adhere to very strict canons of fact finding. So far as the Board deliberately tried to guide the submittal of evidence, statements, affidavits, and interchange of opinions, it aimed (1) to extract the fundamental issues of the dispute; (2) to find a common ground of agreement between the two parties; (3) to persuade each party to make a voluntary settlement; and (4) to arrange, as soon as possible, for negotiations looking toward such settlement.

The hearing was not necessarily before the full Board, or even before an equal number of members representing industry and labor plus the impartial chairman or one of the vice-chairmen. The members of the Board were all busy men. They were occupied with their daily affairs as labor leaders, as industrials, as members of the Labor or the Industrial Advisory Board. Thus, only in exceptional cases was a full complement of the Board present. Most hearings were held in the presence of only a few members, occasionally only one or two, without any regard for numerical equality of representation as between the members from industry and labor. A stenographic record of the proceedings was kept.

If the chairman was present, he presided at the hearing; if not, one of the Board members presided. The presiding officer, as well as the other members of the Board in attendance, participated actively in the conduct of the hearing. They not only asked questions to elicit information, but made suggestions from time to time on what appeared

to them to be a proper formula for settling the dispute. Moreover, they intervened with appeals to both employers and employees to respect the purposes of the recovery program; to retreat from stubborn positions; and not to impede the progress of reemployment by keeping men out of work. If, at any time during the course of the hearing, the discussion reached a point where both sides appeared willing to compromise, the hearing was forthwith recessed. The parties to the dispute were asked to go into conference, with the view to working out an agreement, and to report back to the Board as soon as practicable. In sum, the principal animating purpose of a hearing before the National Labor Board was to lead to an amicable conference from which an agreement might issue.

Informal as the hearings may appear from this description, there has been some criticism that many of them were too formal and resembled court procedure too closely. This criticism was based largely on externals. The members of the Board at a hearing were often seated on a high platform looking down upon the two tables to the right and to the left; at these tables the disputants were seated. The representatives of the two parties—often lawyers—were permitted to make long speeches and to harangue "the tribunal."It is claimed that such procedure could not create the calm and reasonable spirit required for conciliation, which, it is said, has better chances of success when both parties meet behind closed doors and touch elbows at the same table.

If the case was settled by voluntary agreement, the Board regarded its work as having been successfully completely. But there were two other possibilities: (1) either the parties to a dispute refused to accept the agreement suggested by the Board or event to meet in conference; or (2) the parties agreed to a conference, but the conference did not bear fruit. In either event, the National Labor Board took the case "under advisement" as a perliminary to issuing a decision. The decision was not handed down immediately. Frequently, after the formal hearing had been terminated, the Board persisted in its efforts to bring the parties together.[12] Only as a last resort, after all attempts at mediation and conciliation and at persuading both parties to submit their controversy for formal arbitration had failed, was a decision issued.

After a case had been taken "under advisement" it was turned over to the legal staff, which studied the files of the case, the stenographic record of the proceedings, and other cases which might bear on it. The legal staff also consulted with the Board member or members most familiar with the case. Presently, the legal staff would formulate a "draft decision" which was circulated among the members of the Board for approval or disapproval. Decisions of the Board were by majority vote; failure of a member to disapprove a "draft decision" was taken to indicate his approval. Furthermore, if the case was of consequence, the decision was likely to be discussed in detail at one of the executive meetings held by the Board from time to time. If the "draft decision" was approved by at least a majority of the members of the Board, it became the Board's official decision and was pro-

[12] This practice prevailed during the early life of the NLB but was not pursued to any extent during the later months.

mulgated as such. Copies of the decision were sent to parties concerned; and its text was given out in the form of an NRA release.[13]

In its work of mediation and conciliation, the Board found it necessary to act not only through its regional boards, but directly through a field staff of its own mediators and conciliators. Here the Board employed a number of mediators who sought to settle disputes on the spot. These mediators played a dual function: on the one hand, they sometimes succeeded in achieving a settlement, in which event the Board did not have to consider the case further; on the other hand, if a case came up for a hearing, the mediators were able to assist the Board by their reports on the facts.[14] The Board's mediators constituted a staff, suited for its task by familiarity with the procedure, principles, and problems of industrial relations.

TYPES OF ADJUSTMENTS

The adjustments which grew out of the work of the labor board system were of four types: (1) informal settlements; (2) voluntary agreements; (3) decisions; and (4) awards. The first three types resulted from the Board's intervention in labor disputes where the parties to the dispute were not willing to submit to arbitration. The fourth type followed a voluntary submission of a labor dispute to the Board for arbitration.

A large number, if not most, of the informal settlements have left but scant record in the files of the Board. Perhaps the most effective work of the Board as an agency for preserving industrial peace was represented by these informal settlements made over the telephone, through personal interviews, or by letters.

The formal agreement which emerged after the process of conferences and hearings described above was usually a bi-partite agreement between the employer and the employees. This was true of all cases where the employer was willing to make an agreement with his employees directly. Here the Board entered into the agreement, if at all, by provision made for the holding of an election or by provision made that all disputes arising out of the agreement should be submitted to the Board for determination.[15] Occasionally, however, employers refused to make an agreement with the workers directly. Such refusal was usually based on the belief that this would be tantamount to union recognition. In such cases both employers and employees entered separately into an identical agreement with the National Labor Board. An agreement of this kind might be called tri-partite.[16]

An NLB decision represented both a finding on the facts of a dispute between employers and employees, and a recommendation urging

[13] Decision procedure in the early days of the Board was much more informal than might be surmised from this description. The decision was ordinarily reached by consultation among the Board members at some executive session or sessions. By June 1934, although consultations of this kind continued, decision procedure in the National Board had become highly formalized and routinized. It still remained informal, for the most part, in the regional boards, subject to the submittal of legal points to the legal staff of the National Board.

[14] Decisions, however, were based exclusively on the transcript of evidence brought out at the hearings.

[15] The Weirton agreement was of this type. It provided both for an election and for submitting differences to the Board. See Chap. IV, p. 100.

[16] The first example of such a tri-partite agreement was the settlement of the hosiery strikes in Reading, Pa. See Chap. IV, p. 97.

what line of action should be pursued in order to compose the dispute according to the requirements of Section 7(a).[17] The National Labor Board did not issue decisions unless it was forced to do so through inability to work out an agreement because of the recalcitrance of one or both of the parties to a dispute. This recalcitrance ordinarily involved the failure of the employer to comply with the recommendations of a regional labor board.[18]

Hhe NLB handed down arbitrational awards only when asked to do so by the parties to a controversy. Its procedure in such cases was that of the usual arbitration board. It heard the case, investigated the facts, and rendered an award. Virtually all the cases that went to the NLB for arbitration involved wage scales or interpretation of a collective agreement between a union and employers.[19] The arbitration cases coming before the Board were few in number and secondary in the significance of issues involved.

In general, we may say that the bi-partisan agreement was the most characteristic type of Labor Board settlement. It was most in accord with the methods of the Board and with its own idea of its proper functions.

THE ENFORCEMENT OF DECISIONS

Except for what may be called its "honeymoon" period of the first few months, the National Labor Board always had to devote a large part of its energies to attempts to bring about compliance with its decisions.[20] Cases of this type usually began with the prior refusal of an employer to carry out the recommendations contained in a decision of some regional board. In describing enforcement procedure, accordingly, we assume that the case was one in which a regional board had exercised original jurisdiction. In the early phases of its handling of this type of case, the Board did not depart from the basic concept that its function was to bring about the voluntary composition of disputes. It was only in the later phases of the handling that the procedure departed significantly from that pursued in the settling of disputes.

As a rule, the National Board learned of the non-compliance of a local employer through the daily and weekly reports of the regional boards. Each regional board was instructed to report instances of non-compliance as soon as they occurred. Forthwith, the NLB would

[17] If Sec. 7(a) was not at issue or was found not to apply, the decision could not in theory be enforced. Nor could the recommendation be enforced, in theory, if the charge of violating Sec. 7(a) was not sustained. In cases like these, the Board merely urged equitable considerations upon the parties in interest. They were free to observe or not to observe, as they saw fit.

[18] The Budd case decision (p. 105) was of this nature.

[19] As examples the following cases may be cited: (1) The New Orleans Public Bridge case in which the NLB fixed a wage scale for skilled artisans on a project financed by the Reconstruction Finance Corporation. (2) The wage dispute between the American Federation of Full Fashioned Hosiery Workers and the Full Fashioned Hosiery Manufacturers of America, Inc. The NLB granted the workers a wage increase of 5 per cent. (3) The arbitration between the Mason Builders Association of Greater New York, and several locals of the Bricklayers', Masons' and Plasterers' International Union of America, in which the Board decided which of the two prior awards was binding on the parties. (4) The arbitration of the wage scales for airplane pilots wherein the Board had to determine between mileage and hourly rates.

[20] It should be stressed that the enforcement problem arose out of such decisions, and such decisions alone, wherein the Board found that an employer violated the requirements of Sec. 7(a). The Board also issued what it called "decisions" in cases (1) where Sec. 7(a) was not at issue, (2) where the statute did not apply, and (3) where the violation complaint was not sustained. Its decisions in cases like these, save of course arbitrational awards, had moral force alone.

send a telegram to the non-complying party. This telegram did not state that the employer had refused to abide by the decision of the regional labor board, and that the NLB was summoning him with a view to a possible enforcement. Instead, it usually stated that the NLB had now assumed jurisdiction over the case, on which a hearing would be held on a given date; and the employer was requested to be good enough to transmit the name of his representative at the hearing. The form of the telegram was significant as indicating the psychological basis of the Board's procedure. The employer was not charged with any wrong; he was not hailed before a tribunal for punishment; he was not reproached for unwillingness to collaborate in the recovery program. To make such statements might spoil the Board's chances for a settlement by further antagonizing persons already antagonistic; hence the neutral and colorless form of the summons to the Board. The assumption was that if the Board avoided even the appearance of compulsion the defiant employer (or employees) would be more amenable to a friendly settlement.[21]

Whether the employer agreed to send a representative or not, the National Labor Board proceeded to a hearing. The procedure at the outset was essentially that of achieving a settlement. As in settlement procedure, the hearing, if necessary, was informal. It amounted essentially to a review of the facts of the dispute as submitted by representatives of both parties but subject to check-up from the regional board report. If a representative of the regional labor board appeared it was only to "sit in," not to entertain formal charges or defend the decision. It would have been inappropriate from the NLB point of view for a regional board representative to "play the advocate." The National Board claimed not to be passing judgment upon an offender, but to be adjusting a dispute which one of its regional agencies had been unable to adjust.

Should no voluntary settlement result from the hearing, the National Labor Board issued a decision which might or might not run parallel, term for term, with that of the regional board. If the employer continued his refusal to abide by such decision, the National Board did not immediately cease its efforts to bring about a voluntary settlement. Only after all means for adjustment had been tried without success did the Board turn over the case to the proper agencies for enforcement.

Thus, the Board dealt with cases of non-compliance as if they were essentially problems of arriving at a settlement. It ostensibly ignored the assumption that settlements might be impossible because some employers were firmly opposed to recognizing the authority or accepting the principles of the Board. Perhaps this was the main reason why the work of the Board after November 1933 was necessarily dilatory and disjointed. But, as we have seen, the Board lacked even nominal enforcement authority until late in its history. In large measure, the NLB's attempts to secure settlements rather than to "lay down" the law of Section 7(a) were caused by its complete lack of enforcement power and by the difficulty of persuading the enforcement agencies to act.

[21] Also, it is important to note that the ULB lacked subpoena power. Within the limits made necessary by this lack of power, the telegram might be said to give the impression of authority rather than of conciliation.

Moreover, the members of the Board were not all of one mind on the enforcement issue. Some members believed that the Board would do well to use legal sanction to enforce its decisions, while others believed that it should rely on public opinion, by presenting the facts of a case in the press. Still others were opposed to the Board's going further than to negotiate and mediate.

Nevertheless, the Board eventually came to adopt the policy of attempted compulsion as a method of last resort. The procedure here was to refer the case either to the Compliance Division of the NRA and/or to the United States Attorney General.[22] Early in March 1934 the Board for the first time introduced formal procedure preliminary to setting the machinery of enforcement into movement. This was the "show cause" hearing, a procedure based on the executive order of February 23, 1934.[23]

The Board did not have recourse to a "show cause" order except in cases where the employer had failed to appear at the formal hearing. The order was used in the hope that the form of notice might persuade the employer to appear. The "show cause" hearing thus came as the sequence to long drawn-out controversies, after all prior efforts to achieve a settlement were unsuccessful, and at a stage where the Board stood ready to invoke disciplinary measures. But the order was intended, essentially, to give the Board one more chance to achieve the settlement.

The first step in a "show cause" hearing was to send a telegram to the employer who had refused to comply with a decision, informing him that he must appear on a specified date to "show cause" why his case should not be referred to the Compliance Division of the NRA for removal of the Blue Eagle and/or to the Attorney General for appropriate action.[24] In some few instances, the mere threat of initiating disciplinary action was enough to induce the employer to comply with the Board's decision.[25] In this event, and upon receipt of information to the effect that compliance was forthcoming, the Board cancelled the proposed hearing. Otherwise the hearing was held. At the hearing the employer was asked to present evidence bearing on the charge that he had violated Section 7(a) either under the code of fair competition to which he was subject or under the President's Re-Employment Agreement, if he subscribed to that. If the evidence was sufficient to persuade the Board that the employer was not guilty, the charges against him were dropped. If the evidence was conclusive, the Board handed down a formal "finding of fact" together with a "conclusion," which it transmitted to the Attorney General and to the Administrator of the NRA.

The "finding of fact" began with a recital to the effect that the company in question was subject to a code of fair competition or to the PRA, and was engaged in interstate commerce. It then recited the manner in which and the circumstances under which the company had failed or refused to comply with Section 7(a) of the Industrial Recovery Act.[26] The "finding of fact" was followed by a "conclusion"

[22] See Chap. VIII for a more detailed discussion.

[23] For text of four "show cause" orders, see *NRA Release No. 3603*, Mar. 3, 1934.

[24] This could take the form of an application for an equity injunction or decree; or even (in theory) the form of criminal proceedings.

[25] For one such instance, see *NRA Release No. 3737*, Mar. 9, 1934.

[26] Refusal to abide by a decision of the NLRB was not in itself a violation of Sec. 7(a) of NIRA.

which summed up in what respect the employer had violated the law.[27]

After a case had been referred to the Attorney General, the Board's immediate connection with it ceased. Nevertheless, the legal staff of the Board might cooperate with the agents of the Department of Justice in preparing the materials on which the prosecution was to be based.[28] Similarly, after a case had been referred to the Compliance Division, further steps depended immediately on the action taken by the NRA.

Thus the Board could initiate enforcement proceedings and it might even lend a helping hand to the agencies charged with the enforcement of the statute. But the ultimate power of procuring compliance with decisions, and of administering discipline in the event of noncompliance, lay outside the Board's reach. This was a serious obstacle to speedy and effective enforcement. First, it was late in the history of the Board before its jurisdictional differences with the NRA Compliance Division were composed. Second, legal proceedings through the Attorney General's Office and the Department of Justice depended on the slow, prolonged, and precise procedures of the federal courts. And we should not forget, third, that the Board was not given formal enforcement powers until February 1, 1934. Finally, and perhaps most important, the President, at no time officially announced that the government's enforcement powers would be thrown wholeheartedly behind the Board.

In sum, therefore, the Board had to place its chief reliance in enforcement and compliance on the factor of public opinion. This factor did not carry great weight in view of the solidarity of sentiment among many employers, especially in non-unionized industries, who defied the Board because they believed that its theory of industrial relations had a bias in favor of trade unions.

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[27] Thus, in the case of the Harriman Hosiery Mills the "conclusion" read:
"The Harriman Hosiery Mills has infringed the rights of its employees to bargain collectively through representatives of their own choosing, as recognized by Sec. 7(a) of the NIRA, by entering negotiations in bad faith and with the definite intention not to make any agreements with the representatives of its employees. (*NRA Release No. 3812*, Mar. 13, 1934.)
Again, in the case of the Roth Company of Chicago the "conclusion" read:
"A. Roth and Co. has interfered with the right of self-organization of its employees, and has infringed the right of its employees to bargain collectively through representatives of their own choosing by refusing to deal with the duly chosen representatives of the employees. It has thus violated Sec. 7(a) of the National Industrial Recovery Act included in the President's Re-Employment Agreement and the codes to which the company has been subject." (*NRA Release No. 3811*, Mar. 17, 1934.)

[28] As in the suit for an injunction against the Weirton Company.

CHAPTER VIII. SUCCESSES AND FAILURES

We have reviewed the NLB's attempt to formulate and put into effect a "common law" of Section 7(a). It is now time to put the questions: How far can it be said that the Board succeeded or failed? What were the factors which determined the nature of its performance?

Because the Board exercised diverse functions, its work must be judged by more than one criterion. To the exercise of each separate function, distinct canons of appraisal must be applied. It will be found further that the board performed some functions better than others, largely because of the varying nature of conditioning factors.

The work of the Board aroused much comment, both favorable and critical. The Board itself was the center of friendly support and of vigorous attack. Its performance was evaluated one way or another according to the critic's bias. There thus came into being a considerable body of interested opinion. The method to be followed in the present chapter will be (1) to present a statement of the main partisan arguments and (2) to examine the Board's record of performance on the basis of what seem to us objective tests and standards.

THE CASE FOR THE NLB

This section will present the sort of *ex parte* case which the NLB might have made itself—a case which would be concurred in, with reservations, by many individuals and groups who feel that the Board performed useful work.

Proper allowance must be made for the extraordinary circumstances with which the Board had to contend. There was thrust upon it the most controversial and vexing issue of the national recovery program—the struggle between labor and management for the right to shape industrial relations—a struggle loaded with traditional biases, fears, and hatreds. Ostensibly the contest was waged on the legalistic plane: the meaning of Section 7(a). In fact, however, the divergences in interpretation of the statute gave formal expression to a more realistic underlying question: Which form of labor organization, the trade or the company union, should henceforth prevail under the régime of "industrial self-government"?

The Labor Board had to work out a policy to meet this problem unaided, if not indeed hindered by the NRA. Only a handful of codes made specific provision for the establishment of joint industrial relations boards which could take upon themselves some of the burdens of the task.[1] The administrators of the NRA in their search for "perfect neutrality" usually made confusion worse confounded when they attempted to take a hand in the matter.[2] Moreover, the Board had to hammer out its policies in the heat and turmoil of strikes, and under

[1] See Chap. X
[2] See Chaps. III and X.

the pressure of the government's re-employment program. Both of these factors were more favorable to the shaping of compromises than to the formulation of principles. In view of these circumstances, it can be claimed that the performance of the Board was more than satisfactory. It was successful in ending many strikes and in averting more—and that after all was the main purpose for which it was created.

But the Board did much more. It evolved a theory of collective bargaining, which if acted upon by workers and employers would probably serve to diminish strikes and lockouts. Though slowly and by piecemeal, the Board developed a body of principles which constituted a doctrinal foundation for a rational system of labor relations. These principles were in accord with democratic ideas and traditions. Contrary to popular misconceptions, the Board's policy was not partisan; it neither sanctioned the trade union as the exclusive agency to bargain collectively, nor ruled out the company union as a lawful instrumentality of self-organization. The Board proceeded on the fundamental premise that it was for the workers themselves, through the exercise of free choice, to say what form of labor organization they preferred. Elections and majority rule were intended only to enable the workers to function as "free men."

Further, the Board by clarifying the obligations of employers under Section 7(a) put real meaning into the term "the right to bargain collectively." The Board did so, notwithstanding that such clarification was distasteful to many employers and at times unacceptable to trade unionists. The Board hewed to its basic democratic concepts, whether the chips flew in the face of employers or workers. Free elections and majority rule were intended to promote neither the "closed shop" nor the "open shop"; neither the A. F. of L. union nor the company union; nor yet any one of various contending "dual" unions. They were intended to establish the identity and authority of the employee representatives, whether individual persons; officers of a union, or unions in their corporate capacity. The elections brought over an American political concept into the field of industrial relations.

True, the Board hesitated and delayed, but finally did come to grips with the vexatious problem of company versus trade unions. To solve this problem, it affirmed and tried to put into effect rules of fair labor practices to run parallel, as it were, to the fair trade practices of the codes. These rules, if legally recognized and enforced, would have put an end to the many industrial disputes caused by discrimination of employers against union workers and by "interference, coercion and restraint" in matters of labor representation.

The Board admittedly sought to bring about settlements by agreement. It did not issue decisions until every means of amicable adjustment was exhausted. This procedure helped to promote a spirit of reasonableness in industrial relations. It did much to soften the die-hard attitude among employers toward dealing collectively with their employees and to remove the deep-rooted suspicion of trade union workers concerning their employers' good faith. True, such procedure slowed up the settlement of industrial disputes. But much, if not most, of the dilatoriness blamed on the Board was due, in fact, to the defective functioning of the NRA's compliance machinery, and to the passive, questioning attitude of the Department of Justice. Last, but not least, the Board brought the issue of industrial relations into public prominence.

It should thus be credited with most of whatever progress was made during the first year of the NRA toward public realization of the need for formulating a national labor relations policy.

Such is the line of argument by which the NLB might have attempted to justify its record of performance.

THE CASE AGAINST THE BOARD

The most severe critics of the National Labor Board fell into two groups, anti-union employers and radical trade unionists; that is, the representatives of the extreme "right" and the extreme "left" point of view. Their arguments ran counter to one another in fundamental premises, but had much in common in the selection of factors stressed.

The "right" point of view

The employer opposed to trade unions approved the efforts of the Board to end and prevent strikes. In fact, in his opinion, this should have been its one and only function. The other activities of the Board he regarded as arbitrary assumptions of power. The Board, he argued, had no business to interpret Section 7(a). The section formed part of a statute enacted by Congress, and if it needed interpretation, the courts were the proper interpreters. It was also *ultra vires* for the Board to contrive a Reading Formula with its paraphernalia of elections and agreements, and to interfere in contests between "inside" and "outside" labor unions.

Even more vigorously did the anti-union employer object to the substance of the Labor Board's interpretations of Section 7(a). The tendency of the Board's doctrines, he maintained, was to force the trade union and its policy of the "closed shop" upon American industry. This, he claimed, was neither the intention of the Recovery Act nor the purport of American political and constitutional principles. Moreover, the NLB's interpretation of Section 7(a) was at variance with that developed by General Johnson and Mr. Richberg. Thus the question arose: What right did the Board have to enunicate doctrines contrary to those enunciated by the NRA?[3]

The anti-union employer further condemned the activities of the Labor Board because, in his opinion, they conveyed to American workers a false vision of what Section 7(a) promised and implied. The workers were thus made an easy prey to professional trade union organizers and agitators. The trade union organizers, the anti-union employer argued, must stir up trouble in order to hold their members. Thus the result of the Board's intervention was to disturb the industrial peace, not to maintain it. This was especially true of such of the Board's decisions and interpretations as implied that the company union might constitute an attempt on the part of employers to interfere with the workers' right to organize, and therefore might be condemned as unlawful.

It was no part of the Board's duty, in this view, to pass even inferentially upon the validity of company unions. All that the Board should have done was to see to it that employees were not coerced into joining either company or trade unions. The company union had a perfectly valid right to exist, so long as employees wished to belong

[3] For the Johnson-Richberg interpretation of Sec. 7(a), See Chaps. III and X.

to it. Moreover, it was entitled to function as an agency for collective bargaining even if only a minority of the workers in a plant belonged to it. Therefore, in so far as the Board forced upon workers the alternative of choosing between a company union or trade union, it was perverting the meaning and purpose of Section 7(a).

The "left" point of view

If anti-union employers criticised the Board for not confining its activities to strike prevention, militant trade unionists attacked the Board for being a "strike-breaking agency." From the point of view of militant labor, the strike is the only effective weapon which workers possess for forcing concessions from their employers. True, this weapon should be used with due regard to tactical and strategic requirements. But labor should always be ready to resort to it in order that employers should not be allowed to forget their employees' potential power of direct mass action. Because the NLB sought to eliminate strikes and to substitute in their stead mediation and arbitration, its activities were detrimental to the interests of organized labor.

The Board pursued methods which were all the more questionable and harmful, militant labor leaders argued, since it constantly persuaded workers to end strikes by promising them "settlements" which it lacked the power to bring about. The Board could not compel employers to "recognize" a trade union; could not reinstate workers found to be victims of discrimination, and could neither bring about elections if management objected to them, nor collective agreements if management did not wish to agree. Despite its pretentions at being a "Supreme Court of Industrial Relations," the Board served merely to retard an aggressive labor movement which began to develop under the stimulus of the NIRA. From the "left" point of view, the NLB deprived the workers of their best chance of winning their rights under Section 7(a)—that is, through militant strikes under a new and vigorous leadership which was springing up from the "rank and file."

The Board was perpetrating fraud, the left-wing laborites maintained, when it asked the workers to put their case in the hands of the government. The government, especially the NRA and the Department of Justice, it was charged, showed no real desire to enforce the rights guaranteed to workers by the statute. All that the government aimed at was giving employers monopolistic power in the guise of codes of fair competition. Because it lacked power, because it made vain promises, because it delayed swift action by aroused workers, because it spent its time in futile legalistic dilly-dallying, the NLB played into the hands of anti-union employers and set back labor self-organization. So the radical labor leaders maintained.

THE RECORD OF THE NLB

In the preceding sections, we summarized what were frankly partisan viewpoints. We pass now to what seems to us an objective appraisal of the Board's record. We shall consider separately the performances of the Board (1) as an adjustment agency, (2) as a quasi-judicial tribunal, and (3) as a body interested in enforcing its decisions. We pass over its performance as an arbitrator because this was an incidental and minor function.

Adjusting disputes

From time to time, the NLB released statistical summaries purporting to demonstrate the efficiency of its entire system, including regional boards, in settling labor disputes. These statistics indicate a high ratio of settlements to disputes; and suggest that the Board was a highly effective adjustment agency. Up to July 1, 1934, the National Labor Board system handled 4,277 cases involving more than 2 million workers. Some 83 per cent of the cases were recorded as "settled," two-thirds by "agreement." The Board had mediated in 1,496 strikes involving over a million workers. "Settlements" were recorded in three-fourths of the cases. The Board claimed that 1,800,000 workers had been "returned to work, or kept at work, or had their other disputes adjusted." More than half of the cases, 2,741, involved alleged violations of Section 7(a).[4]

The official figures, however were not of a high statistical order. They were gathered hastily and offhand in the rush of more urgent work. There was a considerable amount of double counting, in the sense that the same cases were sometimes included in the separate totals of the regional and the national boards. In contrast, many cases settled quietly were not counted at all. Nobody on the staff of the NLB was charged with specific responsibility for doing this statistical work; and no real effort was made to perform it in a craftsmanlike manner.

There was reason also to suspect that the published figures were presented for propagandistic rather than informative purposes. As compiled from time to time, the statistics took the form of press releases, designed, in part, to further the Board's claim that it was successful in maintaining industrial peace. To illustrate, no genuine effort was made to draw a line between what were truly "settlements" and what were merely "dispositions," or cases formally removed from the docket. Also a case would be counted as "settled" because of an "agreement" reached, although there was no certainty that the agreement was being kept. Again, the National Board exerted no serious efforts to check up on the reports from certain regional boards which might have been inclined, for purposes of prestige, to overstate the success of their activities.[5]

But even if complete and reliable statistics were available, it would still be an error to judge the success or failure of the Board by reference to the quantitative data alone. No doubt, many thousands of workers were persuaded to call off strikes and return to their jobs as a result of the intervention by the national and the regional boards. Many thousands of workers more were persuaded not to begin striking. If we assume that strikes as such were wrong, because they retarded the progress of the re-employment campaign, it follows that the Labor Board system, so far as it ended and averted strikes, performed its adjustment function well. But the Board was not created to end and avert strikes on any and all terms. It was presumably given the task of settling disputes on terms consistent with the provisions of Section 7(a) of the Recovery Act. The appropriate canons of appraisal to be applied to its performance are therefore not quantitative

[4] *See NRA Release No. 6295*, July 7, 1934, for complete tables.

[5] Examination by one of the authors of the reports from the regional boards revealed a widespread tendency to treat cases "pending" as the alternative to cases "settled"; that is, once a case was disposed of in some way it was recorded as a "settlement"

but qualitative. The questions to be asked are: What terms were typically included in settlements? How did the Board's settlements "take"? Were agreements made under Board auspices kept faithfully? Did employers and employees comply in general with the decisions it handed down?

As described elsewhere, the Board's settlements generally provided for calling off strikes, reinstating the strikers, holding an election, obliging the employer to recognize and deal with the elected representatives of his employees, and the submission of all future controversies to impartial determination. Most important were the provisions concerning elections of representatives and the employer's obligation to deal with them. These provisions gave substance to the Board's interpretation of the rights granted by Section 7(a).

The Board conceived of its settlement formulae as impartial and as in accord with the proper construction of the statute. Yet, in most disputes that came before the Board, the employers had little to gain and much to lose from the holding of elections. As a rule, the employers had either already established "employee representation plans" or were in the process of so doing. Election à la Reading Formula under the auspices of the Board thus meant to most employers only a disturbance of the "peace," and the unpleasant task of proving that the company union was the genuine and free choice of the employees. In contrast, the trade unions generally had little to lose and everything to gain from the elections held by the Board. In fact, a major reason why trade unions were willing to abide by Board recommendations urging them to call off strikes was their belief that in a free election they were quite likely to win against the company unions.[6]

This explains why the impression became current that the Labor Board favored the trade unions. It also explains why many employers attacked the Board on the ground of partiality, and joined in a campaign to arouse public opinion against a system which, so they charged, was furthering "monopoly" control by the American Federation of Labor. The record, however, seems clear that the Board sought to be non-partisan in accord with Section 7(a). It attempted neither to "impose" the trade union nor to "outlaw" the company union. If its election procedure worked in favor of the trade unions, that was because of the temper of the workers and because in most disputes the unions were the weaker party whom public intervention would tend to help.

Setting forth a theory of collective bargaining was, however, but a beginning. From the standpoint of effectively adjusting labor disputes the more important questions are: To what extent was it possible to bring about voluntary agreements? To what extent was there compliance with decisions? The record of the National Board makes somewhat sad reading on this point. It was replete with instances of failure to achieve voluntary agreements and of refusal by employers to comply with decisions. The regional boards, even more than the National Board, ran into similar difficulties. After mid-December 1933, the Labor Board system began to be overwhelmed with instances of non-compliance, usually of employers. By early spring 1934,

[6] According to the Brown study noted in Chap. VII, there were 449 unit elections wherein workers had the choice between trade unions and employee representation plans. Trade unions won in 323 units; employee representation plans in 126. Trade unions polled 61,231votes; employee representation plans, 10,995.

efforts to obtain compliance continually taxed and finally exhausted the energies of the national and the regional boards.[7]

In contrast to this, it must be emphasized that in a large number of cases handled by the Labor Board system, employers were thoroughly willing to accept its good offices so that no question of failure to agree or refusal to comply arose. The Board received most publicity in the press for those controversies in which its autohrity was "defied." It received little publicity in controversies in which its authority was accepted. Moreover, the National Board and its regional agencies performed their most effective work in a multitude of disputes which were settled informally and expeditiously, by a quickly convened conference, by the intervention of staff mediators, by telephone, calls, and in other informal ways. Of many of these disputes, no formal records were kept in the files of either the National Labor Board or the regional affiliates.

Nevertheless, as instances of non-complance multiplied and were broadcast publicly, it became increasingly difficult for the Labor Board system to secure compliance with its decisions. It was not so much that the Board's authority was defined by certain employers, but definance, it became evident, did not result in quick penalties. By the end of June 1934 only four employers had been deprived of the Blue Eagle.[8] Moreover, the government's suit to restrain the Weirton Steel Company from interfering with the Board's conduct of an election had come to grief for the time being in the United States District Court of Wilmington, Delaware, on May 29, 1934.

As employers increasingly challenged the Board's authority and went unscathed, the workers also began to lose faith in it. The existence of the Labor Board system notwithstanding, the spring months of 1934 were notable for a nation-wide outburst of strikes, characterized in many instances by violence. In short, organized labor apparently did not pay heed to the Board's pleas that strikes should be used only as an instrument of final resort. What was more significant, in some instances trade unions proved reluctant to submit to Board mediation, and even opposed Board decisions.[9]

To summarize, the National Labor Board and its regional boards were an important factor in composing labor disputes and provided a

[7] Excluding arbitrational or quasi-arbitration cases, we may consider 75 of the cases included among the edited *Decisions*. More than half of these, that is 43, involved earlier failure by the regional boards to achieve a settlement; 18 cases of refusal to comply with a regional board "decision" or ruling; 9 cases of refusal to comply with a regional board "recommendation" or proposal; 9 cases of refusal to submit to regional board jurisdiction. (Of this total of 36 cases, workers were the noncomplying and/or resisting party only three times.) In 7 more cases, the regional board was unable to adjust the differences, completing the total of 43. In 6 additional cases there was an appeal from a regional board ruling; 5 times by employers and once by workers. It is to be noted also, that on at least three occasions, regional boards were made parties to injunction proceedings instituted by employers.

The National Board was able to bring the Department of Justice to act only once—in the Weirton case, and succeeded in having the NRA Compliance Division remove 4 Blue Eagles, two of which were later restored. In 11 cases, the Board issued "show cause" citations; in 5 cases it recommended the removal of the Blue Eagle. (These figures do not include cases later acted on by the National Labor Relations Board.)

Five cases were transmitted to the Attorney General: Weirton, *NRA Release No. 3556*, Mar. 1, 1934; Harriman: *NRA Release No. 3812*, Mar. 13, 1934; Roth, NRA Release No. *3881*, Mar. 17, 1934; National Lock, *NRA Release No. 5094*, May 16, 1934; Great Lakes Steel, *NRA Release No. 5308*, May 24, 1934.

[8] A. Roth and Co. of Chicago, Apr. 3, 1934; the Harriman Hosiery Mills of Harriman, Tenn., Apr. 20, 1934; the National Lock Co. of Rockford, Ill., May 23, 1934; and the Milwaukee Electric Railway and Light Co., June 6, 1934. The Harriman and Milwaukee Blue Eagles were later returned. The recommendation in the Great Lakes Steel case was not acted upon, an amicable adjustment having been obtained. (Data obtained from the NLB and from the NRA Compliance Division.)

[9] Notably the Haverhill shoe strike referred to on pp. 204 and 205.

mechanism—lacking in all but a few of the codes of fair competition—for regulating industrial relations. The fact that there existed an instrument for bringing employers and employees together to work out agreements; and the further fact that this instrument was highly publicized and had some prestige, brought about settlements in many controversies where agreement would not have been reached otherwise. As a rule, the Board's adjustment formulae were far more successful when expressed in a mutual "agreement" then when prescribed by a "decision." The Board's decisions, however, even in the absence of enforcement, helped to clarify the issues involved in the problem of collective bargaining. These decisions thus posited many of the questions that must be answered if a rational process of settling industrial disputes is to be set up in the United States.

Interpreting section 7(a)

Forced thereto by circumstances, the NLB evolved into a sort of quasi-judicial body. Its primary intention, however, was not so much to act like a court of law as it was to evolve a set of principles and devices—a theory of labor relations—which would appeal to employers and workers alike because of rationality and justice.

The Board was practically forced to evolve such a theory. Section 7(a) was vague and ambiguous. Trade unionists read into it the idea that the trade union was to be the exclusive instrumentality for collective bargaining; employers interpreted it to mean that company unions were adequate for the purpose. Many of the disputes which came before the Board thus centered around the issue of what practices in the formation of company unions to counteract trade unions should be regarded as violations of Section 7(a). But although the Board eventually came to realize the need for principles of interpretation, it was slow in formulating them. It evolved them piecemeal under the pressure of circumstances, in connection with the particular issues raised by specific cases. As a result it proceeded much of the time without a clear idea as to the doctrinal basis on which it was operating. Thus majority rule was not enunciated clearly until March 1, 1934; recognition of representative labor unions not until March 8, 1934.

But the Board was opposed on principle to handing down *obiter dicta;* to issuing gratuitous pronouncements on points not formally presented to it for adjudication. On many issues, therefore, the Board did not take an unequivocal stand all through its history. The question of the closed shop was the outstanding example. But the same was true of other basic issues: Must unsettled differences in collective bargaining go, finally, to arbitration? Did the duty to exert every reasonable effort to conclude agreements similarly imply eventual arbitration? Must contracts be written?—and similar questions.

Enforcement

By December 1933 it had become evident that the Board could not depend on moral suasion as a device for getting employers to comply with its recommendations. Those employers who were determined not to deal with trade unions questioned the Board's right to conduct elections and rejected its rulings on employee representation plans and collective bargaining with trade unions. The Board was thus forced to consider ways and means of enforcing its ruling within the limited powers it possessed.

As related elsewhere, between December 16, 1933 and February 23, 1934, the powers of the Board were extended and a definite procedure for enforcing its rulings was laid down.[10] It was on the basis of the executive orders of February 1 and 23, 1934 that the Board started its first court prosecutions, made its first authorized recommendations to the Department of Justice for legal prosecutions, and started a series of "show cause" hearings preliminary to the removal of the Blue Eagle. But even under these executive orders, the powers of the Board were very narrow, being limited in substance to the right to refer cases to other disciplinary agencies in the executive branch of the government. The orders did not specify what action the NRA must take or how soon. Thus many loopholes were left for the NRA to nullify the disciplinary procedure of the Board, if the former body felt inclined to do so. Moreover, the Department of Justice was not obliged to initiate proceedings if its judgment on the merits of a case differed from that of the Labor Board.

In trying to understand why the enforcement record of the Board was so poor, we must lay heavy stress on these factors outside of the Board's control. A few small employers were persuaded into compliance by the threat of "show cause" hearings; but that was about all. The Budd case was settled by the NRA on a basis entirely different from the recommendations of the Labor Board in its decision of December 14, 1933.[11] The Harriman Mills were deprived of their Blue Eagle only after a long interval of inaction.[12] The Weirton case was still in the federal courts when the National Labor Board passed out of existence.

DETERMINING FACTORS

In analyzing the conditions which affected the Board's record of performance, we shall follow the procedure of considering separately its several functions. It should be kept in mind, however, that the special conditions bearing specifically on each separate function had also a general effect on the total work of the Board.

As an agency of conciliation and mediation, the Labor Board system was sometimes slow and dilatory. One reason for this was inadequate staffing in the face of a rush of work. Another was the lengthy and formal procedure necessitated by hearings in cases where settlement attempts had failed in the first instance. Much of the Board's time was taken up in formally hearing numerous cases of minor importance which the regional tribunals had failed to settle. It should be realized, however, that most of these were cases inherently difficult of settlement.

The system as a whole, particularly the National Board, was also hampered in its conciliation and mediation activities by the fact that hearings often tended to take the outward appearance of court proceedings.[13] This brought in the lawyer's brief, encouraged prolonged haggling over technical points, and stiffened the attitude of disputants

[10] President's Executive Order No. 6511 of Dec. 16, 1933; No. 6580 of Feb. 1, 1934; No. 6612–A of Feb. 23, 1934. See Chap. IV.

[11] After a series of misadventures, a settlement was obtained pursuant to the automobile settlement—the NLB's greatest defeat.

[12] But the Blue Eagle was returned under circumstances which aroused considerable controversy. The Attorney General, it might be noted, did not believe there was sufficient evidence to warrant a prosecution, but nevertheless upheld the Administrator's right to remove the Blue Eagle. See *NRA Release No. 6207*, July 2, 1934.

[13] See Chap. V, pp. 126–28.

anxious to "save face." As a matter of fact, when the Board was successful in its mediation, it was chiefly through informal conferences held prior to or after formal hearings.

The National Board's exrcise of interpretative functions was another factor which operated against the success of its mediatory functions. The Board's interpretation of Section 7(a) offended and antagonized certain groups of disputants, particularly anti-union industrialists. So did the Board's efforts at enforcement, feeble as they were. It is obvious that as a mediatory body the Board was undermining its own strength; (1) by taking a definite attitude on highly controversial issues, and (2) by having recourse to compulsion.

The National Board was in a particularly bad situation for the performance of the interpretative functions which it assumed. Its bipartisan character [14] made it impossible for it to reach quickly clear and definite principles on the issues that were vital. The sympathies, loyalties, and prejudices of both its employer and employee members were known in advance. They represented interest groups. Inevitably, the decisions handed down by the Board were bound to be viewed with suspicion. Employers distrusted them because it was known that high officials of the A. F. of L. had participated in rendering them. Employees distrusted them because of the known participation of big business men.

The Board undertook to interpret Section 7(a) without first securing a formal grant of authority to do so. It thus exposed itself to challenge and defiance which undermined its prestige and made it increasingly difficult for it to develop its interpretations. Moreover, as the Board's theory of industrial relations evolved, it became apparent that the "common law" was in conflict with the ideas of the Administrator and General Counsel of the NRA. This not only caused confusion among employers and employees genuinely desirous of abiding by Section 7(a), but strengthened the opposition to the NLB. Thus the Board's interpretative activities were further hampered.

In view of these difficulties, it was not surprising that the Board proceeded haltingly in its interpretative functions, and that it remained vague on some of the most vital issues that came before it. Also, its legal advisers had no conclusive body of precedents interpreting Section 7(a) to fall back upon. In the absence of the United States Supreme Court decisons, they had to rely mainly on their own wits. Only slowly could these advisers break through the maze of legalistic concepts and become familiar with the concrete issues and realistic conditions which made the problems of industrial relations under the NRA so difficult and vexing.

The inability of the Labor Board to enforce its settlements and decisions was by no means its own fault. Not until February 1934 was the Board authorized to initiate enforcement proceedings of any kind. And even then, the powers of enforcement were meager and rested on executive order rather than on statute. The most that the Board could do was to refer cases of non-compliance to the Department of Justice and/or to the NRA. In the former event, an further move depended on the judgment of the Department of Justice. In the latter event, the Compliance Division was apparently animated by the idea of a minimum of governmental compulsion. In either case virgorous pushing of

[14] See Chap. V, pp. 118–19.

the issues raised by the NLB might have precipitated the Recovery Act into the courts—a course the Administration was seemingly anxious to avoid.

Should the National Labor Board have tried to hand down theoretically enforceable decisions at all? Some would say that the NLB erred in trying to advance beyond achieving settlements, if possible, by voluntary agreement. At most, these critics will say, the Board should have issued recommendations where agreement was impossible. By attempting to do more, by laying down formal decisions, the Board was bound to raise embarrassing questions about its own powers and jurisdiction, and to stir up resentment and distrust detrimental to its mediator activities. Other persons would say that the NLB was justified in trying to see that Section 7(a) was enforced. In the opinion of such persons, the Board was meant to be more than a mediation body; its true purpose was to function as a "Supreme Court of Industrial Relations" under the Recovery Act. Like any other court, the Board should interpret the law and take steps to enforce its decisions. To some degree the members of the Board themselves inclined to one or the other of these views.

In any event, the NLB was long delayed in securing the right to initiate enforcement proceedings. This tardiness meant an accumulation of instances of defiance and non-compliance, which was responsible for a loss of prestige. And in the interim, the effort to enforce decisions before authority to do so was granted was bound to result in failure. Such failure encouraged recalcitrants among employers and disappointed organized labor.

In spite of the factors which rendered the NLB ineffective, much of the extreme criticism of the Board is hardly borne out by the facts. Consider a common charge, the accusation that the Board helped to end strikes. But it is doubtful that man strikes which would otherwise have been won by the workers were lost because of the intervention of the Board. Most of the strikes which were handled by the National Labor Board had little chance of success to begin with. They were of the "organizational" type, conducted for the purpose of "recognition" by a union attempting to penetrate into new territory, where a strong tradition against trade unions prevailed. Also, the continued unemployment throughout 1933–34 was not favorable to the success of many strikes. In fact, by ending and averting strikes, the Board often saved workers newly converted to trade unionism as well as "infant" unions from bad defeats. True, the Board was not of much help to the workers in gaining for them their demands; but it brought into the arena of public discussion the issues which were agitating the wage earners of the country.

4. (Source: Lewis L. Lorwin and Arthur Wubnig, chs. IX and XI of *Labor Relations Board,* Washington, D.C., The Brookings Institution [1935])

CHAPTER IX. ENACTMENT OF PUBLIC RESOLUTION NO. 44

By the end of February 1934 those most concerned with the work of the National Labor Board, particularly its chairman, had become convinced that it was necessary to reconstruct the Board on a permanent, statutory basis. The Board in its then status was practically impotent to enforce its decisions. Moreover, after a relatively quiet period during the winter months, strikes centering around Section 7(a) were beginning to break out once again. A legislative restatement of Section 7(a) which would remove ambiguities, it was believed, would diminish the possibility of further and continued industrial conflict.

Accordingly, Senator Wagner and his associates drafted a bill that became known as the Labor Disputes bill, which he introduced in the Senate on March 1, 1934.[1] This bill, referred to the Committee on Education and Labor, immediately became the center of heated controversy and of a protracted legislative struggle which, culminating in the enactment of Public Resolution No. 44, had a decisive influence on the later course of collective bargaining under the "New Deal." In the present chapter we shall analyze the provisions of the Labor Disputes bill, summarize the arguments for and against it, and briefly relate its transformation, first into the National Industrial Adjustment bill and then into Public Resolution No. 44. We shall also give a point by point comparison between the Labor Disputes bill and the Labor Relations bill of 1935, its lineal successor.

Consider also the common charge that the Board was operating under false pretenses in that it sought to end and avert strikes without possessing the power to grant to workers not merely their reasonable demands, but even demands which the Board's interpretation of the statute implied were theirs as a matter of law. True, the Board was too hopeful during its earlier phases that anti-union employers would voluntarily submit to a radical reconstruction of industrial relations.

[1] 73 Cong. 2 sess., S. 2926, "A bill to equalize the bargaining power of employers and employees, to encourage the amicable settlement of disputes between employers and employees, to create a National Labor Board, and for other purposes." Representative William Connery (Mass.) introduced a similar bill in the House.

On Feb. 21, 1935 Senator Wagner introduced a similar measure under the title National Labor Relations bill (74 Cong., 1 sess., S. 1958, "A bill to promote equality of bargaining power between employers and employees, to diminish the causes of labor disputes, to create a National Labor Relations Board, and for other purposes"). This bill was reported out favorably with certain amedments by the Senate Committee on Education and Labor on May 2, 1935 (74 Cong. 1 sess., S. rep. 573 to accompany S. 1958). The measure, as reported out of committee, passed the Senate on May 16, 1935, after a cursory debate, by a vote of 63 to 12. (*Cong. Record,* daily ed., May 16, 1935, No. 102, p. 7980.) On May 21, 1935, S. 1958 was reported out favorably by the House Labor Committee, amended to the extent of placing the Board under the Department of Labor. See p. 243.

But as soon as the Board realized that moral suasion was insufficient to accomplish this end, it sought to fortify itself with enforcement powers. Its chairman, moreover, sought to procure legislation which would define the Board's powers and jurisdiction on a firm statutory basis. Finally, the Board acted on the belief that the Administration would support firm, vigorous, and unrelenting enforcement of its doctrines of collective bargaining. These hopes were not fulfilled. Nevertheless, the Board was justified in hoping for their eventual realization; and what enforcement powers it did possess, it did not hesitate, finally, to use. By this time, however, it was too late.

In sum, the Board tried to settle the problems of collective bargaining under the NRA by relying upon the democratic procedure of elections. This policy was not acceptable to many anti-union employers. Their opposition frustrated the Board; the workers also began to have less faith in it. Thus the Board became on the one hand the object of an organized campaign of criticism and attack, and on the other a helpless body unable to enforce is opinions or rulings. The situation was an impossible one. By the spring of 1934 it became clear that the Board must be reorganized or it would collapse. Senator Wagner embarked valiantly on the course of reorganization and on March 1, 1934 he introduced his Labor Disputes bill. The fate of that bill and its effects on the course of collective bargaining are considered in the next chapter.

THE LABOR DISPUTES BILL

The Labor Disputes bill professed to have three main purposes in view: (1) to equalize the bargaining power of employers and employees; (2) to encourage the amicable settlement of disputes between employers and employees; and (3) to create a National Labor Board.[2] We shall consider the main provisions of the bill in their bearing on these three principal objectives.

EQUALITY OF BARGAINING POWER

Title 1, Sections 1 to 6 inclusive, contained various provisions intended to secure equality of bargaining power between employers and employees. Section 1 stated the title of the proposed act—the Labor Disputes Act. Section 2, the declaration of public policy, departed sharply from the individualistic tradition of industrial relations. It began by stating that tendencies in modern economic life toward "integration and centralized economic control" have long since destroyed "the balance of bargaining power between the individual employer and the individual employee." The individual unorganized worker, in the words of the bill, has been rendered "helpless to exercise actual liberty of contract, to secure a just reward for his services, and to preserve a decent standard of living." The inadequate recognition of the "right of employees to bargain collectively through representatives of their own choosing has caused strikes, lockouts, and similar

[2] Compare the virtually identical purposes of the 1935 measure.

manifestations of economic strife," and as a consequence, commerce has been obstructed and the general welfare imperiled.[3]

In view of all these considerations, the bill declared it to be the policy of Congress to "remove obstructions to the free flow of commerce," to "encourage the establishment of uniform labor standards," and to "provide for the general welfare" by removing the obstacles which prevent the organization of labor for the purpose of cooperative action in maintaining its standards of living. These ends it was proposed to accomplish by encouraging the equalization of the bargaining power of employers and employees and by providing agencies for the peaceful settlement of disputes. The declaration of policy, it is obvious, was inspired by trade union ideology. But in the formal sense the measure was ostensibly based on the familiar powers of the legislature over "interstate commerce" and the "general welfare." [4]

Section 3 of the bill constituted a mere catalogue of definitions. Some of these definitions, however, were of extreme importance in view of the principles which they implied and the practices against which they were aimed. Provision one defined the term "person" to include "individuals, partnerships, corporations, legal representatives, trustees in bankruptcy, receivers, legal representatives of a deceased person." [5] This precluded an employer from avoiding the burdens of the bill by having recourse to any one among the several legal forms of business enterprise. Provision two defined the term "employer" to include "a person who has one or more employees."

Specifically excluded were the United States, any state or municipal corporation, other government instrumentalities, any "person subject to the Railway Labor Act as amended from time to time," and finally, "any labor organization, or anyone acting in the capacity of officer or agent of such labor organization." [6] Provision two thus

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[3] Compare the statement in the original draft of Senator Wagner's 1935 measure: "Equality of bargaining power between employers and employees is not attained when the organization of employers in the corporate and other reforms 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 depression, with consequent detriment to the general welfare and to the free flow of commerce." (Section 1.)

The Senate Labor Committee amended Sec. 1 to read as follows: "The inequality of bargaining power between employer and individual employee which arises out of the organization of employers in corporate forms of ownership and out of numerous other modern industrial conditions, impairs and affects commerce by creating variations and instability in wage rates and working conditions within and between industries and by depressing the purchasing power of wage earners in industry, thus increasing the disparity between production and consumption, reducing the amount of commerce, and tending to promote and aggravate business depression. The protection of the right of employees to organize and bargain collectively tends to restore equality of bargaining power and thereby fosters, protects, and promotes commerce among the several states.

"The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial unrest which burden and affect commerce. Protection by law of the right to organize and bargain collectively removes this source of industrial unrest and encourages practices fundamental to the friendly adjustment of industrial strife." (*Cong. Record*, daily ed., May 16, 1935, No. 102, p. 7948.) See also pp. 261–62.

[4] Compare the statement in Sec. 1 of the 1935 measure: "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 public 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 purposes of negotiating the terms and conditions of his employment or other mutual aid or protection." (See also pp. 261–62.)

[5] In substantial accord is Sec. 2(1) of the 1935 measure.

[6] In substantial accord is Sec. 2(2) of the 1935 measure. As amended by the Senate Committee, this section reads: ". . . any labor organization (other than when acting as an employer) . . ." (*Cong. Record*, daily ed., May 16, 1935, No. 102, p. 7948.)

brought within the purview of the act the small as well as the large employer; the financial, commercial, agricultural, and household employer as well as the industrial employer.[7] At the same time, by excluding labor organizations, provision two precluded the use of the bill against trade unions.

Provision three of Section 3 defined the term "employee" to include "any indvidiual employed by any employer under any contract of hire, oral or written, expressed or implied." Also included thereunder were helpers and assistants, regardless of the immediate source of their compensation, if employed with the "knowledge, actual or constructive" of the employer. Provision three further extended the term "employee" to cover "any individual formerly so employed whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice." In contrast, provision three excluded from the term "employee," "any individual who has replaced a striking employee." Thus, although the striking worker was to be regarded for the purposes of the bill as being vested with a tenure of employment, the worker who took the place of a striking worker would not be entitled to similar consideration.[8]

Provision four defined the term "representative" to include "any individual or labor organization."[9] This brief definition was highly significant because it ruled out the argument that, where the statute spoke of representatives, it meant nothing more than individual persons in their individual capacities.

The term "labor organization"—a crucial term—was defined in provision five as any "organization, labor union association, corporation, or society of any kind in which employees participate to any degree whatsoever, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, or hours of employment."[10] This definition was wide enough to cover both the trade union and the company union. But it was not wide enough to cover organizations existing for the *sole purpose* of administering pension schemes, unemployment and accident insurance plans, programs for the recreation, amusement, instruction, or cultural advancement of employees. An employer would thus be free to promote pure "welfare" organizations among his employees without becoming subject to the burdens of the bill. But any "welfare" organization which transformed itself into an instrumentality of collective bargaining—which attempted to deal with wages, hours, and other working conditions—would become subject forthwith to the provisions of the bill.

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[7] Excluded as employees under the 1935 measure are agricultural, domestic, and family workers. Sec. 2(3).

[8] Striking workers and workers out of employment because of an "unfair labor practice" are defined as employees in the 1935 measure. Nothing is said, however, about workers who replace strikers. Important also is the express statement that "the term . . . shall not be limited to the employees of a particular employer. . . ." Sec. 2(3).

[9] In accord is Sec. 2(4) of the 1935 measure.

[10] In substantial accord is Sec. 2(5) of the 1935 measure. As amended by the Senate Committee, this section reads: ". . . any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work." (*Cong. Record*, daily ed., May 16, 1935, No. 102, p. 7948.)

The heart of Labor Disputes bill was contained in Sections 4 and 5. Section 4 stated the rights of employees in the following words:

> Employees shall have the right to organize and join labor organizations, and to engage in concerted activities, either in labor organizations or otherwise, for the purpose of organizing and bargaining collectively through representatives of their own choosing or for other purposes of mutual aid or protection.[11]

Evidently Section 4 was an attempt to restate the rights of Section 7(a) of the NIRA in more direct and specific form. Where Section 7(a) was vague on the question of whether or not employees could bargain collectively through trade unions as such, Section 4 of the Labor Disputes bill specified the right to join "labor organizations." Because "labor organizations" as provided in Section 3 might function as employee representatives, this was tantamount to requiring the "recognition" of representative trade unions.

The real significance of Section 4, however, derived from Section 5, wherein were enumerated six types of behavior forbidden to employers as "unfair labor practices." All six provisions sought to limit the activities of the employer with respect to the self-organization of workers; none of them attempted to limit similarly directed activities on the part of labor organizations. Provision one stated that it was an unfair labor practice for an employer to impair the rights guaranteed in Section 4 "by interference, influence, restraint, favor, coercion, or lockout or by an other means."[12] Here was a much more detailed catalogue of disabilities than those set forth in Section 7(a) of the Recovery Act. The five remaining provisions of Section 5 elaborated and clarified the meaning of provision one. Provision two declared that it was an unfair labor practice for an employer "to refuse to recognize and/or deal with representatives of his employees, or to fail to exert every reasonable effort to make and maintain agreements with such representatives concerning wages, hours, and other conditions of employment." This formula, repeating similar language in the Railway Labor Act, gave voice to the National Labor Board's construction of Section 7(a).[13] The value of the formula hinged on the meaning of the term "reasonable effort." The National Labor Board contemplated by the bill would have no power of compelling employers and trade unions to conclude collective agreements; it could only decide to its own satisfaction whether or not any employer in a given case was exerting every "reasonable effort." And this determination, naturally, would be subject to final adjudication by federal courts.[14]

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[11] Compare Sec. 7 of the 1935 measure: "Employees shall have 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." The attempt by Senator Tydings to amend this by adding, "free from coercion or intimidation from any source" was voted down by the Senate, 50 to 21. *Cong. Record*, daily ed., May 6, 1935, No. 102, p. 7974.

[12] Compare Sec. 8(1) of the 1935 measure: " . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

[13] It also gave voice to the later construction of Sec. 7(a) by the National Labor Relations Board. See Chaps. VII and XI.

[14] No similar unfair practice was stated in the original draft of the 1935 measure, although Sec. 9(a) authorized employee representatives to bargain collectively "in respect to rates of pay, wages, hours, or other basic conditions of employment." But the Senate committee added, as Sec. 8(5), a fifth unfair practice—". . . to refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 9(a)." (*Cong. Record*, daily ed., May 16, 1935, No. 102, p. 7949.)

Much more specific were provisions three and four. They imposed drastic limitations upon any activities by which an employer might seek to promote, establish, or maintain company unions. Thus provision three made it an unfair labor practice for any employer "to initiate, participate in, supervise, or influence the formation, constitution, by-laws, other governing rules, operations, policies, or elections of any labor organization." [15] And provision four made it an unfair labor practice for an employer "to contribute financial aid or other material support to any labor organization, by compensating any one for services performed in behalf of any labor organization, or by any other means whatsoever." [16] These provisions did not "outlaw" the company union, which remained just as valid as it was under Section 7(a) of the NIRA. But they laid restraints on practically every practice by means of which employers have been accustomed to encourage company unions.[17]

According to provision five, it was an unfair labor practice for any employer "to fail to notify employees in accordance with the provisions of Section 304(b)." Section 304(b) was abrogative in character, with effects that might be construed to be retroactive. It read as follows:

> Any term of a contract or agreement of any kind which conflicts with the provisions of this act is hereby abrogated, and every employer who is a party to such contract or agreement shall immediately so notify his employees by appropriate action.[18]

Evidently provision five was aimed at company unions which had been established prior to the enactment of the Labor Disputes bill by practices which the bill characterized as unfair. But the constitutionality of any such *ex post facto* provision was highly doubtful.

Provision six prohibited "discrimination" by an employer for or against any labor oragnization. It was declared an unfair labor practice for any employer "to engage in any discriminatory practice as to wage or hour differentials, advancement, demotion, hire, tenure of employment, reinstatement, or any other condition of employment, which encourages membership or nonmembership in any organization." [19] This formula was directly aimed at such tactics as discharging workers for refusing to join a company union; refusing to hire or advance workers because of membership in a trade union; paying members of a company union higher wages or giving them shorter hours than trade union workers performing identical tasks. Its pur-

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[15] Compare Sec. 8(2) of the 1935 measure: ". . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

[16] Compare the same. But Sec. 8(2) contains the proviso: "That subject to rules and regulations made and published by the Board . . . an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

[17] These two provisions may be compared with (1) the Texas and New Orleans case under the Railway Labor Act of 1926, 281 U.S. 548 (1930); (2) the decisions of the NLB and of the NLRB bearing on company unions, Chaps. VI, VII, and XI; (3) certain language in the amendments to the Bankruptcy Act of 1933 and 1934, 47 Stat. L. 1481; U.S.C., Title 11, Secs. 205 (p) and (q), and 48 Stat. L. 912, U.S.C. Title 11, Secs. 207 (l) and (m); (4) similar language in the Emergency Transportation Act of 1933, 48 Stat. L. 214; U.S.C. Title 49, Sec. 257(e); (5) Mr. Eastman's interpretation thereof as co-ordinator of transportation, *New York Times*, Dec. 9, 1933; (6) above all, the Railway Labor Act as amended in 1934, 48 Stat. L. 1185.

[18] No similar provision is contained in the 1935 measure.

[19] Compare Sec. 8(3) of the 1935 measure: ". . . 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"; to which is added 8(4)—"to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this act."

pose was to compel employers to treat all employees on an equal footing regardless of their union affiliations.

Provision six was subject, however, to two important provisos. The first read:

> Provided, that where a contract or agreement of any kind is or shall be in force between an employer and a group of employees, the provisions of such contract or agreement regarding conditions of employment shall not, because of anything contained in this paragraph, compel an employer to observe similar conditions of employment in his relations with all his employees.[20]

It was not clear what the language meant. Probably it was intended to mean that if an employer entered into an agreement with some particular craft organization, he was not obliged to enter into identical agreements with other organizations covering different crafts. Yet it might also be construed to mean that it was permissible for the employer to make different contracts with different organized groups pursuing the same crafts. This would assume a plurality of bargaining groups, each group bargaining for itself. Such a result would have been in conflict with the stand taken by the National Labor Board on majority-minority representation, and would have raised difficult questions bearing on "discrimination."

The second proviso read:

> Provided further, that nothing in this act shall preclude an employer and a labor organization from agreeing that a person seeking employment shall be required, as a condition of employment, to join such labor organization, if no attempt is made to influence such labor organization by any unfair labor practice, if such labor organization is composed of at least a majority of such employers' employees, and if the said agreement does not cover a period in excess of one year.[21]

This proviso was obviously intended to validate closed-shop agreements executed under the conditions specified. The proviso was no doubt intended to safeguard trade unions in the execution of closed-shop contracts. Nevertheless, a closed-shop contract with a company union would also be valid, provided the company union had not been formed and was not being maintained by means of unfair labor practices.

Both provisos were susceptible of a construction which might be taken to evidence a trade union bias in the Labor Disputes bill. Under the first, an employer might grant to his organized workers a favorable contract, which need not necessarily apply to the unorganized workers. This, if done without "discrimination," would serve as an inducement on workers to enroll in the union enjoying the contract. Under the second proviso, it might be expected that only trade union closed-shop agreements would be valid. This followed from the numerous rigid and extreme restraints which the bill imposed on the activities of the employer with respect to initiating and promoting labor organizations.

Section 6 was the enforcing clause of Title I. It invested the several district courts of the United States with jurisdiction to prevent and restrain "any unfair labor practice that burdens or affects commerce or

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[20] Nothing akin to this is contained in the 1935 measure. But Sec. 9(b) thereof empowers the Board to define collective bargaining units.

[21] Compare a like proviso to Sec. 8(3) in the 1935 measure. As amended by the Senate committee, the proviso reads in part: "if such labor organization is the representative of the employees as provided in Section 9(a)" (*Cong. Rec.*, daily ed., May 16, 1935, No. 102, p. 7949.) Sec. 9(a) requires majority rule.

obstructs the free flow of commerce, or has led or tends to lead to a labor dispute that might affect or burden or obstruct the free flow of commerce." It was the duty of the several district attorneys of the United States—under the direction of the Attorney General (but solely at the request of the National Labor Board)—to institute appropriate equity proceedings in their respective districts.[22]

POWERS OF THE BOARD

Title II of the Labor Disputes bill was concerned primarily with the organization, procedure, and powers of the National Labor Board to be established thereunder. Sections 201–03 inclusive dealt with the personnel of the Board, their compensation, the *situs* of the Board's activities, and similar matters.[23]

The principal powers of the Board as set forth in Sections 204 to 207 inclusive, were: first, to mediate and conciliate in labor disputes; second, to restrain unfair labor practices, by issuing "cease and desist" orders; third, to function as an arbitrator upon voluntary joint submission; fourth, to investigate and determine representation controversies. The cease and desist orders, it was provided, should be subject to judicial review in the federal courts, the "facts" as found by the Board being accepted as "conclusive." [24] In determining representation controversies, the Board might hold secret ballot elections; but nothing was said about majority rule or proportional representation.[25] In the exercise of its investigatory powers the Board could administer oaths and affirmations, take depositions and evidence, require the presence of witnesses and the production of books.[26] Also the Board could, from time to time, "make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of the act." [27]

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[22] In substantial accord was Sec. 11 of the original draft of the 1935 measure. But this provision was eliminated by the Senate committee, a change which, together with other amendments, would allow the Board direct access to the federal courts. *Cong. Rec.*, daily ed., May 16, 1935, No. 102, p. 7951.

[23] There were to be seven members, to be appointed by the President with the advice and consent of the Senate. Three members representing the public were to serve full time at a salary of $10,000 a year each. Two of the members were to be designated as representatives of employers and two as representatives of employees. These partisan members were to serve one year each, at a per diem compensation of $25. All members were to be eligible for reappointment. The President was to designate one of the public members as chairman. The Board was empowered to avail itself of the services of a salaried staff, and to establish regional boards from time to time whenever necessary. Under the 1935 bill three members, all presumably "impartial," were to be appointed. It should be stressed that under both the 1934 and 1935 measure, the National Board in contemplation was to be independent of the Department of Labor. But in the form of the 1935 measure, reported out by the House Committee on Labor, the Board was to be created "in the Department of Labor." 74 Cong. 1 sess., H. rep. 1147 (by Mr. Connery to accompany S. 1958), p. 2 and pp. 11–14.

[24] To the same effect, Secs. 10(e) and (f) of the 1935 measure.

[25] Sec. 9(a) of the 1935 measure as originally written affirms majority rule in the choice of representatives for "collective bargaining," but "any individual employee or group of employees shall have the right at any time to present grievances to their employer through representatives of their own choosing." But the Senate committee struck out the phrase, "through rpresentatives of their own choosing." (*Cong. Rec.*, daily ed., May 16, 1935, No. 102, p. 7950.)

[26] Compare Sec. 13 of the 1935 measure.

[27] Compare Sec. 6(a) of the 1935 measure. Under the original draft of the 1935 measure, the Board would be empowered: to prevent unfair labor practices (Sec. 10); to define collective bargaining units (Sec. 9–b); to determine representation controversies (Sec. 9–c), presumably by majority rule (Sec. 9–a); and to act as a voluntary arbitrator (Sec. 12). Nothing is said about conciliation and mediation. But Sec. 12 was eliminated by the Senate committee, thereby removing the Board from arbitration as well as conciliation. (*Cong. Rec.*, daily ed., May 16, 1935, No. 102, p. 7951.) The Senate Committee also amended Sec. 4(a) to read "Nothing in this shall be construed to authorize the Board to appoint individuals for the purpose of mediation and conciliation (or for statistical work) where such service may be obtained from the Department of Labor." (The same, p. 7948.)

We need not develop those provisions of Title II which dealt with the intricate federal court procedures for reviewing and enforcing the orders, determinations, and awards of the Board.[28] Section 210 provided for a fine of not more than $5,000 and imprisonment for not more than one year, or both, to apply to "any person who shall willfully assault, resist, impede, or interfere with any member of the Board or any of its agents in the performance of his duties." Resistance of the Board in the exercise of its statutory powers was thus made a criminal offense. But resistance to the orders, determinations, and awards of the Board, if punishable at all, could be punished only through contempt of court proceedings. For the federal courts, in the last analysis, had the power of reviewing all such instruments, and of confirming, modifying, suspending, or vacating them.[29]

The most important part of Title III of the Labor Disputes bill was Section 303, which affirmed the right of employees to strike. The section read: "Nothing in this act shall be construed so as to interfere with or impede or diminish in any way the right to strike."[30]

THE ATTACK ON THE BILL

Few bills in recent years have evoked such determined, organized, and large-scale opposition as did the proposed Labor Disputes Act.[31] Practically every important employer organization in the United States, as well as a great many individual employers, appeared to speak against it.[32] Employee representatives from numerous company unions, particularly in the iron and steel industry, also appeared to speak in opposition to the proposed legislation. Finally, the bill was opposed by the "left wing" of the organized labor movement.[33]

EMPLOYERS' ARGUMENTS

Many specific objections were raised against the bill, but in the main they were reducible to four points. The first and most frequent objection was that the bill was economically unsound in that it would promote rather than allay labor strife. This presumably would follow from the provisions which made continuance of employee representation impossible and thus gave the A. F. of L. unions a "monopoly" of organization with the concomitant results of "compulsory" unionization and a universal "closed shop."

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[28] The essential procedure—prevention of unfair labor practices—was based upon the procedures long followed by the Federal Trade Commission. Procedure under the 1935 measure is based still more closely upon that followed by the Federal Trade Commission.

[29] For court procedure contemplated under the 1935 measure as it passed the Senate, see Secs. 10 and 11.

[30] In accord, is Sec. 15 of the original 1935 measure, which became Sec. 13 as amended by the Senate committee.

[31] An important factor in giving heart to the opposition against the bill was the automobile strike settlement of Mar. 25, 1934. This settlement (discussed in Chap. XIII) seemingly committed the Administration to principles of industrial relations in conflict with those worked out by the National Labor Board and reflected in the provisions of the bill. The opponents of the bill began their case on Mar. 26, 1934. (73 Cong. 2 sess., *To Create a National Labor Board*, Hearings before Senate Committee on Education and Labor on S. 2926, Pts. I–III.) For the arguments pro and con on the 1935 measure, see 74 Cong. 1 sess., *National Labor Relations Board*, Hearings before Senate Committee on Education and Labor on S. 1958, Pts. I–III.

[32] Namely, National Association of Manufacturers, Hearings on S. 2596, pp. 340–41; Full Fashioned Hosiery Association Inc., pp. 427–28; National Publishers Association, pp. 459–60; American Cotton Manufacturers Association, pp. 622–23; American Transit Association, pp. 678–84; National Automobile Chamber of Commerce, pp. 709–17; U.S. Chamber of Commerce, pp. 495–502; representatives of individual companies, such as American Rolling Mill, Youngstown Sheet and Tube, Republic Steel, United States Steel, National and Weirton Steel, and so forth.

[33] A similar alignment of forces made itself manifest at the hearings on the 1935 measure.

The second objection was that the bill exemplified class legislation. It imposed restraints on employers but not on workers or trade unions. This was manifestly unjust. The third objection was on constitutional grounds. The bill, it was claimed, represented an unconstitutional extension of the powers of Congress over "interstate commerce" and the "general welfare," granted extraordinary and arbitrary administrative powers to the National Labor Board, and was in conflict with the "true" interpretation of Section 7(a) evolved by the National Recovery Administration.[34] Finally, it was said, the bill proposed hasty and immature measures of fundamental reform at a time when what was needed was emergency legislation to hasten recovery.

The arguments of James A. Emery, representing the National Association of Manufacturers, in his attack against the bill covered the ground rather fully. He said:

> We will demonstrate that it is not an exercise of the commerce power of Congress, but a deliberate and indefensible invasion of the right [that is, of the States] to regulate . . . local employment conditions. . . . But assuming the bill were within the commerce power, the administrative body established, the authority proposed, the manner of its exercise, are arbitrary, destructive of the fundamental rights of the parties, and vest in an administrative body the determination of facts and law, without judicial review, that may be adjudicated only by a court.[35]

Mr. Emery quoted with approval the President's statement of principle made the day before in settling the automobile strike,[36] to the effect that the government's only duty was to secure freedom of choice and not to favor a particular form of labor organization. But Senator Wagner's bill, said Mr. Emery,

> . . . will stimulate complaints, promote the interruption of employment and deliberately undertake by its definitions and operation to force employees into one form of labor organization—the union. It will secure through the union, monopolistic control, assuring the unrestricted use of the strike, and thus confer the power to assess the public with the costs of sustaining a labor monopoly, established with federal aid, relieved of appropriate legal control, and without corresponding responsibilities for the acts of its agents.[37]

Mr. Emery concluded: "The issue it presents is plain. It is no mere dispute over policy between employers and labor union. It is a deliberate step toward a nation unionized by the act of government." [38]

Other representatives of employer organizations restated these arguments in different ways. A few quotations may be interesting as illustrative of the psychological factors animating employers. Thus, the Pittsburgh Chamber of Commerce opposed the bill, because "it is frankly subversive of the whole spirit of the original recovery legislation. Under the cover of the provisions for collective bargaining in Section 7(a) . . . a group of professional labor agitators are undertaking with the aid of Senator Wagner . . . to compel the great free majority of American workingmen to join a labor federation which they never have been willing to join of their own accord, and the professional leaders of which are endeavoring to make themselves masters of a labor monopoly with unprecedented powers tantamount to dicta-

[34] The Johnson-Richberg interpretation is best set forth in *NRA Releases No. 463*, Aug. 23, 1933; *No. 625*, Sept. 4, 1933; *No. 3125*, Feb. 4, 1934. See also Chaps. III and X.
[35] Hearings on S. 2926, p. 341.
[36] See Chap. XIII, pp. 352–54.
[37] Hearings on S. 2926, p. 345.
[38] The same, p. 394.

torship over all American labor and industry." [39] E. M. Torrey, speaking for the Employers' Association of Northern New Jersey, was particularly outspoken in his objection to the bill:

> We believe it to be inequitable, economically unsound, pregnant with class antagonism, and therefore contrary to sound public policy. From our experience, we believe this measure is aptly called the "Labor Disputes Act." We feel that its enactment would assure an unprecedented volume of labor disturbances. . . . The explanation of this . . . is simple. With few exceptions, strikes do not happen. They are caused. The setting up of a governmental bi-partisan agency to mediate labor disputes . . . naturally [suggests] to those trained in promoting labor organizations the possibility of advantages to be gained. To secure action by such an agency, there must be a dispute. Therefore, a strike must be promoted.[40]

Henry I. Harriman, president of the United States Chamber of Commerce, attacked the bill on constitutional grounds. The bill sought, as he saw it, "to broaden and make permanent the rights and privileges" which labor had gained under NIRA, "without similarly making permanent those features which affect business." [41] Arthur H. Young, vice-president of the United States Steel Corporation in charge of industrial relations, objected to what he thought was the basic theory of the bill; that there exists a fundamental conflict of interest between capital and labor. "I find this bill" he said, ". . . both vicious and undesirable because of its fundamental philosophy." He continued:

> All of its provisions assume a regimentation of each side into a warring camp, and intercourse between the two is referred to in terms and implications of perpetual strife. This is in utter disregard of progress toward complete co-operation and the abolition of small remaining areas of conflict . . . that has distinguished and uniquely characterized industrial relations in the U.S.A.[42]

Mr. Young launched into a defense of work councils and employee representation plans as devices for the implementation of collective bargaining, and emphasized the futility of attempts to fit the square peg of the craft union structure of the A. F. of L. into the round hole of the industrial structure of modern business.[43]

Thomas Girdler, president of the Republic Steel Corporation, opposed the bill because "it is designed to interfere with direct contact between management and employees and to destroy the friendly relations which now exist. . . . I think its purpose is to unionize all industry and to subject our plants to the domination of national labor unions. Senator Wagner may call this a bill to equalize the bargaining power of employers and employees, but I call it a bill to tie the hands of employers and turn industry over to the American Federation of Labor." [44]

It is not necessary to state in detail the arguments put forward by representatives of company unions. Almost uniformly, these arguments followed the same line of attack: existing employee representation plans had come into being by the worker's free choice, and consti-

[39] The same, p. 412.
[40] The same, pp. 478–79.
[41] The same, p. 497.
[42] The same, p. 720. Compare Judge Nields' statement of Feb. 27, 1935 in denying an injunction against the Weirton Steel Co.: "The theory of a balance of power [between labor and management] is based upon the assumption of an inevitable and necessary diversity of interest. This is the traditional Old World theory. It is not the twentieth century American theory of that relation as dependent upon mutual interest, understanding and good-will. This modern theory is embodied in the Weirton plan of employee representation." (*New York Times*, Feb. 28, 1935.)
[43] Hearings on S. 2926, pp. 721–27.
[44] The same, pp. 773–78.

tuted genuine instrumentalities of collective bargaining. The bill was aimed against such plans; therefore it was bad and should not be passed by Congress.

OPPOSITION OF "LEFT WING" UNIONISTS

The "left wing" trade unions were opposed to the bill, because they believed that it aimed to suppress strikes and to introduce compulsory arbitration. They saw in it a purposeful check to the revolutionary activities of a militant labor movement. They pointed to the record of the existing National Labor Board, arguing that the Board had been successful only in strike breaking. Senate bill No. 2926, as they saw it, was only a device for giving statutory sanction to similar strike-breaking activities in the future. This point of view was expressed by William F. Dunne, who spoke on behalf of the Trade Union Unity League. He said:

> It is true that the Wagner bill has a certain emergency character, but its main provisions are inherent in clause 7(a) of the National Recovery Act of which it is an extension. As such, the Wagner bill, under the guise of stimulating and increasing the so-called "bargaining power" of labor organizations, actually diminishes the power of workers to obtain better wages and working conditions by putting still more obstacles in the way of the effective use of the strike weapon.[45]

What the government was aiming at, he declared, was a cessation of militant labor action. To quote:

> Now the peace that the Wagner bill and the official program of the A. F. of L. proposes is the *pax Romana*—the peace of death—for the American working class. It is a program of preparation for a new drive against the working class and its living standards, preparation for imperialist war, and a step toward Fascism.[46]

DEFENSE OF THE BILL

The supporters of the Labor Disputes bill who appeared before the Labor Committee comprised: (1) members of the National Labor Board system,[47] (2) officers of the American Federation of Labor and its unions,[48] and (3) government officials and college professors concerned with labor problems.[49]

The supporters of the bill uniformly described it as a measure to clarify the intent of and to "put teeth" into Section 7(a). The statute, they claimed, had fallen short of the mark principally because of the activities of employers in organizing company unions. Just so long as the employer was able to impose employee representative schemes on his workers, they argued, true collective bargaining was impossible. Something had to be done, therefore, to free the worker from the interference of his employer; to make the worker a "free man." The general refrain of proponents of the bill was that the company union was a menace not only to the NIRA but to the "very freedom of the American people." [50]

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[45] Hearings on S. 2926, p. 973.
[46] The same, p. 992.
[47] For example, Senator Wagner, Hearings on S. 2926, pp. 7–18; Father Haas, pp. 113–20; Mr. Handler, pp. 28–38; Mrs. E. M. Herrick, pp. 176–88.
[48] For example, Mr. Green, the same, pp. 67–113; Mr. Lewis, pp. 138–57; Mr. Hillman, pp. 120–24.
[49] For example, Secretary of Labor Perkins, the same, pp. 18–27; William M. Leiserson, pp. 231–40; Sumner H. Slichter, pp. 58–65; Paul F. Brissenden, pp. 211–20.
[50] Hearings on S. 2926, p. 191.

The supporters of the bill all argued, further, that some means must be found to compel employers to abide by the implicit obligations of Section 7(a). This point was most elaborately stated by William Green:

> The bill we are discussing today must be looked upon as a frank recognition of several facts. First, that collective bargaining is not wanted by all employers; second, that some employers . . . have shown themselves entirely unwilling to support the recovery program; third, that if unobstructed organization of workers is to proceed, it must do so in the face of bitter and often unscrupulous opposition from these employers; fourth, that if collective bargaining is to be carried out, it must be forced upon some employers; and fifth, that . . . [the National Labor Board] . . . has not the requisite power and authority to enforce Section 7(a).

Mr. Green then proceeded to develop the theme of enforcement:

> Certainly no one can deny that the National Labor Board has done a real work. But no one can deny that it has not done what it was hoped it would do. This failure to fulfill all our hopes can in no way be considered as the fault of the Board itself. Rather, it is due entirely to the position in which the Board has been placed by the ambiguous nature of Section 7(a). The National Labor Board has been given a heavy burden of responsibility—that of preserving industrial peace—without the accompanying authority which is essential if its responsibility is to be fulfilled. The Board has been consistently forced to straddle the real issue in many of the cases . . . union recognition for collective bargaining. . . . Unless Congress is prepared to establish the National Labor Board as an authoritative body, with power to enforce its ruling, it must be prepared to see the entire national recovery program held in increasing disrespect and disregard. There is no middle course. For seven months we have tried the method of persuasion. It has not worked. We are now forced to recognize that a deliberate and planned campaign is under way on the part of certain employers, not to comply with Section 7(a). We must recognize this fact and meet it.[51]

The third major argument of the supporters of the bill was that where employers are unwilling to recognize truly representative trade unions, collective bargaining becomes but a sterile right. It was not enough merely to prevent the employer from foisting upon his workers labor organizations dominated by himself. It was necessary that the employer be obliged to meet and confer with the workers' representatives in negotiations looking toward the execution of collective agreements. In Senator Wagner's words, the first defect of Section 7(a) was "that it restated the right of employees to bargain collectively, but did not impose upon employers the duty to recognize such representatives." Failure to acknowledge this correlative duty "caused more than 70 percent of the disputes coming before the National Labor Board. The new bill, therefore, provides that employers shall recognize those chosen by their workers and shall make efforts to arrive at satisfactory agreements. . . ." [52]

THE NATIONAL INDUSTRIAL ADJUSTMENT BILL

The Senate Committee on Labor and Education concluded its hearings on the Labor Disputes bill on April 9, 1934. For more than a month thereafter the press was filled with gossip and rumors bearing on the ultimate fate of the bill, its acceptability to the President, and its relation to the general legislative program of the Administration.

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[51] The same, pp. 70–71.
[52] The same, p. 8.

While the bill rested with the committee a new upsurge of strikes began. These strikes of the late spring of 1934 were characterized by extreme and widespread violence. Three strikes in particular were featured by the newspapers; those of truck drivers in Minneapolis, employees of the Electric Auto-Lite Company of Toledo, Ohio, and longshoremen in the Pacific Coast ports, particularly San Francisco. "Union recognition" was the main issue in all three, as well as in many others that occurred during the spring months. Stirred into action by the crescendo of labor unrest, the Senate Labor Committee on May 26, 1934 reported out the Labor Disputes bill favorably, not in the original form, but in totally revised draft that came to be known as the National Industrial Adjustment bill.[53]

The National Industrial Adjustment bill differed from the Labor Disputes bill radically. The declarational of public policy in the new bill was toned down,[54] all references to equality of bargaining power being eliminated. The term "employer" was amended to exclude any person employing less than ten employees.[55] The term "employee" was amended to exclude agricultural workers, domestic servants, and workers in family enterprises.[56] The prohibition against regarding as employees, new workers who replace strikers, was removed. Section 4 of the original bill, stating the general rights of employees with regard to collective bargaining, was taken out. Above all, the unfair labor practices were reduced in number from six to four, and the content of these practices was substantially modified.[57] Under the new bill it would be unfair: (1) for employers to interfere with the self-organization of employees; (2) for employees to interfere with the self-organization of employers;[58] (3) for employers to dominate any labor organization or contribute financial support to it;[59] (4) for employers to encourage or discourage membership in any labor organization by discriminating in hire or tenure, in terms or conditions of employment.[60] It would no longer be an unfair labor practice, however, for the employer to refuse to recognize or deal with the representatives of his employees; or for the employer to fail to exert all reasonable efforts to make and maintain collective agreements. Also, instead of being forbidden to take any part whatever in the formation and maintenance of labor organizations, the employer was merely forbidden from "dominating" or "financing" them. Thus, from the trade

[53] 73 Cong. 2 sess., S. 2926 (rep. 1184). "A bill to equalize the bargaining power of employers and employees, to promote the amicable settlement of labor disputes, to create a National Labor Board, and for other purposes."

[54] The new declaration read: "It is hereby declared to be the policy of the United States to remove unnecessary obstructions to the free flow of commerce, to encourage the establishment of uniform labor standards, and to provide for the general welfare, by establishing agencies for the peaceful settlement of labor disputes, and by protecting the exercise by the worker of complete 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." (Sec. 1.)

[55] Sec. 2(2).

[56] Sec. 2(3).

[57] Sec. 3(1–4).

[58] In passing the Labor Relations bill on May 16, 1935, the Senate voted down—50 to 21—an amendment proposed by Senator Millard E. Tydings of Maryland to prohibit coercion and intimidation by labor unions as well as by employers. *Cong. Record,* daily ed., May 16, 1935, No. 102, p. 7974.

[59] This was subject to a proviso enabling employers to compensate employee representatives for time taken from work and devoted to the business of a labor organization.

[60] This was subject to a proviso validating, under specified circumstances, contracts requiring membership in a labor organization on the part of persons seeking employment. Sec. 3(4).

union point of view, most of the teeth of the original bill were extracted in the revised draft. Both the employer's duties to recognize representative unions, and his disabilities in forming and maintaining company unions, were weakened.

Instead of a National Labor Board enjoying autonomous powers similar to those of the Federal Trade or Interstate Commerce Commission, the new bill provided for a National Industrial Adjustment Board "in the Department of Labor." [61] The National Industrial Adjustment Board was empowered to engage in four types of activities: (1) prevention of unfair labor practices; [62] (2) voluntary arbitration upon joint submission; (3) determination of the identity of employee representatives, by secret ballot or other suitable method; and (4) investigations necessary to prevent unfair labor practices and to determine the identity of employee representatives. The bill, it should be noted, failed to empower the Board to engage in the mediation and conciliation of labor disputes. Presumably, these functions were to revert to the Conciliation Service of the Department of Labor.

In place of Section 303 of the original draft, which expressly affirmed the right to strike, the new draft engaged in circumlocution by a provision which read as follows:

> Nothing in this act shall be construed to require any employee to render labor or service without his consent, or to authorize the issuance of any order or injunction requiring such service, or to make illegal the failure or refusal of any employee individually, or any number of employees collectively, to render labor or service.[63]

Despite the favorable report of the Senate Labor Committee, the National Industrial Adjustment bill never came to a vote. Anti-union employers opposed it with the same vigor with which they had opposed the Labor Disputes bill, because in their opinion the new bill still offered an opening wedge to the A. F. of L. to unionize all industry under closed-shop conditions. Organized labor maintained a discreet silence on the new bill. It was evident, however, that the trade unions were disappointed with it in general, and suspicious of it on those particular points where it amended the original bill.

PUBLIC RESOLUTION NO. 44

It seemed for a while that Congress would adjourn without enacting any legislation to supplement Section 7(a). However, at the last moment before the adjournment of Congress, the President, motivated no doubt by the threatening imminence of a nation-wide strike in the steel industry,[64] informally transmitted to congressional leaders in both the Senate and the House a draft of a proposed resolution. On

[61] Section 4(a). The NIAB was to be composed of five members. Three of these were to be representatives of the public. The remaining two, one representing employers, the other employees, were to be drawn from appropriate panels. (Secs. 4–b and 4–c.) Under the 1935 measure as passed by the Senate (but not as recommended by the House Labor Committee), the NLRB would be independent of the Department of Labor.

[62] But the initiative, in bringing cases to the attention of the Board, had to come from the Secretary of Labor. Under the Labor Disputes bill, the National Labor Board was empowered to act on its own initiative.

[63] Sec. 140. This provision, taken in the context of the bill's principal objective—"peaceful settlement of labor disputes"—might reasonably be taken to limit the right to strike. In its positive content it merely reaffirmed the usual prohibition against involuntary servitude.

[64] The Amalgamated Association of Iron, Steel and Tin Workers called the strike for June 16, 1934 but rescinded the call at the last moment. See Chap. XII, p. 335.

June 15, 1934 this resolution was introduced as Senate Joint Resolution No. 143 by Senator Robinson of Arkansas and as House Joint Resolution No. 375 by Representative Byrns. With certain amendments,[65] it was enacted on June 16 as Public Resolution No. 44 and signed by the President on June 19.[66]

Public Resolution No. 44 professed to "effectuate the policy of the National Industrial Recovery Act" and contained six sections.[67] The President was empowered to establish a board or boards "authorized and directed to investigate issues, facts, practices, or activities of employers or employees in any controversies arising under Section 7 (a) . . . or which are burdening or obstructing, or threatening to burden or obstruct, the free flow of interstate commerce." Each such board was empowered "when it shall appear in the public interest" to conduct elections to determine by what "person, persons, or labor organization" the workers wished to be represented in collective bargaining. To expedite and facilitate the holding of such elections, the boards were authorized to call for the production of records and to take testimony under oath. All orders issued by the boards under authority of this section were to be enforced or reviewed "in the same manner, so far as is practicable," as provided for in the cases of orders issued by the Federal Trade Commission under the Federal Trade Commission Act.

The boards were given administrative power of prescribing, with presidential approval, such rules and regulations as were necessary; (1) with reference to the investigation of labor disputes, and (2) "to assure freedom from coercion in respect to all elections." Persons knowingly violating such rules and regulations, and/or who interfered with or impeded any member or agent of the board in the performance of his duties, were punishable by a fine of not more than $1,000 or imprisonment for not more than one year, or both. The resolution and the boards established thereunder, were not to continue beyond June 16, 1935, to the expiration date of the Recovery Act. Finally, the right to strike was safeguarded in Section 6 of the resolution as follows: "Nothing in this resolution shall prevent or impede or diminish in any way the right of employees to strike or to engage in other concerted activities."

Not much remained in the joint resolution of either the Labor Disputes bill or of the Industrial Adjustment bill. The boards established under the joint resolution might: (1) conduct elections of employee representatives; and (2) investigate labor disputes. But that was the practical limit of their authority. With reference to election procedure alone, the boards might issue orders patterned after the orders of the Federal Trade Commission. No new powers of enforcement were given these boards; compliance was to be obtained in the old way, through reference to the NRA for the removal of the offender's Blue Eagle, or to the Department of Justice for court proceedings. Furthermore, no unfair labor practices were specified.[68]

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[65] Notably Sec. 6 guaranteeing the right to strike introduced by Senator LaFollette.

[66] No record vote was taken except in the Senate on the LaFollette amendment, which passed unanimously.

[67] Stat. L. 1183; U.S.C., Title 15, Secs. 702(a)–(f).

[68] "The text of the joint resolution reads:

"To effectuate further the policy of the NIRA. *Resolved by the Senate and the House of Representatives of the U.S.A. in Congress assembled,* That in order to further effectuate the policy of Title I of the NIRA, and in the exercise of the powers therein and herein conferred, the President is authorized to establish a board or boards authorized and directed

Public Resolution No. 44 was at bottom a compromise which avoided the basic issues raised by the NLB's efforts to interpret and apply Section 7(a). It served as a basis for establishing the National Labor Relations Board and a number of other boards which are considered in subsequent chapters. And the experiences of these joint resolution boards served to prepare the path for the introduction, in 1935, of the National Labor Relations bill.[69]

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to investigate issues, facts, practices or activities of employers or employees in any controversies arising under Section 7(a) of said act or which are burdening or obstructing, or threatening to burden or obstruct, the free flow of interstate commerce, the salaries, compensation and expense of the board or boards and necessary employees being paid as provided in Section 2 of the NIRA.

"Sec. 2. Any board so established is hereby empowered, when it shall appear in the public interest, to order and conduct an election by a secret ballot of any of the employees of any employer, to determine by what person or persons or organization they desire to be represented in order to insure the right of employees to organize and to select their representatives for the purpose of collective bargaining as defined in Section 7(a) of said act and now incorporated herein.

"For the purpose of such election such a board shall have the authority to order the production of such pertinent documents or the appearance of such witnesses to give testimony under oath, as it may deem necessary to carry out the provisions of this resolution. Any order issued by such a board under the authority of this section may, upon application of the board or upon petition of the person or persons to whom such order is directed, be enforced or reviewed, as the case may be, in the same manner, so far as applicable, as is provided in the case of an order of the Federal Trade Commission under the FTC Act.

"Sec. 3. Any such board, with the approval of the President, may prescribe such rules and regulations as it deems necessary to carry out the provisions of this resolution with reference to the investigations authorized in Section 1, and to assure freedom from coercion in respect to all elections.

"Sec. 4. Any person who shall knowingly violate any rule or regulation authorized under Section 3 of this resolution or impede or interfere with any member or agent of any board established under this resolution in the performance of his duties, shall be punishable by a fine of not more than $1,000 or by imprisonment for not more than one year, or both.

"Sec. 5. This resolution shall cease to be in effect, and any board or board established thereunder shall cease to exist, on June 16, 1935, or sooner, if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by Section 1 of the NIRA has ended.

"Sec. 6. Nothing in this resolution shall prevent or impede or diminish in any way the right of employees to strike or engage in other concerted activities."

[69] The Labor Relations bill had already been passed by the Senate (May 16) and favorably reported out by the House Labor Committee (May 21) when the Recovery Act codes were held to be unconstitutional by the Supreme Court (May 27, 1935). Until June 16, 1935, however, Public Resolution No. 44 still remained theoretically in effect, although the powers of the boards established thereunder to adjudicate on Sec. 7(a) disputes were terminated forthwith. On June 19, 1935 the House passed the Labor Relations bill without a record vote. It accepted an amendment, proposed by the House committee, to rewrite the declaration of public policy in an attempt to accommodate the intent of the measure to the concepts formulated by the Supreme Court in the Schechter case decision (*Cong. Rec.*, daily ed., June 19, 1935, no. 126, p. 10099). The new declaration of policy read in part as follows:

"The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife and unrest, which have the intent or the necessary effect of burdening or obstructing interstate and foreign commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the process of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption, and promotes the flow of . . . commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes . . . as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees."

To the same end, the House also accepted a re-definition of the term "affecting commerce" to read: ". . . in commerce or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (the same, p. 10100). The House voted down the committee amendment put the National Labor Relations Board "in the Department of Labor" (the same, p. 10106). It also voted down several other amendments: to include agricultural workers within the scope of the act; to limit the right to strike; to relax the restraint against company unions; and to prevent "coercion by trade unions." The House passed an amendment providing that "units of collective bargaining," when defined by the Board, should not include the employees of more than one employer. This amendment and another referring to freedom of speech were, however, removed in conference. The conference report was accepted by both houses of Congress on June 27, and the bill was signed by the President on July 5, 1935.

CHAPTER XI. THE NATIONAL LABOR RELATIONS BOARD

In the general scheme of new agencies for dealing with industrial relations under Section 7(a), the National Labor Relations Board held a key position, even more important than that held by its predecessor, the National Labor Board. The NLRB was the potential source of a new "common law" on collective bargaining by which the legal foundations of industrial relations in the United States may some day be recast. It was also the potential supreme arbiter over the activities of all other Recovery Act boards in the field. We must therefore first consider the NLRB before passing to an analysis of the other labor relations boards which concerned themselves with Section 7(a). We shall examine in turn the Board's powers and jurisdiction; its organization and functions; its contributions to the theory of Section 7(a); and some of its principal operational problems. The story is carried no further than May 27, 1935, when the United States Supreme Court ruled unanimously that the NRA codes were unconstitutional.

POWERS AND JURISDICTION

On June 29, 1934 the President issued an executive order providing for the establishment "in connection with the Department of Labor" of the NLRB as the successor of the NLB.[1] The creation of the one and the abolition of the other board became effective on July 9, 1934. This executive order was issued in reliance upon Public Resolution No. 44, the story of which was related in Chapter IX. The powers and jurisdiction of the NLRB were thus based, in general outlines, upon this resolution, and in specific details upon the executive order.[2] These powers and jurisdiction may be summed up as follows:

(1) The Board could investigate any and all labor disputes which arose under Section 7(a) of the Recovery Act or which affected interstate commerce; (2) it could order elections among any groups of employees—whenever such elections appeared to be "in the public interest"—to determine through secret ballot by what persons or organization the employees wished to be represented for purposes of collective bargaining; (3) it could hold hearings and issue findings of fact in all cases involving alleged violations of Section 7(a); (4) it could, subject to presidential approval, lay down rules and regulations necessary to carry on its investigatory activities and to assure freedom from coercion with regard to elections; (5) it could recommend to the President rules and regulations relating to collective bargaining, labor relations, and labor representation, to be prescribed by the President in reliance on the powers granted to him by Section 10(a) of the Re-

[1] Executive Order No. 6763.

[2] Both the resolution and the order are quoted in full in *Decisions of the NLRB* (July-December 1934), pp. v-vi, vii-ix.

covery Act; (6) it could act as a tribunal of arbitration upon voluntary joint submission.

With regard to labor elections, but to no other subject matter of its activities, the Board had the power to subpoena witnesses, take testimony under oath, and issue orders which were reviewable or enforceable by the federal courts in the same manner as an order of the Federal Trade Commission. Any person who knowingly violated Board rules (approved by the President) bearing upon the investigation of labor disputes or coercion in elections was liable to a fine of not more than $1,000, or imprisonment for not more than one year, or both. In all other matters the Board had to rely for enforcement discipline on the NRA and the Department of Justice.

The executive order specified the relations of the NLRB to other boards growing out of the Recovery Act. In view of the importance of this relationship and of the controversies which it aroused, it may be best to quote Sections 3(a) and 4(c), which are directly pertinent. Section 3(a) authorized the Board as follows:

> 1. To study the activities of such boards as have been or may hereafter be created to deal with industrial or labor relations, in order to report through the Secretary of Labor to the President whether such boards should be designated as special boards and given the powers that the President is authorized to confer by Public Resolution 44.
>
> 2. To recommend through the Secretary of Labor, to the President, the establishment, whenever necessary of "regional labor relations boards" and special labor boards for particular industries vested with the powers that the President is authorized to confer by Public Resolution 44.
>
> 3. To receive from such regional, industrial and special boards as may be designated or established (in accordance with 1 and 2) reports of their activities and to review or hear appeals from such boards in cases in which (1) the board recommends review, or (2) there is a division of opinion in the board, or (3) the National Labor Relations Board deems review will serve the public interest.

Section 3(a), it would seem, constituted the NLRB as a "Supreme Court" over all other joint resolution boards subsequently established.[3] At the same time, Section 3(a) defined a procedure whereby the NLRB might disestablish any co-existent labor board in order to reconstitute it as a joint resolution tribunal. These two features of Section 3(a), taken together, formed a possible basis from which a single and uniform system of labor boards under the Recovery Act might have been projected. The possibility was destroyed, however, through informal action taken by the President late in January 1935, by which the newspaper, automobile, and certain other NRA code boards were taken out of the NLRB's scope of power.[4]

Section 4(c) was also highly significant in connection with problems which arose out of the existence of "joint resolution" boards and NRA code labor boards. This section read as follows:

> The National Labor Relations Board may decline to take cognizance of any labor dispute where there is another means of settlement, provided for by agreement, industrial code, or law which has not been utilized.

The phrase "may decline to take cognizance" was permissive, not mandatory. It apparently conferred upon the NLRB discretionary power to intervene or not to intervene in any labor dispute which

[3] The National Steel Labor Relations Board (see Chap. XII) and the Longshoremen's Board (see Chap. XV) were established prior to the NLRB. Whether the NLRB could review decisions of either of these boards was at all times an open and doubtful question.

[4] See pp. 326–27.

might otherwise have been routed through an NRA code labor board or a joint resolution board. But this was disputed by NRA authorities and the newspaper publishers in the so-called Jennings case.[5] Finally, as we shall see, the President ruled against the NLRB and it was forbidden to intervene, originally or on review, in cases arising under codes equipped with a board empowered to make "final adjudication."

Whatever right of intervention the NLRB may or may not have had, it had autonomous power over such cases as probably fell within its jurisdiction. Whenever the Board took jurisdiction over a case, no other agency in the executive branch of the government could intervene; and all findings of facts or orders issued by the Board in any case or controversy were final and not subject to review by any person or agency in the executive branch of the government. This meant that the NLRB was free from the Department of Labor. It also meant that the NRA Compliance Division was disqualified from initiating independent investigations into controversies on which the NLRB had already passed.

ORGANIZATION AND FUNCTIONS

The National Labor Relations Board, to quote from the executive order, was established "in connection with the Department of Labor." It was nevertheless independent of the Secretary of Labor, who, besides making the facilities of the Department available to the Board, acted as the medium by which its recommendations were transmitted to the President.

The NLRB, with offices in Washington, consisted of three impartial members, each appointed by the President at a compensation of $10,000 per year. No member of the Board might engage in any other business, vocation, or employment.[6] The NLRB might use the services of the staff of the Department of Labor, but it also had a staff of its own. This staff was composed of a legal division at the head of which stood the general counsel to the Board (Mr. Calvert Magruder); a number of examiners who acted as mediators and conciliators; a few research and statistical experts, and clerical employees. There was also an executive secretary (Mr. Benedict Wolf).

Heading up into the National Board, and subject to its authority, was a nationwide system of 17 regional labor boards, each functioning within its proper district. This regional set-up was substantially the same as that which prevailed under the National Labor Board, save for a few territorial readjustments. Some regional boards for

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[5] For a full discussion of this problem, see the Board's decision in the Jennings case (No. 195, decided Dec. 3, 1934, affirmed, Dec. 12, 1934). Relying on Sec. 4(c), the Board decided that it had authority to adjudicate in a discrimination case, notwithstanding that the case had not been submitted, as it might have been, to the Newspaper Industrial Board. The NRA, in the persons of Mr. Richberg and Mr. Blackwell Smith, argued that the NLRB had no jurisdiction over the case; further, that the intervention of the Board was contrary to the terms of the newspapers publishing code. After the NLRB had turned the matter over to the NRA Compliance Division with the recommendation that the employer be deprived of his Blue Eagle, the President interfered and the matter was dropped.

[6] The three original members of the Board were: Lloyd Garrison, dean of the Law School at the University of Wisconsin; Harry A. Millis, chairman of the Department of Economics at the University of Chicago; and Edwin S. Smith, former commissioner of labor and industries of Massachusetts. Mr. Garrison resigned on Nov. 16, 1934. He was replaced by Francis Biddle of Philadelphia, an attorney, who was still chairman when this book went to press.

reasons of administrative convenience had more than one office.[7] Each regional board was in charge of a regional director. In some districts, one or more associate directors were named. The functions of the director and his associates were to engage actively in mediation; to see that cases were promptly and efficiently heard and disposed of and that full and complete records of every hearing were made, so that in case of review by the Board the case might be finally disposed of without additional testimony in Washington.[8] Attached to the regional boards were examiners, who exercised the functions described above under the supervision of the directors. Each regional board had the services of one or more panels, appointed by the NLRB and consisting of representatives from labor, industry, and the public.[9] Each case was heard before such a panel. One of the important duties of the regional director was to assign cases in which formal hearings were necessary to the proper panels. The director was also expected to participate at the hearings in the questioning of witnesses, and to see that an adequate record of the case was built up. Generally, however, the regional director did not sit as a member of the panel which heard the case.[10]

The NLRB and its regional boards engaged in four activities: (1) the settlement of labor disputes so far as they involved issues relating to Section 7(a); (2) the quasi-judicial interpretation of the statute; (3) the enforcement of the statute's collective bargaining requirements; and (4) the conduct of elections. We shall consider each of these activities in the order indicated.

SETTLEMENT OF DISPUTES

Settlement of labor disputes so far as they related to statutory issues bulked large in the activities of the regional boards.[11] Each board was instructed to strive to bring about amicable adjustments of controversies, even where there were apparent or clear violations of Section 7(a).[12] The task of mediation and conciliation was one of the primary duties of the director, who might ask for assistance from the Conciliа-

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[7] In all, 24 offices were distributed among the 17 regional labor board districts, as follows: First District, Boston; Second, New York City; Third, Buffalo; Fourth, Philadelphia and Pittsburgh; Fifth, Baltimore; Sixth, Atlanta; Seventh, New Orleans; Eighth, Cleveland, Toledo, and Detroit; Ninth, Cincinnati; Tenth, Chicago, Indianapolis, and Milwaukee; Eleventh, Minneapolis; Twelfth, St. Louis and Kansas City; Thirteenth, Fort Worth; Fourteenth, Denver; Fifteenth, Los Angeles; Sixteenth, San Francisco; Seventeenth, Seattle and Portland.

[8] *Functions of the NLRB and the Regional Labor Boards*, distributed by the NLRB, Oct. 31, 1934, 11(c). This publication will be referred to hereafter as *Functions*.

[9] There were 544 panel members in all.

[10] The following exceptions should be noted: (1) If a public representative was not available, the director might act as chairman; (2) if a former impartial chairman was appointed director, he might continue to preside at hearings if so instructed by the NLRB; (3) if a panel was not available for a particular hearing, the director might sit alone, take the testimony, and refer it to a panel as soon as possible if a written opinion became necessary; or (4) if some other method of procedure was directed by the NLRB. See *Functions*, II (d).

[11] Regional boards were instructed to "confine their jurisdiction to the handling of complaints, controversies, or strikes involving violation of Section 7(a)." (That is, the collective bargaining requirements thereof.) Complaints involving violation of code provisions on wages, hours, and the like, were to be referred forthwith to the NRA Compliance Division unless there was a "strike in progress because of the code violation." In the latter event, the regional boards had to report the case to the NLRB for transfer to the Department of Labor Conciliation Service. The Conciliation Service also enjoyed "exclusive jurisdiction" over "all labor disputes which involve neither code violations nor violations of Section 7(a)." The regional boards might handle complaints which involved both Sec. 7(a) violations and minor wage and hour violations; but first they had to request the NLRB to "secure an authoritative ruling from the NRA regarding the code violation." Where a complaint involved violation of Sec. 7(a) and where code violations were important features of the case, the regional board could handle the 7(a) violations but had to refer the code violations to the NRA Compliance Division. See *Instructions* (mimeographed) issued to regional labor boards by the NLRB, Mar. 19, 1935, p. 1.

[12] *Functions*, IV (a).

tion Service of the Department of Labor.[13] There were three successive steps in the process: (1) the director intervened in a dispute and strove to bring about a settlement without recourse to a hearing, if possible; (2) at the hearing itself, if one was necessary, the director and the panel continued the quest for a compromise; and (3) after the hearing but before the regional board expressed its opinion, mediational efforts, if still practicable, were continued. The regional board handed down a formal opinion only after further negotiations toward a settlement became impossible or seemed fruitless.

The boards were instructed to make settlements on terms which were "in harmony with the provisions of 7(a) as interpreted by the NLRB."[14] In disputes involving Section 7(a), they were not to sacrifice "principles" to "expediency"; at the same time, however, they were not to insist on "legalistic interpretations of 7(a)" where "genuinely harmonious relationships" could best be brought about by agreement.[15]

The regional boards were not to commence mediation where, upon inquiry, it appeared that "there is a substantial Section 7(a) question" and that prompt settlement would be unlikely.[16] In issuing this instruction, the NLRB sought to avoid one of the most serious mistakes committed by the National Labor Board, and was guided by the belief that "nothing is more fatal to the enforcement of 7(a) than delay."[17] For the same reason, if upon a hearing of the case a prompt settlement still appeared unlikely, the regional boards were instructed to proceed at once to make their findings and opinions; and if the latter were not observed, to transmit the case to the NLRB.[18]

The theory of the NLRB was that it should refrain from engaging directly in mediation and should function, so far as possible, as a court of administrative adjudication on Section 7(a) cases. But the Board did not hold strictly to this theory. It helped to settle strikes in the aluminum industry, and among employees of the Atlantic and Pacific stores and marine workers in the Atlantic and Gulf ports. It also tried to mediate in the national textile strike, though without success. Taking the NLRB system as a whole, we may say that its adjustment activities were essentially intertwined with its judicial functions, though to a much less extent than was true of the former National Labor Board.[19]

The NLRB and its regional boards stood ready to act as arbitration tribunals and invariably encouraged resort to voluntary arbitration. The willingness of the boards notwithstanding, employers and employees submitted only a few disputes to arbitration.[20]

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[13] The same, IV (d).

[14] The same, IV (b).

[15] The same. The instructions of the NLRB read further: "Perhaps the only rule that can safely be laid down is that no board should suggest or participate in settlements unless they are fair and reasonable under the circumstances and do not countenance or perpetuate conditions which could be remedied by enforcement of Section 7(a)."

[16] *Functions,* IV (c).

[17] The same.

[18] The same.

[19] From July 1, 1934 to Dec. 31, 1934, the regional boards handled 3,437 cases involving 1,195,247 workers. Of this total, 3,075 cases were reported as "closed"—1,315 by "agreement," 566 by "decision," and the rest by some other disposition. On Dec. 31, 1934, 528 cases were pending before these boards. Of the cases handled up to that date, 691 had to do with actual or threatened strikes, affecting 495,371 workers directly. Strikes "settled" numbered 514, involving 196,910 workers; strikes "averted" numbered 469, involving 411,469 workers. Of all cases handled, 2,937 involved charges of Sec. 7(a) violations; 376, wage demands; and 14, reduced earnings. *Sixth Monthly Report of the NLRB to the President,* Jan. 9, 1935, p. 2.

[20] On arbitration procedure, see *Functions,* V (a–h). Up to Dec. 31, 1934, a total of 82 cases had been jointly submitted to the regional boards for arbitration. *Sixth Monthly Report,* p. 2.

QUASI-JUDICIAL ACTIVITIES

The quasi-judicial process within the NLRB system began with a hearing of a dispute before a panel of some regional labor board. If a settlement was clearly impossible or would involve too much delay, the regional board proceeded to hand down an "opinion." [21] The procedure was for the director to draft an "opinion," which he submitted to the members of the panel for correction and approval. The opinion included the "findings" which indicated in what particulars, if any, the employer had violated the statute, and the "enforcement clause" giving the employer a "fixed and reasonable period within which to bring about a condition in harmony with the law." This clause also stated that if the employer failed to adopt the corrective measure set forth within the specified period, the case would be referred to the NLRB for "appropriate action." If the regional board found that the law had not been violated, it issued "recommendations" for the adjustment of the dispute.[22] The parties to the dispute were free to accept or reject such recommendations. Non-compliance did not result in the transmission of the case to the NLRB.

With regard to the regional boards, the NLRB acted as a superior court. It obtained jurisdiction in one of two ways: (1) Either party to a proceeding before a regional board might request a review by the NLRB; or (2) in the event of non-compliance with an enforcement clause, a regional board had to refer the matter to the National Board immediately.[23] In either event, the NLRB promptly scheduled a hearing in Washington, and invited the parties concerned to appear and argue upon the record previously developed at the regional board proceedings. For the purposes of such a hearing, the regional board transmitted to the NLRB a complete file of the case. Having heard the argument upon the record, the NLRB proceeded to hand down its "decision." Generally, a decision reviewed the facts of the case in terms of the Board's interpretation of Section 7(a); gave the findings, and stated either an "enforcement" or "recommendation" clause, or both, as the case might require. The enforcement clause of a decision ordered the employer to comply with the law within a specified period of time, and warned him of the steps the Board would take if he failed to comply.

The NLRB reserved to itself the power of laying down the general principles of Section 7(a). As these principles emerged in one decision after another, it became the duty of the regional boards to apply them in particular cases. Procedure at the NLRB hearings, although informal and flexible, conformed to the spirit of the judicial process.

ENFORCEMENT OF DECISIONS

The NLRB inherited its enforcement techniques from the National Labor Board. It could avail itself of one or both of two methods of discipline against non-complying employers: It could recommend removal of the Blue Eagle to the NRA Compliance Division, or it

[21] On "opinion" procedure, see *Functions*, VIII (a–d).
[22] Recommendations such as these were issued but rarely.
[23] *Functions*, IX (a–b).

could refer the case to the Department of Justice for appropriate action.

After some difficulties culminating in the Chicago Motor Coach case, the NLRB worked out a *modus operandi* with the NRA Compliance Division. Under this arrangement, the Compliance Division agreed to remove Blue Eagles without delay upon the receipt of an NLRB recommendation—but only in so-called "normal" cases. In exceptional cases the Compliance Division reserved the power of "ultimate discretion." [24]

For a while this arrangement worked well. During its first six months of existence the NLRB succeeded in having 24 Blue Eagles removed. At the end of this time, twelve cases were still pending with the compliance authorities, and a few recommended removals were held up by court actions initiated by employers.[25] But early in December 1934 difficulties arose as a result of the so-called Jennings case.[26] These difficulties were not smoothed over until the President stepped in to diminish the NLRB's power over and against code labor boards.

The NLRB tried to make use of the disciplinary powers of the Department of Justice. As matters stood in May 1935, it could not be argued that these efforts had been successful; for the Department of Justice was much more reluctant to prosecute than the NLRB was to recommend prosecutions. Where the NLRB was convinced that it had clear-cut cases of 7(a) violations, the Department of Justice was cautious and reserved, slow to move into action before every possible legal contingency had been fully evaluated. During the period from July 9, 1934 to January 9, 1935 inclusive, the NLRB transmitted 21 cases to the Department of Justice. Eight of these were referred by the Department to United States district attorneys for the initiation of proper legal proceedings. In only one case was a bill of complaint filed. This was the famous Houde case, involving the refusal of an employer to

[24] As set forth in the *Second Monthly Report of the NLRB to the President,* Sept. 9, 1934, pp. 2–3, the arrangement was as follows:

1. In the normal case where the Board has found a violation of Sec. 7(a) and the company within the time allotted to it by the Board has not made such restitution, if any, as the Board has recommended, the Compliance Division of the NRA, upon submission of the decision and of the file, will without delay remove the employer's right to fly the Blue Eagle and will notify the Board accordingly.

2. In the normal case if, after the employer's Blue Eagle has been removed because of violation of Sec. 7(a), the employer petitions for restoration of the Blue Eagle, the petition will be referred to the Board for investigation and for a recommendation to the Compliance Division as to the terms upon which restoration should be granted. In the normal case this recommendation will be followed.

3. Whenever for any reason the Compliance Division believes that in a particular case there is reason not to follow the procedure outlined above, a joint conference will be arranged between the Compliance Diviison and the Board for a discussion of the matter, it being understood that so long as responsibility for the removal of the Blue Eagle remains with the Compliance Division discretion with respect to its removal and restoration must remain with this division.

[25] See the *Sixth Monthly Report,* p. 1. Between July 9, 1934 and Mar. 2, 1935 the NLRB issued decisions in 111 cases. In 86 of these, a Sec. 7(a) violation was found to have occurred. In 52 cases, of which 33 were referred to the Department of Justice, the Board had to initiate compliance proceedings. See testimony by Chairman Biddle, 74 Cong. 1 sess., *National Labor Relations Board,* Hearings before the Senate Committee on Education and Labor on S. 1958, p. 93.

[26] Jennings, a rewrite man on the San Francisco *Call Bulletin,* complained that he had been forced to resign his position because of his activities in the American Newspaper Guild. The NLRB intervened in the case and handed down a decision in favor of Jennings. When the employer failed to comply, the NLRB transmitted the case to the NRA Compliance Division. Instead of removing the Blue Eagle at once the Compliance Division referred the matter to the Newspaper Industrial Board, established under the daily newspaper publishing code, asking for counsel and advice.

assent to a decision wherein the Board laid down the principle of majority rule.[27]

CONDUCT OF ELECTIONS

The conduct of employee elections in which workers chose representatives for collective bargaining was one of the major tasks of the NLRB system.[28]

Regional labor boards could hold elections on their own initiative only in cases where they obtained the employer's consent to a referendum. If the employer refused to grant his consent, then the matter had to be referred to the NLRB, which decided how to proceed further, if at all. The power to *order* elections was specifically granted to the NLRB; but it could exercise this power only in the case of employers who were engaged in "interstate commerce." The procedure for handling election petitions which came to the regional labor boards was set forth as follows:

Immediately upon the presentation of a bonda fide petitione for an election to the director, he will satisfy himself by a cursory examination that the number of signatures on it bears a substantial ratio to all of the employees in the plant or the petitioning unit. Then he will promptly forward to this board a memorandum on the petition covering the following points:

1. The number of signatures on the petition.
2. The total number of people in the unit for which the election is petitioned.
3. A history of the attempts which the petitioning group has made to bargain collectively with the employer, and information as to the nature of the dispute resulting in the petition.
4. His comments as to the appropriateness of the request for election, in so far as the unit is concerned.
5. The official names and addresses of (a) the Company; (b) the petitioning union; and (c) any other bargaining group which may be involved in the matter, such as an employees' representation plan.
6. Information as to the interstate or intrastate character of the company's business.
7. The proposed date for an election hearing to be conducted before the director. This date should be not more than ten days following the date of the memorandum and should state specifically hour and place of the hearing, as well as the date.

Upon receipt of this memorandum, this board will immediately decide whether to schedule the case for hearing before the director of the regional board as its agent. Such hearing, if called, will be scheduled for the date indicated by the director's memorandum, and the hearing notices will go out by wire from this board.

In the meantime, after the director has transmitted the memorandum to this board, he shall initiate the usual mediation procedure in an attempt to secure the employer's consent to the election. If he is successful in arranging the consent election, the hearing called by this board will be cancelled. If he does not succeed, the issue will be adjudicated promptly. It is understood, of course, that when the record and the transcript are completed, they should be filed immediately with this board for decision as to whether an election order should be issued.

[27] See the *Sixth Monthly Report*, p. 1. Our compilation includes one case inherited from the NLB and one case which never came before the Board for decision. In the Houde suit the government asked for the following relief: (1) A subpoena requiring the employer to answer charges of violating Sec. 7(a); (2) a decree requiring the company to recognize (that is, to bargain collectively with) the labor union concerned; (3) An order directing the employer to cease negotiations with other collective bargaining agencies, specifically the employee representation plan; (4) An injunction restraining the employer from interfering with his employees' exercise of the rights of self-organization and free choice. (See *New York Times*, Dec. 1, 1934; also *NLRB Press Memorandum in re Bill of Complaint in Houde Case*, Nov. 30, 1934.) Of the 33 cases sent to the Department of Justice up to Mar. 2, 1935 the Houde case was still the only one in which a bill of complaint had been filed. See the statement by Chairman Biddle noted above. Further proceedings in the Houde case were dropped on June 1, 1935, together with all other Recovery Act suits.

[28] See *Functions*, X (a–d); also XI as amended by further *Instructions* dated Mar. 19, 1935.

This procedure is instituted because the initiation of mediation efforts has in the past resulted in long delays in adjudicating the issues, and such delays have been extremely prejudicial to the rights of the petitioning employees. Furthermore, there is excellent reason for believing that the existence of a deadline such as the hearing date will eliminate many of the customary excuses and delays put forward by the employer.[29]

In the handling of election petitions by regional boards, it was presupposed that an independent labor organization or a substantial number of employees acting on their own initiative would submit the request. If these conditions were not satisfied, the regional board had to refer the case to the NLRB for further instructions. "Requests by an employer for an election among his employees, or requests made by employees who have been prompted thereto by their employer, should not be entertained unless permission is secured from the NLRB. This is to prevent any abuse of the election device by using it to forestall, obstruct, or defeat legitimate self-organization of employees." [30]

If the employer consented to an election, the regional boards had to try to state the conditions of the election in the form of a written agreement between the parties concerned. "If there is no agreement, the conditions should be determined by the regional director or board, and the director should transmit to the parties a letter stating the conditions. Whenever possible the regional director should have the approval of a panel in ordering, arranging, and conducting an election." [31] The conditions of the election were expected to include the following subject matter:

1. Date. "Usually a week or ten days should be allowed before election day. . . . The time or hours for polling will depend upon the number of votes to be cast, working conditions and transportation facilities. . . ."

2. Location of polling place. "Elections should never be held in the plant where the workers are employed. The most desirable polling place is a federal building. . . . If none is available, municipal buildings, churches, lodge rooms, or vacant stores are acceptable."

3. Eligibility to note. "In the absence of some special agreement, the general rule is that only production employees are eligible—excluding all in supervisory capacities, all who can 'hire and fire,' foreman who can recommend employment or discharge, factory clerks, timekeepers, service planners, production and efficiency checkers, working foremen, straw bosses, gang leaders, research workers, chemists, draftsmen and office workers.

"The date as of which the eligible classes are to be determined must be fixed, and will depend upon the circumstances of each case. Sometimes a date prior to a strike or to lay-offs, if the strikers or men laid off are likely to, or should be reinstated, may appropriately be taken. In the absence of special facts, the date on which the election petition was filed should be taken."

4. Form of election notices. ". . . election notices should be prepared. These notices should state briefly and clearly (1) the purpose of the election, (2) the classes of employees eligible to vote, (3) the date, time and location of the election, (4) the manner of voting, by secret ballot under governmental supervision, ensuring freedom of choice without coercion or intimidation, (5) the main contents of the ballot, (6) any agreement as to the effect of the election. These notices should be handed to the company, the union, and any rival groups. . . . A copy should be given to the newspapers. . . ."

5. Form of ballot. The recommended forms offered the worker a simple and clear choice between representation by two (or more) labor organizations, or between acceptance and rejection of representation by some given labor organization, etc. Ballots all included the name of the RLB and statements that the poll was to be secret, that each voter should mark *x* in the proper space, should *not* sign

[29] *Memorandum* from Chairman Biddle to the regional labor boards, Mar. 6, 1935.
[30] *Functions*, X (b).
[31] The same, X (d).

his name, and should fold the ballot with printing inside before depositing it in the ballot box. "In most instances, where a particular organization is a candidate its names should not be followed by the name of any individual members or officers. This is to make clear that the worker is selecting the organization [instead of] individual members."

6. Supervision of elections. "The election should be held under the supervision of the regional director, or an examiner, or a staff member of the NLRB, if one has been assigned to the case. . . . An equal number of tellers should be selected to represent each of the employee groups concerned in the election. . . ."

7. Method of voting. Procedure similar to that ordinarily pursued in American political elections by secret ballot.

8. The agreement, if any, as to the effect of the election. "If possible the parties should agree in advance that they will be bound by the results of the election, and the employer should agree that the representative or representatives selected by a majority of the employees eligible to vote should be the exclusive agency for collective bargaining for all of the employees eligible to vote. If such an agreement cannot be obtained, the election may proceed without it." [32]

As a rule, it was expected that a request for an election would be accompanied by an appropriate petition, subscribed to by a substantial number of the employees engaged in the unit for which the election was sought. The purpose of requiring such a petition was "to avoid agitation by small and non-representative groups." [33] But the regional director was given discretion, in "exceptional cases," to proceed without a petition. He could thus proceed "where an election may be used as the means of calling off or averting a strike, or where there is no real doubt that a particular organization represents a substantial group, or where the employer consents." [34] The mere fact that one employee organization objected to an election requested by another employee organization was not to be deemed a sufficient reason for withholding the election, providing that the organization requesting the election was a bona fide "collective bargaining agency genuinely representing a substantial group of workers." [35]

Finally, the regional boards had to keep constantly in mind the inherent purpose of an election. As stated by the NLRB:

> The purpose of having an election among the employees of a given bargaining unit (plant, department, etc.) is to determine by what person, persons, or organizations they desire to be represented for the purpose of collective bargaining.[36]

It proved no easier for the NLRB than it had been for NLRB to compel recalcitrant employers to submit to elections. Tied up as the election orders were with the principle of majority rule, they clearly pointed the way toward union recognition, at least in cases where the trade union could command a majority of the workers. On several occasions, employers went into the courts to restrain the Board from putting into effect decisions which called for elections.[37]

From July 10, 1934 to January 9, 1935, the NLRB system conducted 103 elections comprising 528 industrial units. Trade unions won the

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[32] The same.
[33] The same, x(b).
[34] The same.
[35] The same.
[36] The same, x(a).
[37] On Nov. 2, 1934 the U.S. Circuit Court of Appeals in Richmond, Va. dismissed an injunction suit brought against the Board by the Ames Baldwin Wyoming Company. On Dec. 5, 1934 the Firestone and Goodrich companies brought suit against the Board in the United States Circuit Court of Appeals for the Fourth District. Other suits against the Board were also brought.

election in 301 of the units (57.0 per cent) and polled 20,682 (59.0 per cent) of the valid votes. Company unions won in 162 of the units (30.5 per cent) and polled 12,207 (34.9 per cent) of the valid votes.[38]

THE THEORY OF SECTION 7(a)

Functioning first and foremost as a quasi-judicial tribunal, the NLRB outlined a theory of Section 7(a) as the basis for industrial relations. In developing this theory, it worked out from the foundations laid by the NLRB, adding many specific details. To present the general outlines of the NLRB's theory of Section 7(a), we shall quote verbatim from the Board's summary of decisions submitted to the President on February 9, 1935,[39] and indicate where specific issues were adjudicated in specific cases by citing particular rulings.[40]

GENERAL POLICIES

While the interpretation of Section 7(a) is not free from difficulty at some points,[41] we have sought to develop a body of decisions in harmony with the language of the statute and the intent of Congress as manifested in the hearings and debates on the NIRA.[42]

As the Board stated in its decision in the Houde Engineering Corporation case:

"Section 7(a) must be construed in the light of the traditional practices with which it deals, and the traditional meanings of the words which it uses. When it speaks of 'collective bargaining' it can only be taken to mean that long-observed process whereby negotiations are conducted for the purpose of arriving at collective agreements governing terms of employment for some specific period. And in prohibiting any interference with this process, it must have intended that the process should be encouraged, and that there was a definite good to be obtained by promoting the stabilization of employment relations through collective agreements."[43]

In this the Board gave to Section 7(a) a fundamental construction similar to that given the comparable provisions of the Railway Labor Act of 1926 by the U.S. Supreme Court in the *Texas and New Orleans Railroad* v. *Brotherhood of Railway and Steamship Clerks*, where Chief Justice Hughes wrote a unanimous opinion:

"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 aggrievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundaries* v. *Tri-State Central Trades Council*, 257 U.S. 184, 209. Congress was not required to ignore this right of the

[38] George Shaw Wheeler, "Employee Elections Conducted by National Labor Relations Board," *Monthly Labor Review*, Vol. 40, No. 5, May 1935, pp. 1149–54. See particularly Tables 1 and 2.

[39] See *Sixth Monthly Report*, pp. 3–5.

[40] Almost exclusively, all cases cited are to be found in the edited volume of *Decisions* covering the period to December 1934. From December 1934 to the end of May 1935, the Board produced a voluminous body of additional decisions. But the decisions contained in the edited volume suffice to cover virtually all points of theoretical interest.

[41] The Board had in mind such points as the closed shop, the proper unit for collective bargaining, the disestablishment of company unions, and so forth. These points are discussed below.

[42] See Chap. II.

[43] *Houde Engineering Corp.* v. *United Automobile Workers Federal Labor Union No. 18839*, decided Aug. 30, 1934, *Decisions of the NLRB*, June 9, 1934—December 1934, pp. 35–44. This volume will be hereafter referred to as *Decisions*.

employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action an would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional rights of either, was based on the recognition of the rights of both."

Acting on this fundamental policy and construction the Board has in its many decisions to date sought to give content to the legal rights and duties expressed by Congress in Section 7(a) in their application to the many factual situations in which they arise.

COLLECTIVE BARGAINING

The right of employees to bargain collectively carries with it a correlative 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 we do not believe that Congress intended the right to be sterile.[44] The employer is obligated by the statute to negotiate in good faith with his employees' freely chosen representatives, to match their proposals, if unacceptable, with counter-proposals and to make ever reasonable effort to reach an agreement for a period of time. The empty declarations by the employer of willingness to confer with union representatives, offers to adjust individual differences as they arise, or mere assent to those terms or demands as are found satisfactory, without an understanding as to duration, do not constitute compliance with the statute.[45]

While the failure to reduce an agreement to writing is not necessarily a violation of the law, the Board has frequently urged that this action be taken, as consistent with business expediency, common sense, and the general purpose of the statute to stabilize industrial relations upon a basis clearly expressed and mutually agreed upon. And the insistence by an employer that he will go no further than to enter into an oral agreement may be evidence in the light of other circumstances in the case, of a denial of the right of collective bargaining.[46] Again, while the breach of a collective agreement is not of itself a violation of the statute,[47] the Board has held illegal the wholesale discharge of employees in violation of an implied term of such agreement or understanding without exhausting the processes of collective bargaining, since the employer is obligated to bargain collectively before modifying or terminating an agreement, arrangement, or understanding.[48] The Board has prescribed the activities of so-called "runaway employers" who sought by the transfer of their business to other localities to

[44] See the Houde case decision. See also the following cases given in the *Decisions:* Atlanta Hosiery Mills, pp. 144–46; Kohler Company, pp. 72–78; and National Aniline and Chemical, pp. 144–17.

[45] For an expression of this point of view, see the Houde, Atlanta Hosiery Mills, Kohler Company, and National Aniline and Chemical cases, cited above. See also the rulings in the following cases reported in the *Decisions:* Century Electric, pp. 78–81; Eagle Rubber, pp. 55–58; Ely and Walker Dry Goods, pp. 94–98; Glabman Bros., pp. 159–60; Gordon Baking, pp. 192–94; Hildinger-Bishop, pp. 129–30; Johnson Bronze, pp. 105–10; North Carolina Granite, pp. 89–93; Omaha and Council Bluffs Street Railway, pp. 190–91; and Whiting Milk, pp. 137–38.

[46] These ideas are illustrated with particular clarity in the decisions on the Ely and Walker and the National Aniline and Chemical cases.

[47] See the rulings in the Glabman Bros. case cited above, and in the Chicago Defender case, *Decisions*, pp. 119–22.

[48] In the Chicago Defender case, the employer, publisher of a Negro periodical, broke his close-shop contracts with the printing trades unions by summarily discharging 35 skilled workers, all but three of them whites. The Board held that the employer violated his duty under Sec. 7(a), not because he broke the contract or discharged the men, but because he did so peremptorily and without any attempt to confer with the men on certain wage questions.

avoid their prior agreements or understandings and to defeat the right of their employees to bargain collectively.[49]

MAJORITY RULE

Acting on the view that any interpretation of Section 7(a) which in practice would hamper self-organization and the making of collective agreements cannot be sound, the Board in the Houde Engineering Corporation case affirmed the principle of majority rule. It is there stated as follows:

> When a person, committee or organization has been designated by the majority of employees in a plant or other appropriate unit for collective bargaining, it is the right of the representatives so designated to be treated by the employer as the exclusive bargaining agency of all the employees in the unit, and the employer's duty to make every reasonable effort, when requested, to arrive with this representative at a collective agreement covering terms of employment of all such employees, without thereby denying to any employee or group of employees the right to present grievances, to confer with their employer, or to associate themselves and to act for mutual aid or protection. This construction accords with American traditions of political democracy, with established customs in industrial relations, with the decisions of the National Labor Board, and with those of the National War Labor Board and the Railway Labor Board under statutes of pronouncements similar in purpose and frequently strikingly similar in language to Section 7(a). It has been expressly confirmed by the President in his executive orders, those of February 1, 1934 with reference to the National Labor Board, and of June 28 and September 26, 1934, establishing the Steel and Textile Labor Relations Boards. The rule was expressly written into the Railway Labor Act by Congress in the amendments of June 1934. We believe it to be the keystone of any sound, workable system of industrial relationship by collective bargaining.[50]

Often the question of what industrial unit should be recognized as appropriate [for collective bargaining] presents difficulties which require careful consideration. Plant representation may be the proper unit, or an industrial as against a craft, union. The organization of the business, the community of interests, geographical convenience, prior bargaining relations, functional coherence—all these considerations should be taken into account. This is peculiarly an administrative matter which has been determined flexibility by the Board, having in mind the growth and nature of labor unions, without laying down too rigid general principles. The Board has sought wherever possible to avoid dictating labor union policies or being drawn into deciding union jurisdictional disputes.[51]

ELECTIONS

The Board believes that the device of elections in a democratic society has, among other virtues, that of allaying strife, not of provoking it. An election is merely a device for determining as a matter of

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[49] See in particular the Maujer Parlor Furniture case, *Decisions*, pp. 20–23. See also the Brooklyn Fur Dressing plant case, decided Dec. 22, 1934 (too late for inclusion in the *Decisions*). In all the "runaway" employer cases, the Board ordered the employer to offer re-employment to the workers discharged on account of his flight from the agreement with the union.

[50] Other cases in the *Decisions* where the NLRB affirmed majority rule are: Atlanta Hosiery Mills, pp. 144–46; Detroit Street Railway Commissioners, pp. 123–26; Columbian Steel Tank, pp. 99–101; Ely and Walker, pp. 94–98; Guide Lamp, pp. 47–48; North Carolina Granite, pp. 89–93; and Tubize-Chatillon, pp. 30–32. The Detroit Street Railway Commissioners case, in particular, bears upon the question of the representation rights of minority groups.

[51] Cases in which the Board ruled upon the definition of a unit for collective bargaining: Detroit Street Railway Commissioners; Ely and Walker Dry Goods; Gordon Baking; Guide Lamp; Hildinger-Bishop; Houde Engineering; Tubize-Chatillon; United Dry Docks. All of these cases except the last (*Decisions*, pp. 150–51) are noted above. Each case was decided on its own intrinsic merits rather than on any general principle of vertical versus horizontal unionism.

fact who are the representatives of the employees in the particular unit. Therefore, where there are contending factions of employees, or a substantial number of employees in any particular unit call for an election, this should, in most cases, constitute grounds for holding that the public interest requires it.[52]

COMPANY UNIONS

The statute does not render illegal a company union, if by that term is meant simply a self-organization of the employees in a particular plant into some form of association for collective bargaining or mutual aid or protection. What the statute prohibits is the interference, restraint or coercion of employers, or their agents, in connection with their employees "designation of representatives of their own choosing, self-organization, or other concerted activities for the purpose of collective action or other mutual aid or protection." Thus violations of the law may arise in respect of the initiation, sponsorship, financial support, elections, by-laws and other affairs of any labor organization, including a plant organization or company union.[53]

Participation by employees in an election under a company union plan which has not been submitted to them for approval, has been taken to indicate no affirmative acceptance of that organization as the desired means of collective bargaining.[54] In certain extreme cases of coercion and interference or where the company union could not operate as a means of collective bargaining, the Board has disqualified the company [union] as agency for that purpose.[55]

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[52] Cases reported in the *Decisions* where the Board developed the theory of "public interest" as the ground for calling elections: Davidson Transfer and Storage, pp. 55–58; Firestone Tire and Rubber, pp. 173–79; Goodrich, pp. 181–88; Kohler, pp. 72–78; North Carolina Granite, pp. 89–93; Omaha and Council Bluffs Street Railway, pp. 190–91; United Dry Docks, pp. 150–51. The Kohler, Firestone, and Goodrich cases are peculiarly significant because of their development of the idea that elections will serve to remedy the employer's coercion in establishing the company union.

Decisions in which the Board saw fit to order elections: Ames Baldwin Wyoming, pp. 68–71; Appalachian Marble, p. 132; Candora Marble, p. 133; Firestone Tire and Rubber pp. 173–79; Goodrich, pp. 181–88; Gray Know Marble, p. 134; Knoxville Gray Eagle Marble, p. 135; Kohler, pp. 72–78; Tennessee Producers' Marble, p. 136. The predominance of the marble cases will be noted. They all formed a single group.

Decisions in which the Board refused to order elections: Omaha and Council Bluffs Railway, pp. 190–91; United Dry Docks, pp. 150–51. In the former case, a trade union's petition was denied on the ground that the employer was already dealing with it as a collective bargaining agency. (Affirmed Dec. 20, 1934.) In the latter case, involving the claims of welders to be treated as a separate bargaining group, the Board found against the welders. See also what appears to be an informal verbal ruling in the Milwaukee Electric Railway and Light case, where the Board denied a company's union election request on the ground that to hold an election would disturb a recent strike settlement whereby three trade unions were "recognized." *New York Times,* July 18, 1934.

[53] This, in substance, was the point of view taken by the NLB. See Chaps. VI and VII.

[54] In other words, election of representatives *under* a company union plan is not equivalent to a vote *in favor* of that plan. See in particular the decisions in the Firestone and Goodrich cases, *Decisions*, pp. 173–79 and 181–88.

[55] By ordering the disqualification, if not the disestablishment of company unions in a number of cases, the NLRB ventured into a realm of interpretation of Sec. 7(a) unknown to the NLB. Disqualification rulings are given in the *Decisions* for the following cases: Danbury and Bethel Fur, pp. 195–200; Davidson Transfer and Storage, pp. 55–58; Ely and Walker, pp. 94–98; North Carolina Granite, pp. 89–93. In other cases, although the Board found that the company union had been established by "coercion" within the meaning of the statute, it nevertheless proceeded on the theory that "the wrong done by the company can be remedied by an election." In ordering the elections the Board therefore ruled that the company union, notwithstanding its unlawful origins, was entitled to a place on the ballot. This point of view was best expressed in the Kohler Company case, *Decisions,* pp. 72–78. Compare also the rulings in the Firestone and Goodrich cases. In the former the Board rejected the trade union's request that the company union be denied a place on the ballot. In the latter case, however, the union refrained from charging a violation of Sec. 7(a) as such. Whether or not the Board's attitude involved a paradox is a moot point. The NLB, it is true, had also ordered elections in many cases where the company union had been initiated or was being maintained by practices which supposedly contravened the statute. But the NLB never went so far as to rule that there might be circumstances justifying the utter disqualification of a company union. In the sequel, the Kohler case projected the NLRB into hot water with the A. F. of L. unions. The election was held and the workers chose to be represented by the company union—the same company union whose lawful origins the Board had challenged.

Our records show that in 30 per cent of the 86 cases heard by the Board, company unions were a primary or attendant cause of the dispute. All but two of the unions were formed or revived since the passage of the National Industrial Recovery Act; a great majority became active immediately before or after a contemporary labor union organizing movement, or in close relation to a strike.

DISCRIMINATION

This is by far the most frequent form of interference, restraint or coercion with choice of representatives or self-organization, being involved in approximately half of the cases heard by the Board. It has arisen in a variety of situations, including discharge, lay-offs, demotion or transfer, forced resignations, or division of work, and in connection with reinstatement following a change in corporate structure, strike, temporary lay-off or transfer of plant. In numerous cases of this type the Board has ordered employees reinstated to their former positions.[56]

SPECIAL ISSUES

A few points in the theory of Section 7(a), not touched upon in the NLRB's own summary, also call for consideration.

CLOSED SHOP

The NLRB took the same stand on the closed shop as did the NLB: a reserved and cautious approach, resting upon the assumption that the statute did not impair the validity of a closed-shop agreement between the employer and a bona fide labor organization. In the Tamaqua Underwear case,[57] the Board ruled that a closed-shop agreement between an employer and a company union was invalid, and that any discharges made in reliance on this agreement were unlawful. In the language of the Board:

> The facts of this case do not require us to determine, in the light of Section 7(a) . . . the validity of a closed-shop agreement with a bona fide labor union resulting in the discharge of employees not joining the union. We need to decide

[56] The Board "ordered" reinstatement only when a Sec. 7(a) violation could be proved; when the charge could not be sustained, the Board could at most "recommend" reinstatement. It was a basic principle that if the strike was caused by the employer's violation of the statute, he was required to offer reinstatement to the striking workers. But where it was not shown that a Sec. 7(a) violation was responsible for the strike, the striking employees could not claim reinstatement as their legal right. See the following cases in the *Decisions:* E. F. Caldwell, pp. 12–14; Century Electric, pp. 79–81; Eagle Rubber, pp. 155–58; Fischer Press, pp. 84–88; International Furniture, pp. 63–64; Kugler's Restaurant, p. 67; Pick Mfg., pp. 161–64; Whiting Milk, pp. 137–38; Winters and Crompton, pp. 165–66.

Like the NLB before it, the NLRB restricted the right of an employer to hire and fire only so far as it could be shown that, in exercising it, he was animated by an intent to punish workers for their union membership or activities. The animating principles were the same as those laid down by the NLB in the Lastowski case (see Chap. VI, p. 169). It would take us too far afield to treat the multiplicity and diversity of discrimination cases in detail. Something should be said, however, about the NLRB's arbitrational award in the so-called Donovan case. Here the Board found that General Johnson, administrator of the NRA, had discharged the president of the NRA Employees Union under circumstances which would have amounted to a violation of the statute if Sec. 7(a) had been applicable. Donovan's reinstatement was ordered, the Administrator complying with the award. See *Arbitration in the Matter of American Federation of Government Employees ex rel. John L. Donovan, and Hugh S. Johnson, administrator for National Recovery* (decided Aug. 21, 1934), *Decisions*, pp. 24–29.

The authors have examined the 32 discrimination cases listed under "discharge" or "lay-off" in the index to the published *Decisions* as well as 38 of such cases decided between Dec. 1, 1934 and Mar. 24, 1935. In 60 instances, the Board found in favor of complaining workers or groups of workers. In 20 instances it found against complaining workers or groups of workers. Some of the cases contained rulings "for" and "against."

[57] *Tamaqua Underwear Co.* v. *Amalgamated Clothing Workers of America* (decided Aug. 6, 1934), *Decisions*, pp. 10–11.

only whether the Tamaqua Employees' Union is a company union within the intent of that part of Section 7(a) which provides that "no employee and no one seeking employment shall be required as a condition of employment to join any company union."

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In the light of all the circumstances present in this case, we are of the opinion that the Tamaqua Employees' Union is a company union within the meaning of Section 7(a). The result is that it was contrary to the terms of the statute to dismiss those who would not join.

In the Bennett Shoe case,[58] the NLRB sustained the discharge of four employees dismissed by the employer pursuant to the terms of his closed-shop agreement with the United Shoe and Leather Workers Union.[59] The discharge, it should be noted, followed the expulsion of the workers from the United after they had been tried by a union tribunal on charges of violating a fundamental union rule.[60] The four complaining workers were informed by the Board that if, as contended, they were wrongfully discharged from the union, courts were available to provide them with adequate relief. If, the complainants were further informed, the union's constitution was wrongfully adopted, the courts provided adequate remedies for setting it aside. Moreover,

. . . by joining the United, the complainants ratified in effect a closed-shop agreement and cannot be heard to question its validity. In fact, they are in complete accord with its terms. By requesting and accepting membership in the United at a time when that union had already adopted the constitution, they assented to it, and it must therefore, for the purpose of the present case, be assumed to have been legally adopted and binding upon them.

It is uncertain upon close analysis, whether in this decision the Board truly passed upon the validity of the closed-shop contract. It can be argued that the Board merely ruled that the complaining workers were stopped from asking for relief from the burdens of such a contract voluntarily assumed by them. But there can be no doubt about the decision's practical effect. It ratified the closed shop.

In the Hildinger-Bishop cases [61] the Board set aside the discharge of Edward and Dominick Cruciana in reliance upon a closed-shop contract [62] but upheld the discharge of one Malkowski in reliance upon an identical contract.[63] Both rulings, however, were inconclusive and avoided the main point. The discharge of Malkowski was sustained because at the time of his dismissal "he was the sole employee of the Princess Theater in the categories of workers comprising the membership of the rival unions concerned. We do not believe that Congress provided in Section 7(a) for the situation presented by the discharge." [64] Reinstatement of the Crucianas was ordered because "applying the majority rule principle . . . it results that the company violated its obligations under Section 7(a) by negotiating a collective agreement with a union representing none of its employees, in the

[58] Decided Dec. 10, 1934, too late for inclusion in the published *Decisions*.
[59] A so-called "independent" trade union; independent, that is, of the A. F. of L.
[60] That no member of the United could belong, at the same time, to any other union in the trade.
[61] *Hildinger-Bishop Co., Cosmopolitan Amusement Co., Inc., Crescent Theater Co., Inc.*, v. *Independent Projectionists and State Employees' Union* (decided Oct. 25, 1934), *Decisions*, pp. 127–30.
[62] In force at the Victory Theater between the employer and Local 359 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators (affiliated with the A. F. of L.).
[63] In force at the Princess Theater between the employer and Local 359.
[64] In other words, this was a case of individual and not collective bargaining.

face of a request for collective bargaining previously made by a union representing all of the employees in the particular craft group concerned." [65]

INDIVIDUAL BARGAINING

No more than the NLB before it did the NLRB ever argue that the statute required workers to bargain collectively and inhibited employees from engaging—if they so desired—in individual bargaining.[66] What the NLRB did argue, in contrast, was that the employer violated the law when he compelled his workers to bargain individually rather than collectively; when he sought by establishing individual bargaining relationships to frustrate them in the exercise of the right of self-organization.

This point of view was best expressed in the E. F. Caldwell case.[67] Here the union contended that "the action of the company in presenting individual contracts to its employees when it was well aware of their desire to bargain collectively, constitutes a violation of the statute." The union also contended that "the company exercised coercion to induce the employees to sign the individual agreements." Unimpressed by the evidence of coercion, the Board preferred to rule on the case as if no coercion had occurred. It held as follows:

> An employer who, having been already informed by the representatives of his employees, that they desire to bargain collectively, deliberately sets out to bargain with them individually, interferes with the right guaranteed his employees by the law. The Caldwell Company's motive is revealed by the fact that the individual contracts were presented at the very time that the employees were attempting to negotiate collectively with a large number of men with whom the company had not previously had similar agreements. These contracts, which covered wages and hours, the prime subjects of collective negotiations, would, if valid, empty the employees' right of collective bargaining of all significance and purpose.

Finally, the Board found, "the circulation of individual contracts by the E. F. Caldwell Company constituted a violation of the rights of its employees to be free from the interference of the employer in their concerted activities for the purpose of collective bargaining." [68]

ORDERS RESTRAINING "UNFAIR LABOR PRACTICES"

In those few cases wherein the NLRB disqualified company unions from the benefits of the statute, the Board concurrently issued instructions to the employer which amounted to the restraint of "unfair labor practices" as contemplated by the Wagner bills of 1934 and 1935. Thus in the North Carolina Granite case [69] the Board ordered the employer (under penalty of enforcement discipline) to offer reinstatement to four employees discharged because of union membership and to

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[65] Thus, not only the closed-shop provision but the entire collective agreement was invalid. The ruling, it might be argued, presupposed the validity of a closed-shop contract between the employer and a labor organization which spoke for at least a majority of the workers.

[66] But compare the ruling on Malkowski above, where it is supposed that he who engages in individual bargaining can expect no redress whatever from the application of the statute.

[67] *E. F. Caldwell and Co., Inc.* v. *Lighting Equipment Workers' Local Union No. 19427* (decided Aug. 9, 1934), *Decisions*, pp. 12–14.

[68] For other comments on bargaining with individual employees, see the decisions in the Columbian Iron Works, Glabman Bros., North Carolina Granite, and Whiting Milk cases, all cited elsewhere in this chapter.

[69] *North Carolina Granite Corp., J. D. Sargent Granite Co.* v. *Granite Cutters' International Association, Mt. Airy Branch* (decided Sept. 24, 1934), *Decisions*, pp. 89–93.

"recognize and deal with the Granite Cutters' International Association as the sole representative of its employees for the purpose of collective bargaining until its employees make an unfettered choice of another representative." In the Ely and Walker decision [70] the employer was ordered to take each of the following steps:

1. Withdraw all financial support from the Employee and Management League (the company union).
2. Cease from soliciting membership in the league, or from suggesting to employees that they should join the league and instruct all supervisors and foremen to cease from such solicitation or suggestions.
3. Recognize the Wholesale Workers' Union Local No. 18316 which represents a conceded majority of the employees in the four departments concerned as the exclusive collective bargaining agency for the employees in these departments.
4. Withdraw any recognition from the league as a collective bargaining agency.
5. Negotiate in good faith with the union, and make reasonable efforts when called upon to do so, to arrive at a collective agreement covering terms of employment of the employees in the four departments.
6. Notify all employees by the posting of bulletins or other suitable means that the foregoing steps are being taken, and that no employees who resign from the league will be discriminated against.[71]

In the Danbury and Bethel Fur case,[72] to cite a last example, the employer was instructed to behave as follows:

1. Refrain from requiring or urging, either directly or indirectly, membership in the shop union.
2. Refrain from in any way aiding, encouraging or assisting the shop union, including permitting its meeting to be held during working hours.
3. Until such time as the employees shall have made a free and unfettered choice of another representative, recognize and deal with the United Hat Workers . . . and refrain from in any way recognizing or dealing with the shop union, as the accredited representative of its employees for the purpose of collective bargaining.

By ordering the disqualification of company unions, the NLRB at most disestablished them from any privileges of status under Section 7(a). But the Board, it should be noted, did not order them to be dissolved. They were disestablished in that the employer was ordered to cease and desist from treating with them as accredited representatives for collective bargaining. They might continue in existence as purely fraternal or social organizations. For all practical purposes, however, if the employer complied with the orders of the Board, complete dissolution of the company union would ordinarily soon follow.

EFFICACY OF THE NLRB SYSTEM

Frankly and openly, the members of the NLRB confessed the breakdown of the system on the enforcement side. "The Board is powerless to enforce its decisions," they stated. "In the ultimate analysis its findings and orders are nothing more than recommendations." In a number of cases, the Board reported, Blue Eagle removals were being held up by injunction proceedings in the Supreme Court of the District of Columbia. More to the point, "in many industries the loss of the Blue Eagle has little practical effect." [73] The Board reported further:

Court enforcement under the present machinery is slow, uncertain and cumbersome. The proceeding may be [a] bill in equity to force the employer to bargain

[70] *Ely and Walker Dry Goods Co.* v. *Wholesale House Workers' Union Local No. 18316* (decided Sept. 25, 1934), *Decisions*, pp. 94–98.
[71] See somewhat similar instructions in the Johnson Bronze case, *Decisions*, pp. 105–10.
[72] *Danbury and Bethel Fur Co.* v. *United Hat Fur Workers of Danbury and Bethel, Conn.* (decided Nov. 22, 1934), *Decisions*, pp. 195–200.
[73] *Sixth Monthly Report*, p. 7.

collectively, or indictment for violation of Section 7(a) as embodied in the particular code under which he may be operating. The record before the Board serves as nothing more than a basis for the Attorney General to proceed. It cannot be filed or used in court, and the case must be tried *de novo*. After a bill in equity is filed, the employer has 30 days to answer; or he may move to dismiss, or for a bill of particulars. The case cannot, necessarily, be tried at once. As it must be brought in the district in which the defendant resides, or where, if a corporation, it is incorporated, there is often the burden and inconvenience of bringing witnesses from a distance. This inevitable delay has been increased by much litigation resulting from uncertainty as to the meaning of Section 7(a). There is perhaps ground for genuine disagreement as to its meaning. This should be clarified.[74]

Nevertheless, the NLRB system proved to be administratively more efficient than the NLB system had been. Two reasons help to explain the improvement. First, the NLRB disengaged itself more fully than the NLB had from mediational activities. Second, by hearing arguments upon a pre-existing record rather than by seeking to build up a complete new record, the NLRB cut through much of the red-tape in which its predecessor was entangled, thus avoiding much delay and confusion. But the improvement did not eliminate all defects. The NLRB system, like that of its predecessor, worked all too slowly to grant relief. The fault was inherent in the use of the regional boards as adjustment agencies simultaneously with their use as tribunals for preparing the record of a case.

On the whole, the NLRB was unable to budge antiunion employers from their determination not to permit trade unions to profit by Section 7(a). The unwieldy machinery of code compliance and the slow action of the Department of Justice were important contributory factors. That the Department of Justice did not see fit to prosecute quickly and vigorously all cases where an employer refused to comply with an NIRB decision explains, in large part, why many employers did not consider it necessary to respect the Board's orders. True, the Board had recourse from time to time to Blue Eagle discipline. But the procedure was uncertain: it worked in "normal" cases, but failed in "extraordinary" cases such as the Jennings *cause célèbre*. Furthermore there is reason to believe that removal of the Blue Eagle had lost much if not most of its punitive force by the time the NLRB entered upon the scene. Public enthusiasm for the NRA had waned, and the public was no longer ready (if it ever had been) to boycott an employer who was deprived of the Blue Eagle because of non-compliance with Section 7(a). As for possible legal disabilities due to the loss of the Blue Eagle—for example the matter of bidding on government contracts—that was a matter of relatively minor influence.[75]

The Board also failed to achieve its hoped for position of a "supreme court" on the "common law" of Section 7(a). Although it was generally supposed that the NLRB could review the determinations of all joint resolution boards, its technical authority over the steel and longshoremen boards was open to question.[76] That the NLRB possessed any authority whatever to intervene in disputes arising under

[74] The same. These comments, it should be noted, were delivered some weeks prior to Feb. 27, 1935, when Judge Nields held unconstitutional the application of Sec. 7(a) to the Weirton Steel Co. The decision applied to a case inherited from the days of the NLB. Its immediate effect, however, was to obscure still further the already obscure status of NLRB findings and orders.

[75] In the Colt case, the NRA refrained for quite a while from informing the governmental agencies concerned that the employer's Blue Eagle had been removed. The case aroused considerable public controversy.

[76] See above, p. 290 n.

industries equipped with NRA code labor boards became doubtful after the Jennings case. On January 22, 1935, while the NLRB and the NRA were still locked in their jurisdictional struggle over the case, the President addressed a letter to Chairman Biddle which rather materially curtailed the powers which the Board had claimed for itself.[77] Henceforth the NLRB could no longer claim original or review jurisdiction over disputes arising under codes equipped with labor relations tribunals empowered to issue "final adjudication." The practical effect of the President's request was not extremely important—at most it shut out the NLRB from the bituminous coal and daily newspaper codes—but the request was rather harmful to the Board's authority and prestige.

On January 31, 1935 the President administered still another blow to the authority and prestige of the NLRB when he incorporated the Automobile Labor Board by executive order into the renewed code of fair competition for the automobile manufacturing industry.[78] This action removed one of the principal fields of industrial relations under the Recovery Act from the scope of the NLRB's potential authority. The Automobile Labor Board, by the terms of the presidential settlement, enjoyed so-called "final adjudication." By virtue of incorporation into the code—in contrast to its prior existence pursuant to a tripartite agreement—the Automobile Labor Board thus became one of the tribunals to which the President's letter of a week earlier was applicable.[79]

Hopes for the future success of NLRB revived when on February 21, 1935 Senator Wagner introduced his proposed National Labor Relations Act, modeled in essential outlines after the Labor Disputes bill of 1934. But the Wagner bill was not then regarded by most qualified observers as an "Administration measure." Although the President

[77] The letter read as follows: "It has come to my attention that out of a total number of approximately 550 different codes . . . a very small number, probably less than 5, contain a provision for the consideration and final adjudication of complaints of violation of labor provisions. The existence of this provision in this handful of codes was due to the evolutionary procedure of code making during the first year of NRA. . . .

"It is, of course, clear to me that it is reasonable that some provision for appeal should be a part of governmental policy. Nevertheless, the fact that government has approved this provision in these very few codes, makes it imperative that government should live up to the letter of the agreement as long as those codes remain in effect.

"I therefore request that the NLRB conform to the following principles in cases arising under these few codes until such time as the codes themselves may be altered. . . .

"1. Whenever, in an approved code of fair competition, provision is made for the consideration and adjudication of complaints of violation of the labor provisions of the code, and where a committee, board, or other tribunal has been established under the code to which an appeal can be taken, and which is empowered to make a final and enforceable decision of such complaints, the NLRB will refuse to entertain any such complaint, or to review the record of a hearing thereon, or to take any other action thereon.

"2. Whenever a complaint shall be made to the NLRB that the tribunal of appeal established under an approved code of fair competition for the final adjudication of labor controversies has not been constituted or is not qualified in accordance with the requirements of such code, the NLRB may investigate the merits of such a complaint and submit its recommendations thereon to the President.

"3. Whenever, in the case of the type of code referred to in No. 1, a complaint shall be made to the NLRB by either party to a case before the tribunal of appeal that the decision of the tribunal of appeal is contrary to the existing interpretations of the law and specifically of Section 7(a) . . . the NLRB may, in its discretion report to the President as to whether in its judgment the interpretations referred to are contrary to law." (See *New York Times*, Jan. 23, 1935.)

[78] Sec. 4 of the executive order read as follows: "The members of the industry will comply with the provisions and requirements for the settlement of labor controversies which were established by the government and have been in operation since March 1934, and which are hereby confirmed and continued."

[79] This question will be discussed further in Chap. XIII, which deals with the Automobile Labor Board. It would appear that "final adjudication"—that is, administratively but of course not judicially final—was enjoyed by only three NRA code boards, the automobile, bituminous coal, and daily newspaper publishing tribunals.

said nothing for or against it for the time being, it was generally supposed at the time that he might refrain from giving it the weight of his support. The chances that the bill would be enacted were regarded as faint. What is more, the Weirton decision of February 27, 1935 had opened up the whole question of the constitutionality of Section 7(a).

By March 1935, therefore, the NLRB had run into a blank wall. It was shut off from applying its doctrines of collective bargaining to all codes then or thereafter to be equipped with qualified industrial relations machinery. Thanks to non-compliance and deficient enforcement, it was like a voice crying in the wilderness. And to cap it all, the future of the NLRB as an interpreter of Section 7(a) was shrouded in the mists of constitutional doubt.

From March to May 27, 1935 the NLRB continued to produce a large quantity of decisions, most of which dealt with complaints of discriminatory discharge. But as soon as the Schechter case ruling was announced by the United States Supreme Court, the NLRB ceased to issue decisions, and suspended all proceedings in Section 7(a) controversies. The regional boards also manifested considerable activity up to May 27. A good part of the NLRB's energies, however, were taken up by an increasing number of court cases, in most of which employers sought to review election orders, findings of Section 7(a) violations, and Blue Eagle removals.[80]

Late in May there occurred two dramatic developments, each of critical importance for the future (if any) of the NLRB. On May 16, the Labor Relations bill was passed by the Senate with surprising ease, thanks to the virtual collapse of all anticipated opposition.[81] On May 21 the House unanimously reported out S. 1598 with a recommendation that it be enacted.[82] For the moment, it appeared that the Labor Relations bill was on the verge of enactment; that the NLRB "common law" of Section 7(a) would at length be projected into the law of the

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[80] As of April 2 the following cases were in the federal courts: Petitions by employers to review election orders—Acme Machine Products; American Oak Leather; Bendix Products; Firestone Tire and Rubber; B. F. Goodrich Tire. Petitions by employers to review findings of Sec. 7(a) violations—Guide Lamp; Hildinger-Bishop. Petitions by employers to restrain removal of Blue Eagle—Ely and Walker Dry Goods; Hazel Atlas Glass; Chas. Pfizer Co. Preliminary injunctions secured by employers against regional boards—Aronson-Rose Co.; Vyn Storage. Information filed by NLRB—Carl Pick Mfg. Suit by NLRB to compel employer to bargain collectively with majority representatives—Houde Engineering. (Data procured from the legal staff of the NLRB.)

On June 1, 1935, Attorney General Cummings announced that the government would forthwith terminate all court proceedings related to the Recovery Act. The following cases in which the NLRB was directly or indirectly involved were accordingly dropped:

Suits against the government: *Acme Machine Co.* v. *NLRB; American Oak Leather Co.* v. *NLRB; Aronson-Rose Mfg. Co.* v. *Elliot* (regional director, RLB); *Bendix Products Corp.* v. *NLRB; Employees' Association, Kelsey-Wheel Co.* v. *NLRB; Employees' Conference Plan, Firestone Tire and Rubber Co.* v. *NLRB; Firestone Tire and Rubber Co.* v. *NLRB; Goodrich Rubber Co.* v. *NLRB; L. Greif and Bro.* v. *NLRB; Hazel Atlas Co.* v. *Clay Williams et al* (NRA); *Hildinger-Bishop Co.* v. *NLRB; Hoosier Mfg. Co.* v. *NLRB; International Nickel* v. *NLRB; Kelsey-Hayes Wheel Co.* v. *NLRB; National Color Printing Co.* v. *D. R. Richberg; Pennsylvania-Dixie Cement Co.* v. *N.L.R.B.; Pfizer and Co.* v. *Clay Williams et al; Schoenfeld Bros.* v. *Hope* (regional director, RLB); *Simon Schwab et al* v. *F. Biddle; Square D. Co.* v. *NLRB; United Color and Pigment Co.* v. *D. R. Richberg; Vyn Co.* v. *U.S.; Washburn Crosby Co.* v. *NLRB; Morris Weinman Co.* v. *D. R. Richberg.*

Suits by the government: *U.S.* v. *Houde Engineering Corp.; U.S.* v. *Oil County Special Ties Mfg. Co.; U.S.* v. *Carl Pick Mfg. Co.; U.S.* v. *Weirton Steel Co.*

[81] Senator Wagner spoke at length in favor of the bill on May 15. The debate on May 16 was scanty and brief. What opposition there was to the underlying objectives of the bill was expressed by Senator Tydings' proposed amendment, which was voted down 50 to 21. The bill passed, in the form recommended by the Committee on Education and Labor, 63 to 12. See Chap. IX, pp. 231–32 n. and p. 237 n.

[82] The House committee proposed one major amendment; to establish the Board, not as an independent establishment, but as a part of the U.S. Department of Labor. Representative Marcantonio dissented.

land, and the Board itself continued as a permanent tribunal vested with adeqaute powers of enforcement.[83]

On May 27, however, the United States Supreme Court—in the Schechter case decision—ruled unanimously against the constitutionality of the National Industrial Recovery Act. The effect of this ruling upon the NLRB was twofold. First, the Board, although it nominally continued in existence until June 16, ceased to function. It entered, so to speak, into a state of suspended animation. True, the Supreme Court had nothing to say about the constitutionality of Section 7(a) as such. But by ruling that all codes were null and void, the court destroyed the subject matter of the NLRB's quasi-judicial activities. Recognizing this fact, the Board halted the issuance of any further decisions, ceased to hold hearings, and terminated all other essential activities.

Second, what the court had to say about the powers of Congress over "interstate commerce" raised serious doubts concerning the constitutionailty of the Labor Relations bill. The bill proposed to restrain such "unfair labor practices" as might be engaged in by employers in general; but the Schechter decision suggested quite strongly that the court might hold that manufacturing, mining, construction, and the like were not "interstate commerce." In any event, immediate action by the House of Representatives on S. 1958 was suspended for the time being in the legislative and executive confusion which ensued upon the judicial scrapping of the Recovery Act.[84]

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[83] According to newspaper reports of the period, the President had finally thrown the weight of his support behind S. 1958 and was ready to push it as an "Administration measure."

[84] Two further developments may be noted: (1) On June 15, 1935 the President issued Executive Order No. 7074, temporarily extending the life of the NLRB to July 1, 1935 (later extended to August 1). The Board was empowered to "exercise the powers and the functions and be charged with the duties prescribed in Executive Order No. 6763 . . . in so far as such powers, functions, and duties are authorized under the NIRA as amended and continued by . . . Senate Joint Resolutions 113." (*New York Times*, June 16, 1935.) (2) On July 5 the Labor Relations bill became law. Rewritten in an attempt to get around the supposed obstacle of "interstate commerce," the bill kept the new statutory board in contemplation independent of the Department of Labor. See Chap. IX, p. 262.

5. (Public Resolution No. 44, 73d Congress, 48 Stat. 1183 [Joint Resolution of June 19, 1934])

CHAPTER 677

JOINT RESOLUTION

To effectuate further the policy of the National Industrial Recovery Act.

June 19, 1934. [H.J. Res. 375.] [Pub. Res. No. 44.]

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to further effectuate the policy of title I of the National Industrial Recovery Act, and in the exercise of the powers therein and herein conferred, the President is authorized to establish a board or boards authorized and directed to investigate issues, facts, practices, or activities of employers or employees in any controversies arising under section 7a of said Act or which are burdening or obstructing, or threatening to burden or obstruct, the free flow of interstate commerce, the salaries compensation and expenses of the board or boards and necessary employees being paid as provided in section 2 of the National Industrial Recovery Act.

National industrial labor boards. Establishment.

Ante, pp. 195, 198.

SEC. 2. Any board so established is hereby empowered, when it shall appear in the public interest, to order and conduct an election by a secret ballot of any of the employees of any employer, to determine by what person or persons or organization they desire to be represented in order to insure the right of employees to organize and to select their representatives for the purpose of collective bargaining as defined in section 7a of said Act and now incorporated herein.

Powers.

For the purposes of such election such a board shall have the authority to order the production of such pertinent documents or the appearance of such witnesses to give testimony under oath, as it may deem necessary to carry out the provisions of this resolution. Any order issued by such a board under the authority of this section may, upon application of such board or upon petition of the person or persons to whom such order is directed, be enforced or reviewed, as the case may be, in the same manner, so far as applicable, as is provided in the case of an order of the Federal Trade Commission under the Federal Trade Commission Act.

To order production of witnesses, records, etc.

Enforcement of Board's order.

Regulations with reference to investigations.

SEC. 3. Any such board, with the approval of the President, may prescribe such rules and regulations as it deems necessary to carry out the provisions of this resolution with reference to the investigations authorized in section 1, and to assure freedom from coercion in respect to all elections.

Penalty provision.

SEC. 4. Any person who shall knowingly violate any rule or regulation authorized under section 3 of this resolution or impede or interfere with any member or agent of any board established under this resolution in the performance of his duties, shall be punishable by a fine of not more than $1,000 or by imprisonment for not more than one year, or both.

Duration.

SEC. 5. This resolution shall cease to be in effect, and any board or boards established hereunder shall cease to exist, on June 16, 1935, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 of the National Industrial Recovery Act has ended.

Right to strike not abridged.

SEC. 6. Nothing in this resolution shall prevent or impede or diminish in any way the right of employees to strike or engage in other concerted activities.

Approved, June 9, 1934.

Chapter 3

LABOR, EMPLOYERS, AND NRA

When Franklin Roosevelt was inaugurated in March of 1933, the nation had already entered its fourth year of depression. The number of unemployed had reached thirteen to fifteen million, and national income was down 53 per cent from 1929 levels. The repudiation of business leadership and the criticism of the ideology of laissezfaire which the economic crisis entailed might reasonably have been expected to have resulted in significant gains for organized labor. The labor movement, however, battered by depression and weakened in membership and resources, only slowly recognized the opportunities created by new and changing conditions.[1]

The American Federation of Labor continued to draw its strength largely from the craft unions, which had in the past secured for the federation reasonably stable membership and financial support. But the failure of the federation to penetrate the mass production industries to any significant degree meant that by 1933 it spoke for a membership of less than three million, or about 10 to 15 per cent of the organizable laborers in the country.[2]

By its adherence to the philosophy of voluntarism with its suspicion of governmental reform, the A.F. of L. had also alienated the political support of many non-labor social workers and liberal reformers who were labor's natural allies. This separation between unionists and the rest of the liberal movement was the major political factor which conditioned the relationship between the administraiton of Franklin Roosevelt and organized labor. Roosevelt himself was not interested in the problems of unionism, was not sympathetic to efforts to guarantee the right of labor to organize, and was generally suspicious of labor leaders.[3] His Secretary of Labor, Francis Perkins, was a former social worker and interested more in a program of social reform than in the issue or organization. Her program, presented to Roosevelt before her acceptance of the position, included unemployment compensation, public works, minimum wages, maximum hours, federal employ-

[1] See Louis Stanley, "The Collapse of the A.F. of L.," *The Nation*, Vol. 131 (Oct. 8, 1930), p. 367.

[2] Harry A. Millis and Emily C. Brown, *From the Wagner Act to Taft-Hartley* (Chicago: University of Chicago Press, 1950), p. 19; see also Edward Levinson, *Labor on the March* (New York: Harper & Brothers, 1938).

[3] Rexford G. Tugwell, *The Democratic Roosevelt* (Garden City: Doubleday & Company, Inc., 1957), pp. 336–37; Frances Perkins, *The Roosevelt I Knew* (New York: The Viking Press, 1946), p. 152.

ment agencies, and abolition of child labor, but there was no mention of protection of the right to organize or other problems peculiar to unions themselves.[4] These attitudes of Roosevelt and Perkins meant that organized labor's principal means of access to the administration was not to be in the executive branch. It was rather to be in the Congress, principally in the person of Senator Robert F. Wagner of New York.[5]

Wagner had been born in Nastätten, Germany, in 1878, and had come to the United States at the age of eight. His family had settled in New York City, where it eked out a living on his father's earnings of $3.75 per week. Wagner, however, graduated from high school as valedictorian of his class, and, with the help of his brother, graduated from City College of New York in 1898. He completed his legal education which was financed by the father of one of his friends, and began to practice law in 1900.

The law, however, was not to be his career. He had joined the Democratic party through Charley Murphy's Tammany Hall in 1898, and in 1904 was sent to the New York Assembly, two years after the election of his friend and roommate at Albany, Al Smith. As the result, in part, of the veto of Wagner's popular five-cent fare bill by Governor Charles Evans Hughes, the Democrats swept the state in 1909, and Wagner was elected to the New York Senate, where he became majority leader as Al Smith became leader of the Assembly. As a legislator, Wagner introduced the resolution creating the commission to investigate the Triangle Shirtwaist Factory fire, an investigation which resulted in the passage of fifty-six bills on factory safety. Wagner also introduced the New York workmen's compensation act which was invalidated by the New York Court of Appeals in the notorious *Ives* case.

In 1919, Wagner was elected to the New York Supreme Court. He served there until 1925 when he announced his candidacy for the United States Senate against James W. Wadsworth, despite Al Smith's attempt to induce him to run for mayor of New York City. Defeating Wadsworth, Wagner entered the Senate in 1926 and by the beginning of the New Deal was recognized as one of the outstanding friends of labor in that body. His interest in the plight of the workingman, and his belief in unionism as a force of economic democracy, which he believed to be a necessary complement of political democracy, were determining factors in labor's rise to power in the 1930's.[6]

Wagner insisted on the inclusion of Section 7(a) in the National Industrial Recovery bill in 1933.[7] The NIRA was aimed primarily at economic recovery, and to this end the anti-trust acts were relaxed to allow employer groups to formulate codes restricting production and controlling prices in exchange for provisions regulating minimum wages, maximum hours, and child labor. Section 7(a), which guaranteed the right of labor to organize ,was the price which organized labor and its supporters were able to extract from the administration's desire

[4] Perkins, *ibid.*

[5] Irving Bernstein, *The New Deal Collective Bargaining Policy* (Berkeley: University of California Press, 1950), p. 130.

[6] This biographical sketch of Wagner is based on: Owen P. White, "When the Public Needs a Friend," *Colliers*, Vol. 93 (June 2, 1934), p. 18; I. F. Stone, "Robert F. Wagner," *The Nation*, Vol. 159 (Oct. 28, 1944), p. 507; Oswald G. Villard, "Pillars of Government: Robert F. Wagner," *Forum and Century*, Vol. 96 (Sept., 1936), p. 124.

[7] I. F. Stone, *loc. cit.*

for business-labor unity in the recovery effort. Employer groups, however, attacked the inclusion of the section in the bill. The National Association of Manufacturers proposed amendments which would have protected individual bargaining, and the Iron and Steel Institute, speaking through Robert P. Lamont, declared that the open shop steel industry was "opposed to conducting negotiations... otherwise than with its own employees; it is unwilling to conduct them with outside organizations of labor or with individuals not its employees." [8]

As a result of this employer opposition, the Senate Committee on Finance inserted a provision in Section 7(a) declaring that "nothing in this title shall be construed to compel a change in existing satisfactory relationships between the employees and employers of any particular plant, firm or corporation. . . ." [9] This proposed change would have protected company unions organized by employers to prevent unionization of their employees. The A.F. of L. declared it would attempt to defeat the whole NIRA bill if this provision remained, and with Senator Norris leading the opposition to it the Senate defeated the provision.[10] As finally passed, Section 7(a) provided that "employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The provision declared further that "no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing." [11]

Thus outlawing the yellow dog contract and prohibiting discrimination against union members, Section 7(a), if strictly enforced, meant a major shift of economic power to unions and a limitation of employer control of industry. NIRA required the inclusion of the language of Section 7(a) in all codes of "fair competition," but employer groups, having lost the fight to qualify the section in the Senate, focused their attention on the formulation of codes under NIRA as a means of diluting its effects. The National Industrial Conference, meeting in Chicago in June, 1933, urged all employer groups to insist on a "clarifying" declaration to follow Section 7(a) in the codes. This declaration should state, the Conference resolved, that Section 7(a) "does not impair in any particular the constitutional rights of the employer and employee to bargain individually or collectively" and that nothing in the code "is to prevent the selection, retention, and advancement of employees on the basis of their individual merit, without regard to their affiliation or nonaffiliation with any labor organization." [12] At the same time funds from employer groups were collected and administered by the NAM to publicize employee representation

[8] National Industrial Recovery, Hearings on S. 1712 and HR 5755, Senate Committee on Finance 73rd Cong., 1st sess., pp. 288–89, 395.
[9] 77 *Cong. Rec.* 5257.
[10] 77 *Cong. Rec.* 5284.
[11] Section 7(a), NIRA, 49 Stat. 195 (1933).
[12] Hearings before a Subcommittee of the Committee on Education, and Labor, U.S. Senate, 75th Cong., 2nd sess., pt. 17, p. 7427. (Hereinafter cited as LaFollette Committee, *Hearings.*)

plans, or company unions, in an attempt to offset the expected organization efforts of the A.F. of L.[13]

With the major concern of the administration directed toward recovery efforts, it soon became clear that the success of labor in securing benefits under codes as well as the retention of the language of Section 7(a) would be determined by the relative strength of union organization in particular industries. The organization machinery of the A.F. of L., however, was slow to move to take advantage of the benefits of NIRA. John L. Lewis, president of the United Mine Workers, had attended early planning sessions on NIRA and had insisted on the protection of the right to organize. Later, he contacted William Green and pointed out the opportunity such a provision would have for labor. To Lewis' insistence that the A.F. of L. start organizing drives in steel, autos, rubber and other mass production industries, Green responded by pointing out the cost and saying, "Now, John, let's take it easy."[14] Lewis, however, refused Green's counsel of caution and launched a UMW organizing drive immediately after the passage of NIRA. The argument that because of Section 7(a) "the President wants you to join a union" was used to full effect, and by the time of the code hearings for the coal industry, the UMW was stronger in the industry than it had been for a decade.[15] The Mine Workers were thus able to balance to a degree the influence of the employer's association in the drafting of the coal code.[16]

Other unions also were in relatively strong positions and were able to extract better terms in the codes than was generally the case in most industries. The Amalgmated Clothing Workers, under the leadership of Sidney Hillman, was one of these. The ACW had broken from the A.F. of L.—affiliated United Garment Workers in 1914 and had achieved considerable success in organizing an industry which had been largely open shop until 1910.[17] Amicable relations had long existed between the ACW and many employers, and employer associations such as the New York Clothing Manufacturers' Association, plus union firms such as Hart, Schaffner and Marx of Chicago, could be counted on to support the union's standards in the code hearings. In opposition were the Industrial Recovery Association of Clothing Manufacturers, an antiunion group, and the A.F. of L. United Garment Workers. Through negotiations between the rival unions, however, the rift in union ranks was healed, and the ACW rejoined the A.F. of L. in August of 1933.[18] The result was that the men's clothing code, providing for twenty per cent wage increases and the thirty-six-hour week, was recognized as being, "from labor's point of view, . . . among the best established for American industry."[19]

The Amalgamated Clothing Workers' strong position in the industry thus won improved conditions for unorganized as well as organized workers and alleviated the competitive advantage nonunion firms held over unionized firms. The nature of the men's clothing industry, however, posed a continuous threat to the union and forced almost continuous organization efforts. In 1933, there were over two thousand firms

[13] *Ibid.*, p. 7572.
[14] Saul Alinsky, *John L. Lewis* (New York: G. P. Putman's Sons, 1949), pp. 67–68.
[15] *Ibid.*, p. 72.
[16] *Ibid.*, pp. 71–72.
[17] Matthew Josephson, *Sidney Hillman: Statesman of American Labor* (Garden City: Doubleday & Company, Inc., 1952), pp. 96–100.
[18] *Ibid.*, p. 369.
[19] Joel Seidman, *The Needle Trades* (New York: Farrar & Rinehart, Inc., 1942), p. 199.

employing about 120,000 workers in the industry.[20] These establishments were highly mobile and easily moved to communities desiring to attract new industry. By the 1930's, the movement of many firms to the South and other nonunion employment areas had begun, forcing the union to maintain constant organizing efforts to prevent the undermining of the competitive positions of unionized firms in the North. An example was the Friedman-Harry Marks Company, a manufacturer of men's summer clothing and overcoats, which had been established at Richmond, Virginia, in 1931. Employing about nine hundred workers, the Friedman-Harry Marks Company operated on a nonunion basis and belonged to the "Curley group" of nonunion clothing manufacturers in Virginia. The company adhered to the provisions of the men's clothing code, but later was to meet with tenacious resistance the attempts of the Amalgamated Clothing Workers to organize its employees.[21]

The success of the Amalgamated Clothing Workers in the code hearings was not to be repeated, however, in most other industries. In the automobile industry, the employees were largely unorganized, and the drafting of the automobile code was dominated by the Automobile Chamber of Commerce. The Chamber submitted a draft code in July, 1933, which affirmed the industry's determination "to continue the open-shop policy heretofore followed. . . ." Because of objections from the officials of NRA, references to the open shop were eliminated, but the automobile code as finally approved contained a provision following Section 7(a) which stated that "without in any way attempting to qualify or modify, by interpretation, the foregoing requirements of the NIRA, employers in this industry may exercise their right to select, retain, or advance employees on the basis of individual merit, without regard to their membership or non-membership in any organization." [22]

This was a major breakthrough for employer groups in their attempt to amend and qualify the meaning of Section 7(a). After Roosevelt approved the automobile code containing this language, business groups loosed a barrage of demands for such qualifying language in codes for other industries. General Johnson, the Administrator of NRA, confessed that he had allowed the inclusion of the so-called "merit clause" in the automobile code "in an unguarded moment," and, after the Labor Advisory Board—labor's watchdog in the NRA administrative apparatus—declared opposition to qualifications of Section 7(a) in the codes, Johnson promised that in future instances such qualifying language would not be permitted.[23]

The auto industry, however, having won its "merit clause," was able to continue its traditional open shop policy and its opposition to the organization of its employees. The A.F. of L. instituted an organizing drive in the industry, and by early 1934 its federal locals, based on the industrial principle or organization, claimed a membership of 40,000 and were threatening a strike. In order to head off a recovery-crippling strike, the President created the National Automobile Labor Board to

[20] *Ibid.*, Table VI, p. 340.
[21] The information on the Friedman-Harry Marks Company is based on NA—Case No. C–40, Friedman-Harry Marks Clothing Co., Folder No. 1, NLRB memorandum dated Sept. 30, 1935.
[22] Lewis L. Lorwin and Arthur Wubnig, *Labor Relations Boards* (Washington: The Brookings Institution, 1935), pp. 65–66.
[23] *Ibid.*, pp. 67–68.

hear complaints from auto employees. The order creating the NALB, however, sanctioned the principle of proportional representation of union, company union, and unorganized employees, and the board would recognize ballots cast only for individuals in representation elections. As a result of these policies, plus effective espionage and strike-breaking efforts by the industry, membership and employee interest in unions declined.[24]

The A.F. of L. organizing efforts and the desire to escape adverse publicity during the early days of NRA, however, led some companies in the auto industry to at least meet with representatives and to avoid open and blatant anti-union discrimination. The Fruehauf Trailer Company was one of these. The company had grown out of a blacksmith shop and wagon works founded by August C. Fruehauf in Detroit in 1897. This operation was converted to the manufacture of truck trailers and incorporated in 1918. By the 1930's, with August Fruehauf's sons, Harvey and Harry, as president and vice president, the company owned a factory covering nine acres and employing about seven hundred workers.[25] When A.F. of L. organizers penetrated the plant after the passage of NIRA, the company met with union representatives as long as NRA was in effect.[26] An employee who had been laid off and had charged anti-union discrimination before the NRA Detroit Regional Labor Board was rehired at the suggestion of the Board.[27]

To counter the unionization of its employees, however, the Board of Directors of the Fruehauf Company decided to contact the Pinkerton Detective Agency, which in early 1934 supplied an operative to the company at the cost of $175 per month. The operative was hired by the company under the name of J. N. Martin and reported to a company vice president, Earl V. Vosler, several times a week on union activities in the plant.[28] Martin joined the union, eventually becoming treasurer of the local, and was known at union meetings as a "queer man of some kind or another. He was always reciting poetry or saying something like, 'You can catch more flies with molasses than you can with vinegar.' "[29] As a result of Martin's activities, unionization in the Fruehauf plant, as in the auto industry generally, failed to be very effective during 1934–35.

One of the industries most reluctant to join the NRA recovery effort was the newspaper industry. The unionization of the mechanical trades in the newspaper industry had been established as early as the 1890's.[30] A minority of the members of the American Newspaper Publishers' Association, however, had begun agitation for an open shop policy in the mechanical departments following World War I, charging that unionization threatened freedom of the press. The ANPA had condemned these charges, but the minority was effective enough to force the creation of an open shop division within the Association in 1922.[31]

[24] William Heston McPherson, *Labor Relations in the Automobile Industry* (Washington. The Brookings Institution, 1940), pp. 16–17.
[25] NA–Case No. C–2, Freuhauf Trailer Co., Extra Papers Folder, Statement of Earl L. Vosler, Vice President of Fruehauf Trailer Co. (no date).
[26] Official report of the Proceedings before the NLRB, in the Matter of Fruehauf Trailer Co., p. 300.
[27] *Ibid.*, pp. 590–602.
[28] *Ibid.*, pp. 260–355.
[29] *Ibid.*, pp. 613, 648.
[30] National Labor Relations Board, Division of Economic Research, *Collective Bargaining in the Newspaper Industry,* Bulletin No. 3 (Oct., 1936), p. 68.
[31] *Ibid.*, pp. 82–83.

The result was that during the 1930's the ANPA maintained both a Standing Committee on Labor, which aided union publishers in negotiations with unions, and the Open Shop Division, which aided non-union publishers in breaking strikes.[32]

The ANPA recommended in July, 1933, that publishers refrain from "subscribing to a code under the recovery act at the present time," but the pressure to join the recovery effort led the ANPA to draft a code which was submitted to NRA during the following month.[33] Particular emphasis in the Association's draft code was placed on the question of the freedom of the press and the right of labor to organize. The draft provided that "because of the limitations of the first amendment to the Constitution of the United States nothing in this code shall be construed as authorizing the licensing of publishers and/or newspapers or as permitting injunction proceedings which would restrain the publication of newspapers." The draft code also qualified Section 7(a) by stating that "no employee shall be required to join any organization to secure or retain employment or to secure the benefits of the code, and the right of every individual to refrain from joining any organization, and the right of employe and employer to bargain together, free from interference by any third party, is hereby recognized." [34]

General Johnson objected particularly to the ANPA's attempt to qualify Section 7(a), and a process of negotiations, which was to last several months, began. The labor provisions soon became of critical importance to the publishers because of the rapid organization of editorial and reportorial employees into "guilds." Heywood Broun, then a columnist for the New York *World-Telegram*, announced in August, 1933, that he would begin attempts to organize editorial employees.[35] The same month editorial employees of the Cleveland press organized into the Editorial Employees' Association and announced opposition to the ANPA draft code. They asserted it would allow publishers "to fly the Blue Eagle while at the same time evading the economic burden strict adherence to the letter and spirit of the act required of other industries." Editorial employees, they said, were squeezed "between the pressures of advertisers and stockholders, between exorbitant tolls of syndicates and press services, and the unionized requirements of the mechanical trades" and were "the most notoriously exploited of all producer groups in this country which require similar standards of intelligence, skill and industry." "It is time," they said, "that local room staffs start living and working for something more than the byline and pat-on-the-back. NRA holds out to them their first bona fide opportunity to go after realities." [36]

Conferences among New York reporters were held at Heywood Broun's apartment during the summer of 1933.[37] and in late September about three hundred reporters met to form the Guild of New York Newspaper Men and Women. They demanded that minimum wage and maximum hour standards for reporters be included in the newspaper code and elected a committee to represent them at the NRA

[32] *Ibid.*, p. 88.
[33] *Editor & Publisher*, Vol. 66 (July 22, 1933), p. 5; (Aug. 12, 1933), p. 3.
[34] *Ibid.* (Aug. 12, 1933), p. 5.
[35] *Editor & Publisher*, Vol. 66 (Aug. 12, 1933), p. 31.
[36] *Ibid.* (Aug. 26, 1933), p. 6.
[37] Levinson, *op. cit.*, p. 246.

code hearings. The committee was headed by Heywood Broun, and included Morris Watson, the star reporter for the Associated Press in New York.[38] Other editorial and reportorial employees across the country, inspired by the passage of Section 7(a), were soon organizing into similar organizations.

There was, however, no agreement on the part of these employees as to the type of organization the "guilds" should be. Many supported the guilds only as a form of professional society, while others, notably Heywood Broun, early favored the trade union principle.[39] This lack of organizational identity alienated many members during the early days of the guilds. Several New York reporters resigned from the New York Guild in early 1934, asserting that its meetings "are devoted to mammy palayor, Utopia in Gotham, and the price of drinks at the nearest bar. The Guild is riding hell-for-leather to nowhere." Many, like H. L. Mencken, didn't "think it will ever accomplish anything, but it will be a hell of a lot of fun." [40] The voice of the ANPA *Editor & Publisher*, approved the early organizational activities of editorial employees. It editorially admitted the abuses of which the writers complained "are real and should be cleaned up whether there is unionization or not. Not the least of these is ruthless and unjustified dismissal, without notice. The obvious dissatisfaction of news writers commands the attention of the newspaper field. After all, they remain the backbone of the structure." [41]

Despite this endorsement, the ANPA and the guilds soon clashed over the provisions of the newspaper code. Elisha Hanson, counsel for the ANPA, asserted in the code hearings that the qualification of Section 7(a) in the Association draft code was "vital if this code is to be signed by publishers of daily newspapers." The qualifying provision, he said, protected publishers against "racketeering." Heywood Broun challenged the publishers' attempt to qualify the section and said that reporters who organized might be subject to "penalties." "The penalty may not be dismissal. All newspapermen know of an institution known as the Chinese Torture room. A reporter who incurs the displeasure of his boss by organizing activity may find himself writing obits for the rest of his life." Morris Watson also appeared at the code hearing and asked for the inclusion of the press association employees in the code.[42]

The ANPA was also adamant on the inclusion of a guarantee of freedom of the press in the newspaper code. Colonel Robert R. McCormick was chairman of the Free Press Committee of the ANPA and was the author of the free press provision in the draft code. It is possible that the Committee's recent successful fight against the Minnesota censorship statute had focused attention on the issue,[43] but whatever the reason, as *Editor & Publisher* stated, there had seldom "been such a unified and insistent demand from newspapers that their constitutional right be reaffirmed officially." [44] The Inland Daily Press Association, meeting in October, 1933, demanded the inclusion of a free press and

[38] *Editor & Publisher*, Vol. 66 (Sept. 23, 1933), p. 7.
[39] *Ibid.* (Dec. 9, 1933), p. 9.
[40] *Editor & Publisher*, Vol. 66 (April 7, 1934), pp. 11, 38.
[41] *Ibid.* (Sept. 23, 1933), p. 24.
[42] *Editor & Publisher*, Vol. 66 (Sept. 30, 1933), pp. 6, 14.
[43] See *Near* v. *Minnesota*, 283 U.S. 697 (1931).
[44] *Editor & Publisher*, Vol. 66 (Nov. 4, 1933), p. 3.

open shop guarantee in the code. The Association passed a resolution pointing out that a free press could be abolished by repealing the first amendment, signing the NRA code without a free press provision, or by the "establishment of censorship, made possible by the unionization of all departments of a newspaper." [45] The issue of the freedom of the press was thus joined at an early stage with the issue of unionization, and this fusion of the two issues was to continue in the publisher-union struggle throughout the 1930's.

General Johnson called the free press issue a "synthetic dead cat," but the publishers were able to gain the support of the American Civil Liberties Union on the issue and succeeded in their efforts to have it remain in the code. The qualification of Section 7(a) was eliminated, but on all other issues the publishers were largely successful in the code hearings. The only major addition to the ANPA draft was the provision for a Newspaper Industrial Board to hear complaints arising under Section 7(a); otherwise, as Charles Howard, president of the International Typographical Union, said, "The employers wrote their own code." [46]

The organizing impetus of the guilds had in the meantime culminated in the creation of the American Newspaper Guild by a convention of guild representatives from twenty-one cities. Heywood Broun, although opposed by some because of his advocacy of trade unionism, was elected president. Morris Watson was elected to head the Press Association Committee of the Guild, and, after addressing the convention, handed General Johnson a proposed press association code providing for a five-day, thirty-five-hour week, and notice before dismissal. Although *Editor & Publisher* editorialized that the Guild "bids fair to play an important and decidedly helpful role in American journalism." [47] most publishers were reluctant to enter into negotiations with Guild representatives on wages and hours. When the New York Guild attempted to break the ice and invited the New York Publishers' Association to negotiate, the Association replied that there was no evidence that the Guild represented any of its members' employees. "Without such credentials," said, "the Association has no authority to meet your representatives." [48]

The New York Guild replied that it was "amazed and regretful at the apparent decision of a majority of members of the Publishers' Association of New York to refuse to meet employee representatives except on a 'strictly legalistic basis,'" [49] but this was to be the fairly uniform pattern of reaction by publishers throughout the country. The result was that the American Newspaper Guild slowly moved toward the organizational form and tactics of a trade union. By September, 1934, *Editor & Publisher* was denouncing the ANG, declaring that editors and publishers "need no longer regard the American Newspaper Guild as an independent body of responsible professional news writers and editors, a 'guild' with an economic program. It is a radical trades union. . . ." The Guild was a "pitiful wreck" and its failure "shameless." [50]

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[45] *Ibid.* (Oct. 21, 1933), pp. 7–9.
[46] National Labor Relations Board, Division of Economic Research, *op. cit.*, p. 143. For a copy of the Newspaper Code see *Editor & Publisher*, Vol. 66 (Feb. 24, 1934), p. 36.
[47] *Editor & Publisher*, Vol. 66 (Dec. 23, 1933), pp. 7, 22.
[48] *Ibid.* (March 17, 1934), p. 10.
[49] *Ibid.* (March 24, 1934), p. 11.
[50] *Editor & Publisher*, Vol. 67 (Sept. 13, 1934), p. 24.

The still existed public pressure to preserve recovery unity, however, and many publishers resorted to covert tactics against troublesome Guildsmen. Morris Watson, a vigorous proponent of the Guild, soon was made to pay the price for his activities by his superiors in the Associated Press. Watson was a native of Joplin, Missouri, had served in the army in World War I, and had been gassed in France. While recuperating, he had begun newspaper work, first for the Omaha *World-Herald* and later the Denver *Morning Post*. He joined the Associated Press in Chicago in 1928 and was transferred to the New York office in 1930, where he rapidly became one of the AP's star reporters.[51] His superiors in the AP duly noted and filed in his personnel record his appearance in the NRA code hearings in behalf of the inclusion of the press associations under the code.[52] Later, Watson, as head of the Press Association Committee, signed an open letter to NRA which was published in the *Guild Reporter* and *Editor & Publisher* demanding a press association code and charging labor abuses by the associations. Watson was forced by his superiors to sign a retraction insofar as the Associated Press was concerned.[53]

By April of 1934, the Guild membership at the New York office totaled about eighty,[54] and in the fall the AP was requested to negotiate. When the AP responded by adopting the five-day week, the Guild hailed the move as a victory, but charged that the AP management was attempting to intimidate Guild members. Watson, who was by then treasurer of the New York Guild, said, "We made a move toward collective bargaining, and then came the five-day week." Over his objections, the AP Guild members rescinded their request for a bargaining conference.[55]

Watson had been warned in the meantime by an AP executive that "he would quit his job rather than bargain with an outsider," and that a foreign assignment, which Watson had requested, would not be granted as long as he remained in the Guild.[56] In September, 1934, Watson was transferred to a less desirable job, but was recalled to his old post to cover the Hauptman trial.[57] Shortly after the beginning of 1935, he suffered a nervous breakdown which he attributed to the transfer from his old job. He did not return to work until midsummer, 1935.[58]

The technique of "Chinese torture" was obviously not unknown to the management of the Associated Press. By the use of similar tactics, plus threats and in some cases outright dismissal, the publishers retained the commanding position they had gained during newspaper code hearings throughout 1933 and 1934. By the end of 1934, *Editor & Publisher* could declare with some truth that the "labor union threat of six months ago has not materialized. It is not going to materialize, and certain highly emotional young men of the newsroom who sought to

[51] *Ibid.*, Vol. 70 (April 17, 1937), p. 12.
[52] NA—Case No. C–84, The Associated Press, Folder No. 1 memorandum dated Nov. 27, 1935, from Regional Office, Dist. II, to NLRB.
[53] *Editor & Publisher*, Vol. 66 (March 24, 1934), p. 11; also memorandum referred to in note 52.
[54] *Ibid.* (April 14, 1934), p. 14.
[55] *Editor & Publisher*, Vol. 67 (Sept. 8, 1934), p. 9; Official Report of the Proceedings before the NLRB, In the Matter of the Associtaed Press and Ameriacn Newspaper Guild, p. 255.
[56] *Ibid.*, pp. 250–52.
[57] *Ibid.*, pp. 260–68.
[58] *Ibid.*, pp. 271–78.

force newspapers into a class-conscious affiliation with one side of the boiling politico-economic controversy, contravening all journalistic idealism, know today that their cause has been licked to a standstill." [59]

Unionization efforts in the newspaper industry could have been called successful, however, when compared to the position of unions in the steel industry under NRA. Except perhaps for the auto industry, steel was the most notoriously anti-union industry in the country. Not since the great steel strike of 1919 had there been any substantial union threat to complete employer control of steel.[60] Anti-unionism was so ingrained in steel executives that when Secretary of Labor Perkins called leading steel executives together for a steel code conference with A.F. of L. president Green in early 1933, most of them backed into a corner and refused even to shake hands. They were afraid, they said, that it would get back to the steel towns that they had talked with Green.[61]

Meetings on the steel code were begun even before NIRA had passed Congress. The Iron and Steel Institute submitted a draft code which formed the basis of hearings in July, 1933, and which, like most codes submitted by other industrial groups, attempted to qualify Section 7(a). The draft code endorsed company unions and restricted representatives of employees to the employees of individual companies. General Johnson objected to the provisions in the public hearings and Robert P. Lamount, representing the Institute, agreed to their withdrawal.[62] The Institute made it clear, however, that the withdrawal of the qualifying provisions did "not imply any change in the attitude of the industry on the parts therein"; unions were denounced as fomenters of class antagonism which were of "no profit to anyone concerned, unless it be the many racketeers who have fastened themselves on to the unions. . . ." [63]

President Michael Tighe of Amalgamated Association of Iron, Steel, and Tin Workers, the A.F. of L. union having jurisdiction over the steel industry, was hardly a racketeer, but, as many believed, hardly a union leader either. After the passage of NIRA, William Green had telegraphed Tighe urging an intensive organization drive in steel to head off the industry's efforts to establish company unions, but Tighe replied that he was busy negotiating a contract with a small Kansas City company where two of the Amalgamated's locals were located. He promised, however, to take the matter up with the union's executive board and pointed out that he had written an article on the company union threat in the union's journal.

It was not until late summer, 1933, that the Amalgamated's executive board authorized a full-scale drive in steel. The union's membership in 1933 was 4,852, but during 1933 and 1934 the union spent over $177,000 on organizational work, and membership reached a peak of over 18,000 in 1934. Nevertheless, the all-out resistance of the industry, plus the lack of full backing from the A.F. of L. and the failure of the government to make good the promise of Section 7(a), meant eventual failure

[59] *Editor & Publisher*, Vol. 67 (Nov. 17, 1934), p. 14.
[60] See Robert R. R. Brooks, *As Steel Goes . . . Unionism in a Basic Industry* (New Haven : Yale University Press, 1940).
[61] Frances Perkins, *op. cit.*, pp. 221–22.
[62] Carroll R. Daugherty, Melvin G. DeChazeau, and Samuel S. Stratton, *The Economics of the Iron and Steel Industry* (*New York*), McGraw-Hill Book Co., 1937, Vol. I, pp. 260–63.
[63] *Ibid.*, Vol. II, pp. 984–85.

of these efforts for effective unionization of steel workers. By the end of 1934, all organizing activities by the Amalgamated were stopped and membership began to decline.[64]

The tactics of the Jones & Laughlin Steel Corporation in its resistance to the union's organizing drive were not atypical of the steel industry as a whole. The firm had been founded by B. F. Jones, who had begun with a small rolling mill in Brownsville, Pennsylvania, and had later moved to what was to be South Pittsburgh. The company followed the rest of the steel industry in eliminating unionism in its works after the disastrous Homestead strike in 1892. The company was reorganized and incorporated in 1902, and with new capital it decided to construct a new works in addition to the South Pittsburgh plant. For this purpose, Jones & Laughlin in 1907 bought Woodlawn Park, an area twenty-six miles below Pittsburgh along the Ohio River. A company town and plant were constructed, and the site was later renamed Aliquippa, after Queen Aliquippa, an Indian woman famous in the early history of Pennsylvania.[65]

In 1914, Jones & Laughlin hired Tom M. Girdler as assistant superintendent of the Aliquippa works. W. L. Jones, who hired Girdler, told him the company wanted Aliquippa "to be the best steel town in the world. We want to make it the best possible place for a steelworker to raise a family." The town was laid out in "plans," each "plan" containing a nationality or racial group, including Italians, Poles, Serbians, Greeks, Russians, and Negroes. Girdler soon hired an ex-state policeman, Harry Mauk, who established a company police, the efficiency of which was proven when the plant failed to lose a single man-hour during the 1919 steel strike. "There was," Girdler wrote later, "in Aliquippa, if you please, a benevolent dictatorship." [66]

By the 1930's Aliquippa was known to union organizers as "little Siberia." [67] Jones & Laughlin owned the city transportation facilities, the water company, and 674 of its employees' houses.[68] Beaver County in which Aliquippa was located, was dominated politically by former state senator David Craig, who reportedly was retained by Jones & Laughlin as an attorney. The sheriff was Charles O'Laughlin, a former Aliquippa police officer; the warder of the county jail, Hamilton Brown, was a former Aliquippa police chief; the Aliquippa chief of police was W. L. Ambrose, a former Jones & Laughlin police officer; and all company police held commissions as special borough policemen.[69]

In anticipation of new unionization efforts, Jones & Laughlin in June, 1933, established a company union,[70] but also prepared for trouble by purchasing more than $4,000 worth of tear and sickening gas in the period 1933–1935.[71] By the summer of 1934, several of its employees

[64] Daugherty, DeChazeau, and Stratton, *op, cit.*, pp. 944–53.
[65] Tom M. Girdler, *Boot Straps: The Autobiography of Tom M. Girdler* (Charles Scribner's Sons, 1943), pp. 163 68. Jones & Laughlin eliminated unionism in its plants in 1897; see NLRB, Division of Economic Research, *Written Trade Agreements in Collective Bargaining, Bulletin No. 4* (Nov., 1939).
[66] Girdler, *op. cit.*, pp. 166–77.
[67] Brooks, *op. cit.*, p. 111.
[68] Official Report of Proceedings before the NLRB, In the Matter of Jones & Laughlin Steel Corporation and Amalgamated Association of Iron, Steel and Tin Workers, p. 127.
[69] Report of the Pennsylvania Department of Labor and Industry on the Relations between the Jones & Laughlin Steel Corp. and its Workers, Submitted at the request of the National Steel Relations Board, Charlotte E. Carr, Sec. of Labor and Industry, Commonwealth of Pennsylvania (Nov. 10, 1934), p. 1.
[70] Brooks, *op. cit.*, p. 112.
[71] LaFollette Committee, Report No. 6, pt. 3, p. 202.

had joined the national steel-workers' union, however, and a local was chartered on August 4.[72] Union members soon paid the price for their activities. Angelo Volpe had his house raided and was constantly shadowed, after refusing a company police offer to work against the union. Martin Gerstner, another union member, met with three friends at his home to discuss union business, but company police posted themselves outside the house and threatened the men when they left. Harry V. Phillips, the president of the local, was assaulted by two men on August 31st.[73] When he asked for protection from the Aliquippa police, he was told to get "the hell out of here. You don't deserve protection." [74]

The union continued its organizing efforts, despite these attempts at intimidation. It hired George Isaski, a former Jones & Laughlin employee, as an organizer, but Isaski was arrested on September 11 and charged with being drunk and disorderly. He was jailed for thirty days and his wife was refused permission to visit him. Finally, upon petition by the Sheriff, the County Judge appointed a lunacy commission composed of an attorney, James Knox Stone, who was known to be violently anti-union, Dr. Margaret Cornelius, who was employed by the County Commissioners, and Dr. M. M. Mackail, the jail physician. Although there was no record of any testimony or witnesses heard by the commission, Isaski was committed to the Torrence State Hospital for the Insane on September 19, and neither his wife nor friends were informed of his whereabouts. It was some time before an investigation ordered by Governor Pinchot was launched, a state psychologist had certified Isaski as sane, and his release from the institution was obtained.[75] These tactics of Jones & Laughlin resulted in a hearing by the National Steel Labor Relations Board in October, 1934, on alleged violations of Section 7(a). The hearings were at first scheduled in Pittsburgh on October 4, but were postponed. The union members who had been prepared to testify, however, asked the Board for safe conduct when they returned to Aliquippa. This request aroused the Board's interest and Governor Pinchot was requested to send state police into Aliquippa. Pichot complied, and seven state policemen arrived and established headquarters at the Woodlawn Hotel. Tension and the intimidation of union members immediately lessened, and on October 14 Pinchot's wife, Cornelia, addressed the first open, public labor meeting ever held in Aliquippa. The Amalgamated was also able for the first time to rent space for a union headquarters.[76]

The resistance of Jones & Laughlin to the unionization of its employees at the Aliquippa works typified the resistance of the steel industry as a whole to granting full recognition of the rights theoretically guaranteed by Section 7(a). In September, 1934, Roosevelt called for a truce between the industry and the union for the benefit of the recovery effort, and during the fall and winter, the industry and organized labor, acting through the National Steel Labor Relations Board, attempted to compromise on a formula on organization rights. In its first proposal, the steel industry offered to meet with representatives of any of its employees and attempt to adjust grievances, but

[72] Off. Rep. of Proceedings before NLRB—Jones & Laughlin, p. 149.
[73] Report of the Pennsylvania Department of Labor and Industry, pp. 6–7.
[74] Off. Rep. of Proceedings before NLRB—Jones & Laughlin, p. 155.
[75] Report of the Pennsylvania Department of Labor and Industry, pp. 11–13.
[76] Report of the Pennsylvania Department of Labor and Industry, p. 3; Daugherty, DeChazeau, and Stratton, *op. cit.*, p. 1000, note 1; and Brooks, *op. cit.*, pp. 111–13.

refused to enter into any contract or to recognize the union. Because the proposal avoided the issue of representation elections and did not grant the legitimacy of the jurisdiction of the NSLRB, the union rejected it. Union leaders demanded that the industry accept both representation elections, which would determine the sole bargaining agents for steel workers, and also the jurisdiction of the NSLRB in cases of anti-union discrimination. The industry would not accept both of these conditions, and, despite many proposals and counter-proposals and a White House conference, throughout the NRA period there was no basic change in the industry's anti-union position which it had announced during the hearing on NIRA and the code hearings.[77]

The failure of the steel negotiations was characteristic of the failure generally, despite some successes, of the NRA labor board system to effect full recognition by industry of the right to organize. In an administrative apparatus focused primarily on economic recovery and relying largely on the good will of industry for compliance, the labor boards were in important respects peripheral both from a policy and administrative standpoint. Under the chairmanship of Senator Wagner, the National Labor Board was created in August, 1933, to enforce compliance with Section 7(a), but neither its legitimacy nor jurisdiction was supported by an executive order until December. In addition to the handicap of early conflict with the labor boards established under the codes, the NLB was weakened administratively by its lack of enforcement powers. It had to rely on the Compliance Division of NRA to remove the Blue Eagles of truculent employers and on the Justice Department to proceed legally against such employers. Enforcement of Section 7(a) was thus subject to the Compliance Division's desire to avoid alienating the good will of employer groups and the Justice Department's hesitance to test what was widely considered an unconstitutional statute on the basis of a Section 7(a) case.[78]

The constitutional and legal difficulties in enforcing Section 7(a) became apparent within a few months of the NLB's creation. In the process of settling early representation cases, the Board adopted the election principle and ruled that employees should not be restricted to voting for fellow employees in such elections. This allowed voting for bona fide unions against company unions, which industry in general was promoting in an attempt to escape the full effects of Section 7(a). The NAM and the Iron and Steel Institute attacked the Board on the election issue, as well as on the rule that a majority should determine the sole bargaining agent for all employees. The Board met early success in settling many threatened strikes on the basis of these principles, but in early December the Weirton Steel Company, repudiating an earlier agreement to allow an NLB election, refused to accept the NLB's procedures and determined to hold its own election on the issue of its company union. Despite an appeal by General Johnson, who warned the company that it was "about to commit a deliberate violation of federal laws," the company persisted in its refusal to accept the NLB's jurisdiction and proceeded with its own election. Senator Wagner asked the Attorney General ot take charge of the case.[79]

[77] Daugherty, DeChazeau, and Stratton, *op. cit.*, pp. 1041–46.
[78] Lorwin and Wubnig, *op. cit.*, pp. 134–37.
[79] Lorwin and Wubnig, *op. cit.*, pp. 102–104. See also, "Weirton and 7(a)," *New Republic*, Vol. 77 (Dec. 27, 1933), p. 183.

The government's prosecution of the case failed when the federal district court of Delaware refused to issue an injunction against the company in May, 1934. In an opinion handed down later, the court fully sustained the Weirton Steel Company's position and rejected a government supervised election as a "revolutionary suggestion." [80] Relying on the line of Supreme Court decisions holding manufacturing not to be interstate commerce, the court rejected the government's flow of commerce argument as "devious." "The manufacturing operations conducted by defendant in its various plants or mills," the court declared, "do not constitute interstate commerce. The relations between defendant and its employees do not affect interstate commerce." The government had also argued that employees must be allowed to organize to balance the economic power of the employer and that the Weirton company union did not permit this. This argument, the court said, was "based on the assumption of an inevitable and necessary diversity of interests. This is the traditional old world theory. It is not the Twentieth Century American theory of that relation as dependent upon mutual interest, understanding and good will. This modern theory is embodied in the Weirton plan of employee organization. Furthermore, the suggestion that recurrent hard times suspend constitutional limitations or cause manufacturing operations to so affect interstate commerce as to subject them to regulation by Congress borders on the fantastic and merits no serious consideration." Section 7(a), as applied to the Weirton Steel Company, was therefore unconstitutional.[81]

The NLB had determined to stake its prestige on the prosecution of the *Weirton* case, and the court's refusal to enjoin the company was a solid blow to the enforcement of Section 7(a). An additional blow came in March when Roosevelt and Johnson negotiated the auto settlement to head off a strike in that industry. The settlement provided for an Automobile Labor Board and endorsed the principle of proportional representation, which contradicted the majority rule principle recommended by the NLB for representation elections.[82] These events as well as other difficulties in the enforcement of Section 7(a) which Senator Wagner observed as chairman of the NLB led him to introduce his labor disputes bill on February 28, 1934. The bill was based on the theory that continuing strikes interrupted and affected the flow of interstate commerce and harmed the general welfare. It proposed to establish a permanent labor board to prevent unfair labor practices which interfered with the right of employees to organize or discriminated against union members. The board was to be composed of employer, employee, and public members and was given powers to arbitrate labor disputes as well as prevent unfair labor practices.[83] Wagner argued in a speech in the Senate that the bill would raise purchasing power by guaranteeing the right to organize and the right to union recognition, would destroy company unions, which did not permit true collective bargaining, and would prevent individual bargaining where the majority of the workers desired a collective agreement.[84]

[80] *United States v. Weirton Steel Co.*, 10 F. Supp. 55 (D.C., Del., 1935), at 71.
[81] 10 F. Supp. at 86.
[82] Lorwin and Wubnig, *op. cit.*, pp. 111–14.
[83] *Legislative History of the National Labor Relations Act*, The National Labor Relations Board (Washington: Government Printing Office, 1949), Vol. I, pp. 1–10.
[84] 77 *Cong. Rec.* 3443.

Hearings on the bill began before the Senate Committee on Education and Labor during March, 1934. The proponents of the bill, who appeared first, argued generally that NIRA had allowed almost unrestricted employer organization, but because of the failure in the enforcement of Section 7(a), employees had not been able to organize effectively to counterbalance the power of the employers. The ranks of the bill's proponents were thin, however; besides Wagner and A. F. of L. leaders, only a few professors appeared in the bill's behalf, and Frances Perkins was the only administration official who appeared.[85]

In contrast to the two days of testimony by those favoring the bill, employer groups conducted a massive attack over a period of almost a month. Leading off the attack was James A. Emery, general counsel of the National Manufacturers' Association who focused his argument on the bill's unconstitutionality. According to the NAM's brief, the bill was void on commerce grounds because manufacturing and production were not a part of interstate commerce; it was void as an interference with liberty of contract as guaranteed by the fifth amendment; and finally, it violated the fifth amendment and article III of the Constitution by conferring judicial power on an administrative agency whose procedure violated due process of law.[86] "It will thus be observed," Emery said, "that the power of Congress is hung upon a hypothetical conjecture, resting in the unrestrained imagination of administrative authority, surmising a relationship between a local complaint and its probable influence upon interstate commerce." [87]

Following the NAM's presentation came chambers of commerce and manufacturers' associations from all sections of the country to protest against the Wagner bill on constitutional and policy grounds. On April 5, the steel industry opened its arguments with Arthur H. Young of U.S. Steel assuring the committee that the company union plan was "a supplement to the Golden Rule." [88] Tom Girdler, by then president of Republic Steel, testified that there had been no labor troubles at the Jones & Laughlin plant at Aliquippa because of the "direct personal contact between our management and our men." The Wagner bill, he said, would by encouraging unionization interfere with these direct relations.[89]

Despite this picture of peaceful employer-employee relations presented by the steel executives, the industry was faced in April with both a demand by a "progressive" rank and file movement within the Amalgamated Association for recognition and a threat of strike in mid-June, 1934.[90] The industry uniformly turned down the demand for union recognition, but the threat of a strike won for the dissident unionists an invitation to visit Washington to confer with NRA and NLB officials. Offers by the Iron and Steel Institute to settle the issue along the lines of the auto settlement or to agree to a tripartite steel labor board were refused by the unionists. They denounced the NRA as the "National Run Around" and threatened "bloody war" unless the steel industry bargained. In a letter to Roosevelt, they declared that

[85] Hearings before the Committee on Education and Labor on S. 2926, pt. 1, U.S. Senate, 73rd Cong. 2nd sess., pp. 1–337.
[86] *Ibid.*, pp. 397–400.
[87] *Ibid.*, p. 353.
[88] *Ibid.*, p. 729.
[89] *Ibid.*, pp. 773–74.
[90] Daugherty, DeChazeau, and Stratton, *op. cit.*, Vol. II, p. 1059.

they had "lost faith in your administration, which promised justice and a new deal to the workers of the nation." [91]

The Wagner bill had in the interim been reported favorably by the Senate committee on May 26, but, faced with the threatened steel strike, Roosevelt decided on the expedient of temporary labor boards based upon a congressional resolution.[92] Public Resolution No. 44, authorizing the President to create impartial boards which would mediate disputes, hold representation elections, and hear discrimination cases under Section 7(a), was introduced in the Senate on June 14, but quickly aroused opposition from pro-labor Senators. Senator LaFollette offered the Wagner bill as an amendment and spoke eloquently for its passage. Wagner, declaring that it was "one of the most embarrassing moments of my whole political life," was forced to ask LaFollette to withdraw his amendment. LaFollette complied, but Senator Cutting of New Mexico declared that the "new deal is being strangled in the house of its friends." [93] On June 15, William Green persuaded the steel unionists to accept a National Steel Labor Relations Board to be appointed by the President under Public Resolution No. 44 and to cancel the threatened strike.[94] A new National Labor Relations Board, composed entirely of public members, was also soon established in place of the old NLB.[95]

Public Resolution No. 44 could not, however, cure the difficulties the old board system had encountered. As one corporation executive put it, the resolution "means that temporary measures, which cannot last more than a year, will be substituted for the permanent legislation proposed in the original Wagner bill. I do not believe that there will again be as good a chance for the passage of the Wagner Act as exists now, and the trade is a mighty good compromise." [96] After a brief tenure as chairman of the new NLRB, Lloyd K. Garrison was writing that "Section 7(a) of the Recovery Act can never be thoroughly enforced with even-handed justice, under the existing administrative machinery. The powers of the Board, which is the chief governmental agency dealing with 7-a cases, are quite inadequate for the proper discharge of its responsibilities." [97] Although the congressional resolution bolstered the basis of the labor board system, it did not alter the basic reliance of the NRA administrative structure on the cooperation and good will of business groups, and, just as the constitutional weakness of the old NLB had been demonstrated by the *Weirton* case, the inability of the new NLRB to enforce Section 7(a) against determined employer pressure on the Recovery Administration was soon demonstrated in a case involving the newspaper industry.

Dean Jennings, a reporter for the San Francisco *Call-Bulletin*, was fired in June, 1934. Jennings charged he was removed because of his activities in the American Newspaper Guild.[98] The case was first referred to the Newspaper Industrial Board which had been established under the newspaper code.[99] Composed of equal numbers of publisher

[91] *Ibid.*, pp. 1060–61.
[92] Lorwin and Wubnig, *op. cit.*, p. 258.
[93] 78 *Cong. Rec.* 12024–52.
[94] Daugherty, DeChazeau, and Stratton, *op. cit.*, 1062–63.
[95] See "Goodbye Section 7(a)," *New Republic*, Vol. 80 (Oct. 31, 1934), p. 325.
[96] 79 *Cong. Rec.* 7569.
[97] "7(a) and the Future," *Survey Graphic*, Vol. 24, No. 2 (Feb., 1935), p. 53.
[98] *Editor & Publisher*, Vol. 67 (June 9, 1934), p. 13.
[99] *Ibid.*, Vol. 67 (June 16, 1934), p. 14.

and mechanical trade union representatives, the NIB had remained in deadlock on the question of selecting an impartial chairman throughout 1933 and 1934. In addition, the American Newspaper Guild was not represented on the board, and the publishers refused to expand the board for the purpose of allowing an ANG representative.[100] In view of these circumstances, the NLB reassigned the case to one of its regional boards, and in the winter of 1934 it came before the new NLRB.[101]

Despite the contention of the American Newspaper Publishers' Association that the case could only be considered by the Newspaper Board, the NLRB announced its decision ordering Jennings reinstated on December 3, 1934, while hearings on revision of the newspaper code were in progress.[102] A spokesman for the ANPA declared that the decision was "a threat to the free press in the United States. It nullifies the freedom of the press reservation contained in the daily newspaper code. . . ." [103] The decision sent NRA officials "scurrying into conferences," and the following day the NLRB was requested by NRA General Counsel Donald Richberg to reopen the case. Richberg's action caused the Newspaper Guild representatives to walk out of the hearings on the code. Heywood Broun declared that "as long as the corridors of Mr. Richberg are filled with mysterious, high-pressure representatives of the publishers, we feel that we belong elsewhere." Morris Watson, who had planned to attempt again to procure the inclusion of the press associations under the code, denounced the code as "apparently a sham to cover special privileges for publishers." [104]

The NLRB complied with Richberg's request and reconsidered the Jennings case, but on December 13 reaffirmed its original decision and recommended that the NRA Compliance Division remove the *Call-Bulletin's* Blue Eagle when the paper failed to reinstate Jennings.[105] Howard Davis, president of the ANPA, stated that the "issue raised by the National Labor Relations Board has precipitated the gravest problem with which the press of the country has yet been confronted." [106] The ANPA scheduled an emergency convention for January and threatened withdrawal from the recovery effort. Before the publishers could act, however, Roosevelt intervened with a letter to the chairman of the NLRB requesting that the Board not assume jurisdiction of cases arising under codes which provided for their own labor boards.[107] The publishers had won. Heywood Broun denounced the President, saying that his letter "means that the Jennings case becomes no more than a pressed flower in our memory book. And we will remember. We feel that it is impossible to dodge the fact that the newspaper publishers have cracked down on the Phesident of the United States, and that Franklin D. Roosevelt has cracked up." [108]

The President's order to remove from the NLRB's jurisdiction all cases arising in industries whose codes provided for labor boards and the resultant blow to the jurisdiction and prestige of the NLRB culminated with the announcement of the district court's opinion in the

[100] NLRB, *Collective Bargaining in the Newspaper Industry*, pp. 145–49.
[101] *Editor & Publisher*, Vol. 67 (June 30, 1934), p. 24.
[102] 2 NLRB 1 (1934).
[103] *Editor & Publisher*, Vol. 67. (Dec. 8, 1934), p. 7.
[104] *Ibid.* (Dec. 8, 1934), p. 5
[105] *Ibid.* (Dec. 15, 1934), p. 17.
[106] *Ibid.* (Dec. 29, 1934), p. 1.
[107] *Ibid.* (Jan. 26, 1935), p. 1.
[108] *Ibid.*, p. 11.

Weirton Steel case, declaring the federal government's jurisdiction over labor relations in manufacturing enterprises unconstitutional. By the end of February, 1935, the NLRB had thus been reduced to a position of almost complete impotence. It was already a "voice crying in the wilderness" when in *Schechter Poultry Corporation* v. *United States* [109] the Supreme Court delivered the *coup de grace* to the whole recovery effort.

For an administration whose major policy efforts had from the beginning existed under the shadow of unconstitutionality, the Roosevelt administration showed a singular lack of preparation to meet judicial challenges of its program. During the early days of the administration, Frances Perkins had pointed out to Roosevelt that her program would entail legislation which could well be unconstitutional. "Well, that's a problem," he had said, "but we can work out something when the time comes." [110] This ambivalent attitude was reflected in the quality of the legal personnel recruited to policy positions during the early part of the New Deal. The Attorney General was Homer Cummings, who had served as a Democratic national committeeman from Connecticut for twenty-five years and who had been an early Roosevelt supporter. While most of the Connecticut delegation had supported Al Smith, Cummings had served as a Roosevelt floor manager at Chicago in 1932, and his reward was the governorship of the Philippines. The candidate for Attorney General, Tom Walsh, had died suddenly, however, and Cummings, passing through Washington for instructions before leaving for the Philippines, found himself in the cabinet post. Under Cummings, the Justice Department was staffed by many with first-rate political credentials but with second-rate legal ability.[111]

One of these was J. Crawford Biggs, the Solicitor General. A North Carolina Democrat, it was rumored that Biggs had been appointed to the government's most important policy post on constitutional issues because Cummings opposed the appointment of Dean Acheson to the post.[112] Biggs did only mediocre work and is generally blamed for the poor representation the administration received on constitutional issues before the Supreme Court. Chief Justice Hughes on one occasion had to admonish Biggs to present more clearly "what you want this court to do." It was not until mid-March, 1935, that Biggs resigned and was replaced by Stanley Reed, who began a reorganization of the Solicitor General's office. The downfall of the NIRA, however, was already rapidly approaching.[113]

The Recovery Administration had from the beginning met with some resistance from business against the enforcement of the codes and had resorted in many instances to litigation in the lower federal courts. By early 1935, there had resulted a growing stream of decisions declaring NIRA unconstitutional and resulting in increased difficulties of enforcement. In addition, the terms in which the act was denounced by federal judges no doubt encouraged resistance to code enforcement by businessmen already chafing under the myriad of NRA regulations.

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[109] 295 U.S. 495 (1935); Lorwin and Wubnig, *op. cit.*, pp. 327–29.
[110] Perkins, *op. cit.*, p. 152.
[111] Joseph Alsop and Turner Catledge, *The 168 Days* (Garden City: Doubleday, Doran and Co., 1938), pp. 25–26; Arthur Schlesinger, Jr., *The Politics of Upheaval* (Boston: Houghton Mifflin Co., 1960), pp. 261–62.
[112] Eugene C. Gerhart, *America's Advocate: Robert H. Jackson* (New York: The Bobbs-Merrill Co., Inc., 1958), p. 85.
[113] Schlesinger, *op. cit.*, pp. 261–62.

According to one such judge, the procedure of the Recovery Administration was "enough to shock the sensibilities of a person trained in the belief that we are living under a constitutional government where the citizen is governed by laws and not by men." It would, the judge continued, "cause any citizen to wonder whether he is still living under and is protected by the Constitution of the United States or whether he is in the country of a Stalin, a Mussolini, or a Hitler." [114] Speeches such as this from the lower courts denouncing NRA reminded some of the political involvement of Federalist judges in the early years of the Republic.[115]

In the face of the rising tide of constitutional doubt, the Justice Department was faced in the *Schechter* case with making its defense of NIRA on the basis of a prosecution under the live poultry code, one of the least tenable of the codes. On the Circuit Court level the government's prosecution had been sustained in part, but the Schechter Corporation had petitioned the Supreme Court for a writ of certiorari and the Justice Department was forced to prepare for the test.[116] The case was not, however, entirely hopeless. A year earlier, the government had successfully prosecuted under the Sherman Act a combination of New York live poultry wholesalers, slaughterers, and a local union for conspiring to control the market and to raise prices. The Court had found that the "control of the handling, the sales and the prices at the place of origin before the intended journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce." [117] From this language, it could reasonably have been assumed that at least some aspects of the live poultry industry were subject to NRA regulation under the commerce clause.

This anti-trust case, plus the *Swift*, *Olsen*, and *Stafford* cases, were the primary precedents relied on by the government in its commerce argument in the *Schechter* case, but to no avail.[118] The Court found that NIRA was an unconstitutional delegation of legislative power and an exertion of power beyond the commerce clause. "So far as the poultry here in question is concerned," Chief Justice Hughes wrote on the commerce question, "the flow in interstate commerce had ceased. . . . Hence, decisions which deal with a stream of interstate commerce—where goods come to rest within a State temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here." [119] The fact that the defendants had violated code provisions on wages, hours, and sales, the Court held, could not constitute practices "affecting" interstate commerce. "In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce," the Chief Justice wrote, "there is a necessary and well established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle." The NIRA's regulation of wages, hours, and

[114] *Table Supply Stores* v. *Hawking*, 9 F. Supp. 888 (S.D. Fla. 1935), at 889–90.
[115] Robert H. Jackson, *The Struggle for Judicial Supremacy* (New York: Alfred A. Knopf, 1941), pp. 115–16.
[116] *Ibid.*, p. 113.
[117] *Local 167* v. *United States*, 291 U.S. 293, at 297 (1934).
[118] 295 U.S. 495, at 510.
[119] 295 U.S. 543.

prices was an attempt to control practices which only indirectly affected interstate commerce and were thus beyond the power of the federal government. To the Court, the restriction of federal regulatory power to the power granted by the commerce clause meant that "the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system." [120]

With Justices Cardozo and Stone concurring in the opinion, the decision of the Court was unanimous. In one blow, the Court had knocked out what had constituted the administration's principal domestic program since 1933.[121] Section 7(a) and the restraint imposed by the recovery effort on employers desiring to discriminate against union members collapsed along with the Recovery Administration and the labor boards. The effect in some businesses was immediate. In Detroit, the Fruehauf Trailer Company ceased to meet with union representatives, and soon foremen were circulating around the plant firing union members on the basis of a list furnished by the company's spy in the union.[122] In Aliquippa, the Jones & Laughlin Corporation resumed the pressure against unionization of its employees to the point that some believed it was greater than before the enactment of NIRA.[123]

Some unions, however, prepared to resist losing any of the ground gained during the NRA period, Sidney Hillman, president of the Amalgamated Clothing Workers, had been warned by his friend Justice Brandeis that NIRA was unconstitutional, and upon hearing a broadcast report of the *Schechter* decision, rolled off a couch laughing, finally recovering enough to say that he "knew this would happen all along." Later, while preparing to leave Washington, Hillman declared that he was "going to raise a war chest of a million dollars through my union to see to it that we hold onto the gains labor has won." [124] The union's general executive board, called into special session, authorized a National Emergency Defense Fund of a million dollars, and organizers were soon being sent into action.[125] By June, 1935, organizers had reached the employees of the Friedman—Harry Marks Company in Richmond, and union meetings were beginning to be held.[126]

Roosevelt expressed surprise at the *Schechter* decision and at the fact that the Court liberals had joined in the opinion. When notified of the decision by telephone, he had asked, "Well where was Ben Cardozo? How did he stand? And what about old Isaiah (Brandeis)?" [127] Four days after the decision, the President attacked the opinion in his press conference for an hour and a half. It contained, he said, "a horse-and-buggy definition of interstate commerce." He had already been forced by events to throw his support behind another policy based on the broad conception of the commerce clause which the Court had

[120] *Ibid.* at 546–48.
[121] On the same day the Court also invalidated the Frazier-Lemke Act in *Louisville Bank* v. *Radford*, 295 U.S. 555, and rebuked the President in his attempt to remove a conservative member of the Federal Trade Commission in *Humphrey's Executor* v. *United States*, 295 U.S. 602.
[122] NA-Case No. C–2, Fruehauf Trailer Co., Folder No. I, Memorandum from G. L. Patterson to NLRB, Sept. 24, 1935; Off. Rep. of Proceedings before NLRB—Fruehauf, pp. 19, 513.
[123] Off. Rep. of Proceedings before NLRB—Jones & Laughlin, p. 391.
[124] Josephson, *op. cit.*, pp. 377–80.
[125] Seidman, *op. cit.*, p. 203.
[126] NA—Case No. C–40, Friedman—Harry Marks Co., Folder No. 1, Memorandum from Gerhard Van Arkel to Charles Fahy, Sept. 30, 1935.
[127] Gerhart, *op. cit.*, p. 99.

rejected. In February, Senator Wagner had reintroduced his bill guaranteeing the right to organize and providing for its enforcement, and it had passed the Senate by a vote of 63–12 eleven days before the *Schechter* decision. Faced with the likelihood that the bill would pass the House with strong labor support, Roosevelt endorsed the bill three days before the Court invalidated NIRA.[128]

With Roosevelt's belated support, the Wagner bill promised to succeed where Section 7(a) and NRA had failed; that is, in effecting a fundamental shift of power between employers and employees. The recovery effort had been based on the recognition of the dominance of employer groups, and in every important test of strength on the issue of the enforcement of Section 7(a), these groups had won. While union membership had increased by almost a million under NRA, the effectiveness of employer countermeasures was demonstrated by the fact that membership in company unions had almost doubled since 1933.[129] With the Wagner bill close to passage in Congress, the employers' position of dominance was seriously threatened, and in the spring of 1935, employer groups across the country mobilized for the legislative battle ahead.

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[128] James MacGregor Burns, *Roosevelt: The Lion and the Fox* (New York: Harcourt, Brace and Co., 1956), pp. 219–23.

[129] In 1932 it was estimated that the workers under company union plans numbered about one and a quarter million; by 1934, this number had grown to about two and a half million. See Robert R. R. Brooks, *When Labor Organizes* (New Haven: Yale University Press, 1937), p. 90.

Chapter 4

PASSAGE OF THE WAGNER ACT

With much of the prestige of business destroyed by the economic debacle of 1929, employer groups during the 1930's found themselves reeling under the frenetic pace of the New Deal and the complexity of the anti-depression measures. As the mood of the country shifted to the left and the administration abandoned the business-labor-government unity once symbolized by NIRA, businessmen were placed on the defensive, and feelings of confusion, fear, and anger became common in the business community. "We feel there should be a cessation of more of the so-called reform legislation," one businessman testified in 1934. "We have got mental indigestion, trying to keep up." [1] Senator Wagner's fight to remedy the weaknesses of the NRA labor board system and to provide effective enforcement of labor's right to organize only sent another of a series of chills through employer groups. In January, 1934, William F. Long of the Associated Industries of Cleveland expressed the mood of business in a letter to James A. Emery, general counsel of the NAM. Long feared that "organizations such as yours and mine are not doing all that should be done to fight the determined effort that is certainly going to be made in the present Congress to have the Government actively encourage unions and to make the formation of 'company unions' difficult, if not impossible." In addition, he doubted that the leadership of business groups had adequately warned industrialists of the danger of governmental encouragement of unions and "told them frankly that industry must either put up the financial sinews of war or see the Open Shop destroyed." He suggested that representatives of the National Metal Trades Association, National Founders Association, the Illinois and Michigan Manufacturers' Association, the Employers' Association of Detroit, and the NAM meet "at least once every fortnight as a sort of war council, for the purpose of exchanging opinions and if possible correlating our efforts. I cannot avoid the feeling that we are drifting." [2]

The threat of governmental action against industry and the loss of prestige by business was also worrying others. During the winter and spring of 1934, a retired vice president of the Du Pont corporation and John J. Raskob, a vice president of Du Pont and ex-chairman of the Democratic party, corresponded on the subject of the loss of business prestige and the political threat this entailed. Raskob finally suggested that his correspondent "take the lead in trying to induce the Du Pont and General Motors groups, followed by the other big industries, to definitely organize to protect society from the sufferings which it is bound to endure if we allow communistic elements to lead the people to believe

[1] Hearings before the Committee on Education and Labor on S. 2926, 73rd Cong., 2nd sess., p. 577.
[2] LaFollette Committee, *Hearings*, pt. 17, p. 7573.

all businessmen are crooks."[3] The result was the formation of the American Liberty League in August of 1934.

During the League formative stages, a confidential memorandum was circulated among prospective supporters which suggested that "however efficient such an organization may be, it will have great difficulty in accomplishing its work unless it has a moral or emotional purpose, and thereby creates a moral or emotional issue." "Nor do I believe," the author of the memorandum continued, "that many issues could command more support or evoke more enthusiasm among our people than the simple issue of the 'Constitution.' The public ignorance concerning it is dense and inexperienced, but, nevertheless, there is a mighty, though vague, affection for it. The people, I believe, need merely to be led and instructed, and this affection will become almost worship."[4] This was a succinct statement of what was to become one of the principal tactics of the Liberty League and other business groups in their opposition to governmental regulation during the 1930's. In choosing this tactic, these groups could identify their cause with the conception of the Constitution as an immutable document enforced by a powerless, but impartial, judiciary. The traditional theory of the judicial function, sponsored by both bench and bar, had long inculcated in the people this view of an unchanging fundamental law and a passive judiciary. Once again the traditional theories of judicial impotence and conservatism were to travel hand in hand.

Against no other piece of New Deal legislation were business' polemics of unconstitutionality directed more urgently than the Wagner Act. Although he had suffered defeat at the hands of the administration when Public Resolution No. 44 was adopted in 1934, Wagner reintroduced his bill in the Senate in February, 1935. The bill had been drafted by Wagner, his staff assistants, and the legal staff of the NLRB. The President, the NRA, and the Department of Labor were not participants, and even the A.F. of L. played only a minor role.[5] The bill guaranteed the right of employees "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." Employers were forbidden to "interfere with, restrain or coerce" employees in the exercise of this right of self-organization, to "discriminate or interfere with the formation of any labor organization or to contribute financial or other support to it," to discriminate in regard to "hire or tenure of employment or any terms or condition of employment" for the purpose of discouraging membership in unions, and to "discharge or otherwise discriminate" against any employee because he filed charges under the act. It was provided, however, that none of these "unfair labor practices" should prevent an employer from agreeing to a closed shop.

To prevent these unfair labor practices, the bill provided for a National Labor Relations Board composed of three members appointed

[3] Frederick Rudolph, "The American Liberty League, 1934–1940," *American Historical Review*, Vol. 55, No. 1 (Oct., 1950), p. 19.

[4] Alpheus T. Mason, *Harlan Fiske Stone: Pillar of the Law* (New York: The Viking Press, 1956), p. 443. See also George Wolfskill, *The Revolt of the Conservatives, A History of the American Liberty League 1934–1940* (Boston: Houghton Mifflin Co., 1962), pp. 110–13.

[5] Irving Bernstein, *The New Deal Collective Bargaining Policy* (Berkeley: University of California Press, 1950), p. 88.

by the President and serving staggered five-year terms. The Board was empowered to issue complaints against employers charged with committing unfair labor practices, to subpena witnesses and evidence and hold hearings to determine the merits of such charges, and to issue cease and desist orders against employers found to be committing unfair practices. If the order were not obeyed, the Board could petition the federal circuit courts for orders requiring compliance under penalty of contempt, after the court had reviewed the record of the Board's hearing on points of law. The findings of the Board on points of fact, if supported by evidence, were made conclusive.

In addition to prohibiting unfair labor practices, the bill authorized the NLRB to hold representation elections and certify the union selected by a majority of employees concerned as the exclusive bargaining agent for all employees within the bargaining unit. For the purposes of such elections, power was lodged in the Board to determine whether the "unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit." Individual employees or groups of employees, however, were permitted to present grievances to their employer. Finally, the Board was given the power to arbitrate labor disputes upon agreement of the parties involved and to file arbitration awards in federal district courts for enforcement.[6]

The drafters of the Wagner bill attempted to hurdle the issue of constitutionality through the use of careful language in a "Declaration of Policy" and in their definition of the terms "commerce" and "affecting commerce." The Declaration of Policy stated two general bases for the policy embodied in the bill. First, it was pointed out that the inequality of bargaining power between employers and employees led to failure "to maintain equilibrium between the rate of wages and the rate of industrial expansion," a condition which "impairs economic stability and aggrevates recurrent depressions, with consequent detriment to the general welfare and to the free flow of commerce." Secondly, it was stated that 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 was 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. . . ."[7] The interstate aspect of the Declaration of Policy was based on the experience of Congress in drafting the Packers and Stockyards and Grain Futures acts, as well as on the language used by the Supreme Court sustaining these acts in *Stafford* v. *Wallace* and *Chicago Board of Trade* v. *Olsen*.[8] In both cases the Court had stated that it was bound by a declared finding by Congress that certain practices were recurringly utilized in conspiracies which affected commerce, and, in the *Stafford* case, it had held that such a congressional finding could be considered the same as proof of intent to restrain commerce in an anti-trust prosecution.[9]

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[6] For a copy of the original bill, S. 1958, see National Labor Relations Board, *Legislative History of the National Labor Relations Act* (Washington: Government Printing Office, 1949), Vol. I, pp. 1295–1310. (Hereinafter cited as, NLRB, *Legislative History.*)

[7] *Ibid.*, p. 1295.

[8] 258 U.S. 495 (1922); 262 U.S. 1 (1923).

[9] NLRB, *Legislative History,* Comparison of S. 2926 and S. 1958, pp. 1338–42. See above, Chapter II.

The Wagner bill defined interstate commerce as "trade or commerce, or any transportation or communication relating thereto, among the several States . . . ," and the term "affecting commerce" was defined as "in commerce, or obstructing the free flow of commerce, or having led or tending to lead to a labor dispute that might burden or affect commerce or obstruct the free flow of commerce." [10] The Board provided for in the bill was given jurisdiction over any unfair labor practice which affected commerce as described in this definition. Here again the drafters of the bill relied on similar language in the Packers and Stockyards and the Grain Futures acts and the fact that these statutes had been sustained by the Court.[11]

With the drafting of his bill completed, Wagner decided that the best strategy would be to make the major effort for its passage in the Senate, which, because of the election of 1934, had become the more liberal body in Congress.[12] The result was that both the proponents and opponents of the bill concentrated their efforts on the Senate Committee on Education and Labor during the hearing stage and on the Senate itself after the bill reached the floor. The National Association of Manufacturers became the general co-ordinator of the opposition efforts of business groups, and as the date for the hearings approached, letters were sent to leaders of business groups calling for witnesses to appear in Washington "to meet the onslaught of union fostered attacks on industry. . . . This is the most important cooperation the NAM ever asked of you." [13]

The opposition was weakened by the fact that their arguments were simply reiterations of the arguments used in the 1934 hearings and by the fact that an opposition mail campaign directed at Congress reached its peak too soon and faltered before congressional action was taken.[14] As in the 1934 hearings, however, the opponents of the Wagner bill occupied most of the time before the committee. James A. Emery, general counsel of the NAM, opened industry's attack on March 21. "The first day of spring, Mr. Chairman," he said, "is marked by consideration of an exotic in legislation, which we trust will find little favor in your cultivated consideration." [15] Emery's arguments against the bill were again based principally on constitutional considerations. He argued that the bill contravened the tenth amendment by attempting to confer on the federal government jurisdication over manufacturing and production enterprises which were local in nature and subject only to state regulation; that the bill violated the fifth amendment by interfering with liberty of contract and by authorizing a procedure for the Board which violated the guarantees of due process; and that the bill further violated the fourth and seventh amendments, as well as article III of the Constitution, by delegating judicial power to the Board and by conferring on it an arbitrary power of investigation and the power to order reinstatement and back pay for discriminatorily discharged workers.[16]

[10] *Ibid.*, 1297–98.
[11] NLRB, *Legislative History*, pp. 1347–48, 1357–58.
[12] Bernstein, *op. cit.*, pp. 88, 100.
[13] LaFollette Committee, *Hearings*, pt. 17, p. 9059.
[14] LaFollette Committee, *Hearings*, p. 14194.
[15] Hearings before the Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st. sess., p. 241.
[16] *Ibid.*, pp. 1629–30.

Following Emery's presentation came a phalanx of opposition from representatives of all types of business and industry. The attacks on the bill, other than constitutional objections, centered on the provision outlawing company unions and the provision authorizing a majority of workers to determine the exclusive bargaining agent for all employees in a collective bargaining unit. It was contended that company unions were generally useful instruments of industrial peace and that the majority rule provision arbitrarily denied the rights of individuals or minority groups of employees.

One of the most effectively organized industrial groups to appear was the steel industry, which began its appearance in opposition on March 26. Appearances by representatives of the Iron and Steel Institute and executives from the individual steel companies were followed by testimony of representatives of the company unions in the steel industry. These representatives testified on the effectiveness of their organizations and the preference of a majority of the steel workers for such representation. The representative of the Jones & Laughlin Employees' Representation Plan at Aliquippa, for example, testified that a majority of workers there preferred the company union and that the Amalgamated Association local was defunct. According to the company union's spokesman, an Amalgamated organizer had been sent to Aliquippa, "but he was withdrawn when the Pittsburgh papers published a story showing that he had been guilty of a criminal assault on his ten-year-old stepdaughter. Two weeks ago one of their members was found guilty of felonious assault and battery in the Beaver Court, after he had stabbed one of our employees because he refused to join the Amalgamated. It is not surprising that our workmen have shown their preference to our plan." [17]

To counter this testimony, the A.F. of L. transported representatives of the Aliquippa local to Washington a few days later. They testified that the local had organized a majority of Jones & Laughlin's employees at Aliquippa, but that there were "men fired just lately for the least little thing, without any reason whatsoever. Our men are scared: and they have—the company—spies all over the street following us." [18]

Despite this protest, the roll call of industry continued. The Automobile Manufacturers' Association [19] entered strong objections to the bill, as did the American Newspaper Publishers' Association, whose representative denounced it as "unfair and one-sided legislation, which amounts, in practical application, to a labor dictatorship." [20] Finally, on April 2, James A. Emery again appeared to round out industry's case on the last day of hearings. Again he attacked the bill on the grounds that its application to production or manufacturing enterprises would be unconstitutional, citing twenty cases in which the lower federal courts had ruled that NIRA could not be applied to such enterprises under the commerce clause.[21] And he reiterated that the bill arbitrarily interfered with liberty of contract, the "right of a man to make a contract to enter into engagements for the sale of his labor or

[17] *Ibid.*, p. 459.
[18] *Ibid.*, p. 665.
[19] Formerly the Automobile Chamber of Commerce.
[20] Hearings before the Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st sess., pp. 593, 637.
[21] *Ibid.*, pp. 840–44.

for the sale of his goods or for the sale of his talent or for the sale of his services in any way he pleases. . . ." "Freedom of contract is the rule," Emery declared, "restraint the exception." [22]

Frances Perkins had thought that the leadership of the A.F. of L. would oppose the Wagner bill because of its objections to the basing of recognition on elections and majority rule.[23] Wagner, however, had sold the bill to the federation, and it lobbied effectively for its passage, counteracting the massive assault by industry. On April 29, the A.F. of L. held a conference of four hundred representatives of its international unions who divided into state groups and called upon congressmen urging the passage of the bill.[24] These efforts were rewarded when on May 2 the Senate committee reported the bill favorably with few basic amendments. The committee rewrote the declaration of policy to eliminate any reference to the general welfare in order to base the act wholly on the commerce clause. The rationale that inequality of bargaining power between employers and employees reduced purchasing power, thus tending to produce depressions, was retained, however, and was a constitutional basis for the act at least as important as the theory that the denial of the right to organize tended to lead to strikes affecting commerce.[25] The committee also eliminated the provisions of the original bill giving arbitration powers to the NLRB.[26]

Wagner and his assistants wrote the committee report accompanying the bill, using language which they hoped would guide the courts in ruling on the act.[27] In the section of the report dealing with constitutional issues, the *Texas and New Orleans* case upholding the Railway Labor Act was relied on to rebut objections based on the liberty of contract. On the commerce question, the anti-trust cases involving labor, mainly the *Coronado*, *Duplex*, and *Bedford* cases, and *Wilson* v. *New*, *Stafford* v. *Wallace*, and *Chicago Board of Trade* v. *Olsen* were relied upon. "While this bill of course does not intend to go beyond the constitutional power of Congress," the report stated, "as that power may be marked out by the courts, it seeks the full limit of that power in preventing these unfair labor practices. It seeks to prevent them, whether they burden interstate commerce by causing strikes, or by occurring in the stream of interstate commerce, or by overturning the balance of economic forces upon which the full flow of commerce depends." [28]

The Wagner bill failed to attract the support of the administration despite the Senate committee's favorable report. Both the NRA and the Department of Labor were unenthusiastic, as was the Senate majority leader, Joe Robinson. This did not prevent, however, attempts by the administrative agencies to add the powers conferred on the NLRB to their own domains. General Johnson, although opposed to the bill, hoped the Board would be attached to the NRA if it passed. Frances Perkins also hoped the Board would be added to the Labor Department,[29] while the Justice Department, through Senator Robinson, sought to attach an amendment transferring the control of the

[22] *Ibid.*, p. 853.
[23] Frances Perkins, *The Roosevelt I Knew* (New York: The Viking Press, 1946), p. 243.
[24] Bernstein, *op. cit.*, p. 111.
[25] NLRB, *Legislative History*, Vol. II, pp. 2285–86.
[26] *Ibid.*, pp. 2295–97.
[27] Bernstein, *op. cit.*, p. 112.
[28] Senate Report No. 573, Committee on Education and Labor, 74th Cong, 1st sess., pp. 17–19.
[29] Perkins, *op. cit.*, pp. 239–40.

Board's litigation to the local district attorneys.[30] The Justice Department's attempt at amendment, if it had succeeded, would have had serious consequences in the litigation testing the act's constitutionality, since the Board's ultimate success in this area was based to a great extent on its ability to select its test cases and control their preparation and legal defense from the hearing stage to the Supreme Court.

More important to the bill's chances than this administrative infighting, however, was the failure of Roosevelt to give it his support. He had hardly been consulted on the subject during the early drafting stages,[31] and when Wagner had asked for his support before the bill's introduction, the President had refused.[32] Roosevelt was still adhering to a middle political position which included the NRA concept of business-labor cooperation, and in the face of the approaching presidential election in 1936 he may have been afraid to lose business support by backing the Wagner bill. In addition, according to Rexford Tugwell, Roosevelt was appealing over the heads of labor leaders, whom he continued to distrust, "on issues other than those having to do with organization. Such matters were absorbing to leaders but not to the rank and file, and Franklin could take advantage of this." The President's sponsorship of social security, Tugwell believes, consolidated a rank-and-file support from labor "that from then on could be counted on. There was nothing labor leaders could do but go along." [33] Thus, even after the Senate committee's favorable report, when Wagner called on Roosevelt, he managed to get only a pledge that the administration would not oppose the bill's coming to the Senate floor. This was enough for the Senator, however, since he was convinced his bill would pass if it came to a vote.[34]

Directing the NAM's campaign against the bill, James A. Emery was also convinced that the bill's prospects were good and that industry's position was desperate. Early in 1934, the NAM's Employment Relations Committee had decided to seek legislation prohibiting "coercion of workers from any source," and Emery decided to attempt to procure such an amendment to the Wagner bill on the Senate floor. "On the Senate side," he wrote privately, "the struggle is yet to divert it, with an effort to secure amendment, if it comes up, that will prohibit coercion or intimidation by 'any person.' We believe, if this amendment is adopted, the labor group would not want the bill, for it would prevent the tactics which they believe essential for their success." [35]

The bill came to the Senate floor for debate on May 14, and two days later the committee amendments were accepted. Senator Tydings of Maryland then offered the NAM-sponsored amendment which guaranteed the right of employees to organize "free from coercion or intimidation from any source." Wagner immediately attacked the proposal, pointing out that the courts in many instances had interpreted "coercion" to include picketing and peaceful persuasion to join a union. Senator Norris joined Wagner in opposition, saying that "the courts

[30] NLRB, *Legislative History*, Vol. II pp. 2319–20.
[31] Perkins, *op. cit.*, p. 239.
[32] Bernstein, *op. cit.*, p. 89.
[33] Rexford G. Tugwell, *The Democratic Roosevelt* (Garden City: Doubleday & Co., Inc., 1957), pp. 336–37.
[34] Bernstein, *op. cit.*, p. 115.
[35] LaFollette Committee, *Hearings*, pt. 17, pp. 14056–202.

are going to construe this measure, if it shall become law, and when they get through with it, as often happens, we may not know our own child." The Tydings amendment was finally defeated by a vote of 21 to 50, and the opposition was forced to switch to constitutional objections to the bill. Senator Hastings of Delaware submitted a brief citing the *Adair-Coppage-Hitchman* line of cases as proof of the measure's unconstitutionality. "It is more or less a joke around the Senate," he said, "that anybody who talks about the Constitution or raises a constitutional question considers himself a constitutional lawyer. From my point of view, one does not have to be anything more than a law student to reach the conclusion that the proposed act is unconstitutional." The constitutional objections, like the NAM amendment, were brushed aside, however, and on May 16 the bill passed the Senate by a vote of 63 to 12.[36]

This overwhelming vote of approval apparently convinced Roosevelt that the bill was sure to pass the House also, and on May 25, after holding a conference with Wagner, Sidney Hillman, John L. Lewis, and administration officials, the President announced his support of the bill.[37] The measure had already been reported favorably by the House Committee on Labor, which had added only one major amendment making the NLRB a part of the Department of Labor.[38] Two days after the President's endorsement of the bill, however, the Supreme Court invalidated the NIRA in the *Schechter* case and by its narrow reading of the commerce clause cast new doubt on the constitutionality of the Wagner bill. The decision buoyed up the hopes of the employer groups opposing the bill but did not lessen their campaign of protest directed against the President and Congress. On May 28, the president of the NAM telegraphed another industrial leader that he believed the "Court decision clearly destroys foundation of the legislation, but proponents are redoubling efforts for such a bill which makes it necessary to keep up telegrams of industrial protest to President. Status in Congress uncertain but until finally disposed of keep up the effort." Another NAM official advised continuance of "every form of expression on House members, especially members of House Rules Committee. . . . Letters to President should emphasize lack of 'coercion from any source provision.'" [39] Publishers, too, feared the measure would pass despite the *Schechter* decision. An American Newspaper Publishers' Association spokesman advised that "some group representing all daily newspaper publishers be equipped to act in their behalf without delay," and The National Editorial Association suggested that publishers "wire their congressmen to call on House leaders and especially on members of the House Rules Committee to prevent issuance of a rule which would ensure a vote on the Bill." [40]

Although the *Schechter* opinion seemed to confirm the constitutional objections employer groups had always voiced against his bill, Wagner countered with a public statement arguing that the Court's language left room within the commerce clause to sustain the bill. "The Court has made it clear in a long series of decisions," he said, "that the issue of whether a practice 'directly' affects interstate commerce, and

[36] 79 *Cong. Rec.* 7648–81.
[37] Bernstein, *op. cit.*, p. 118.
[38] NLRB, *Legislative History*, Vol. II, p. 2946.
[39] LaFollette Committee, *Hearings*, pt. 17, pp. 14206–07.
[40] *Editor & Publisher*, Vol. 68 (June 1, 1935), pp. 3, 11.

thus is subject to federal regulation depends more upon the nature of the practice than upon the area of activity of the business in which the practice occurs." "It is clear," he continued, "that the *Schechter* decision limits federal supervision of wages and hours in situations where federal efforts to maintain industrial peace, and thus to prevent interference with the physical flow of goods, would be sustained." While giving this public show of confidence, Wagner was able to have the bill recommitted to the House Labor Committee for the purpose of redrafting the declaration of policy and the definitions of commerce in the light of the Court's action.[41]

As re-reported on June 10, the bill contained a new "Finding and Policy," which was more careful and more specific in explaining the act's basis on the commerce clause. The bill now declared that the denial by employers of the right to organize led "to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing . . . commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channel of commerce." In the new "Finding and Policy," the purchasing power theory—that is, that the inequality of bargaining power and the employee's lack of "full freedom of association or actual liberty of contract" reduced wages and aggravated depressions—followed the more specific argument on the commerce question. Finally, the "Finding and Policy" stated the finding of Congress that the protection of the right to organize and bargain collectively "safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest. . . ." [42]

As further clarification, the term "commerce" was redefined as meaning "trade, traffic, commerce, transportation, or communication among the several States . . . ," [43] and the term "affecting commerce" was also redefined as meaning "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led to or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." [44]

After these changes had been made, the bill was re-reported and given a rule by the Rules Committee on June 18. The Committee's rule allowed consideration of the bill in the Committee of the Whole with debate limited to three hours and with amendments subject to the five-minute rule.[45] Despite the care with which the measure had been redrafted to reinforce its constitutional basis, the opposition's major attack was along constitutional lines. "We have," an opposition member

[41] Bernstein, *op. cit.*, p. 121–22.
[42] NLRB. *Legislative History*, Vol. II, pp. 3033–34.
[43] *Ibid.*, p. 3035. The bill as passed by the Senate had defined commerce as "trade, traffic or commerce, or any transportation or communication relating thereto. . . ." The new draft therefore narrowed the definition somewhat.
[44] *Ibid.* The Senate version had read "in commerce, or burdening or affecting commerce, or obstructing the free flow of commerce, or having led or tending to lead to a labor dispute that might burden or affect commerce or obstruct the free flow of commerce."
[45] 79 *Cong. Rec.* 9668.

declared, "the remarkable situation of the legislative and executive branches deliberately and willfully engaged in enacting legislation to vest powers in the administrative branch which powers they know the Constitution says are not within the jurisdiction of the Federal Government." Representative Cox of Georgia believed that the "purpose of the measure, as all honest minds must confess, is to circumvent the effect of the recent ruling of the Supreme Court in the *Schechter* case," and another Representative asked, "Is there a good lawyer in this House who for one moment believes that such a law would be upheld by the Supreme Court? Certainly it will not stand. Passing this bill is a futile thing. It is a mere gesture." [46]

The opposition's constitutional arguments were answered principally by Representative Truax of Ohio. The opposition, he said, "talk about the Constitution. If I felt the way some of the constitutional lawyers feel about the Constitution and about the decisions of the Supreme Court, I would be in favor of abolishing the Congress and letting the Supreme Court do the legislating for the people of this country. Mr. Chairman, do you know if you gave the people of this country a vote on some of these decisions of the Supreme Court, the people would sweep the Supreme Court into oblivion by a vote of 100 to 1?" The Court, Truax charged, had failed to think in terms of humanity and thought instead in terms of property rights. Closing his defense of the bill, he castigated the opposition for their interminable constitutional objections and asked, "What are you going to do with this sacred old Constitution? You cannot eat it, you cannot wear it, and you cannot sleep in it." [47]

When the bill was read for amendment, the NAM-sponsored "coercion from any source" amendment was again offered several times but was voted down on each occasion. The committee's amendment placing the NLRB in the Department of Labor was rejected, however, and the provision in the bill describing the units appropriate for collective bargaining as being "the employer unit, craft unit, plant unit, or other unit" was amended to limit the appropriate unit to the employees of one employer.[48] The success of this amendment was probably due to the uneasiness expressed by A.F. of L. leaders on the appropriate unit question. The issue of industrial unionism was growing more serious as the federation's convention, scheduled for October, approached, and Wagner had been forced, in early June, to reassure some of the adamant craft union leaders on the lodging of this crucial power in the Board.[49]

Pressure from publishers was also in evidence when an amendment was introduced by Representative Connery, the sponsor of the bill in the House, which provided that nothing in the act "would abridge freedom of speech or the press as guaranteed by the First Amendment." The publishers had convinced Wagner of the genuineness of their fears that unless such a provision were added to the bill it would imperil a free press. "I suggested it to Chairman Connery for inclusion in the House," Wagner later said of the provision, "although I believed at the time, and still believe, it is not necessary and that the fears are unfounded." [50]

[46] *Ibid.*, 9678–9701.
[47] 79 *Cong. Rec.* 9714–15.
[48] 79 *Cong. Rec.* 9718–28.
[49] Bernstein, *op. cit.*, p. 126.
[50] *Editor & Publisher*, Vol. 68 (June 29, 1935), p. 3. Here I disagree with Bernstein's excellent analysis, since he states that the pressure for this amendment came from the White House. See Bernstein, op. *cit.*, *p.* 126.

With both Wagner's and Connery's sponsorship, the amendment was easily adopted in the House.

Following the "free press" amendment, the House quickly passed the bill by an unrecorded vote. The Senate refused to accept the House amendments and a conference committee was agreed to.[51] The committee, which reported on June 26, accepted the House's rejection of the Board as a part of the Department of Labor and rewrote the provision relating to appropriate bargaining units so that it read "employer unit, craft unit, plant unit, or subdivision thereof," thus narrowing the NLRB's discretion on the issue.[52] The conference committee also spurned efforts by industry, acting through the Secretary of Commerce, to procure adoption of the "coercion from any source" amendment, and agreed to the elimination of the "freepress" amendment under pressure from the American Newspaper Guild.[53] "There is no reason," the conference committee report stated, "why the Congress should single out this provision of the Constitution for special affirmation. The amendment could not possibly have had any legal effect, because it was merely a restatement of the first amendment of the Constitution, which remains the law of the land irrespective of congressional declaration." [54]

The report of the conference committee was accepted by both houses on June 27, and the congressional battle was over.[55] Roosevelt signed the bill on July 5, issuing a statement drafted by the Department of Labor and approved by Wagner which again confronted the constitutional issues involved with caution. The Wagner Act, the President said, "does not cover all industry and labor, but is applicable only when violation of the legal right of independent self-organization would burden or obstruct interstate commerce. Accepted by management, labor, and the public with a sense of sober responsibility and of willing cooperation, however, it should serve as an important step toward the achievement of justice and peaceful relations in industry." [56] With Roosevelt's signature affixed to the bill, Wagner's long fight in behalf of labor had come to an end. He had maneuvered the National Labor Relations Act through Congress despite indifference and hostility from the executive branch and a campaign of opposition which was called "the greatest ever conducted by industry regarding any Congressional measure." [57]

Under the terms of the act, employers were now prohibited from interfering with the exercise of their employees' right to organize, from dominating or financing a company union, and from discharging or discriminating in regard to conditions of employment for the purpose of discouraging membership in a union. The act also provided that employers who refused to bargain collectively with their employees were guilty of an unfair labor practice. A majority of employees in any given bargaining unit, on the other hand, could determine the collective bargaining representatives of all the employees in such a unit after an NLRB-supervised election. The greatest test for the

[51] 79 *Cong. Rec.* 9730–31 ; 9778 ; 9864.
[52] National Labor Relations Board, Report No. 1371, House of Representatives, 74th Cong., 1st sess. (June 26, 1935), pp. 2–4.
[53] Bernstein, *op. cit.*, p 127.
[54] National Labor Relations Board, Report No. 1371, p. 6.
[55] 79 *Cong. Rec.* 10259 ; 10300.
[56] Bernstein, *op. cit.*, p. 127. For the text of Roosevelt's statement, see NLRB, *Legislative History*, Vol. II. p. 3269.
[57] *Ibid.*, p. 110.

Wagner Act, that of its constitutionality, remained to be met, however, and despite the care with which its drafters had handled the issue, those who held the negative position could speak with much assurance in the spring of 1935. The act was essentially a bet on the broad conception of interstate commerce which the Supreme Court had embraced in the *Stafford* and *Olsen* cases and the conception of due process to which the Court had adhered in the *Texas and New Orleans* case. But as the act passed Congress, the Court appeared to be reading the commerce clause with increasing narrowness. In addition to the doctrine of the *Schechter* case, the Court had also adopted a narrow reading of the commerce power in *Railroad Retirement Board* v. *Alton*, where it invalidated a railroad pension scheme adopted by Congress in 1934.[58]

The act had provided that employee and employer contributions be paid into the federal treasury and that the fund thus established would be used for the pensioning of superannuated railway employees. Coverage was extended to persons in the employ of carriers one year prior to the passage of the act, if they re-entered the service at some future date. In an opinion by Justice Roberts, the Court held that treating the contributions of all railroads as one retirement fund and the extension of coverage to employees who had left the service were denials of due process of law. The act, Roberts said, "is not only retroactive in that it resurrects for new burdens transactions long since past and closed; but as to some of the railroad companies it constitutes a naked appropriation of private property upon the basis of transactions with which the owners of the property were never connected. Thus the Act denies due process of law by taking the property of one and bestowing it upon another." [59]

Having found the act unconstitutional on due process grounds, the Court proceeded to hold it invalid also on commerce grounds. The act's purpose was stated as being "the satisfactory retirement of aged employees," the creation of possibilities for "greater employment opportunity and more rapid advancement," and the "greatest practicable amount of relief from unemployment and the greatest possible use of resources available for said purpose and for payment of annuities for the relief of superannuated employees." [60] The Court held, however, that the purpose of the act was simply to foster "a contented mind" on the part of railroad employees, and that if such a reason could be allowed for the exercise of the commerce power, "obviously there is no limit to the field of so-called regulation." [61] The act, the Court said, was "an attempt for social ends to impose by sheer fiat non-contractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old age dependency. This is neither a necessary nor an appropriate rule or regulation affecting the due fulfillment of the railroads' duty to serve the public in interstate transportation." [62]

The majority in the case was composed of Justice Roberts, McReynolds, Sutherland, Butler, and Van Devanter. Chief Justice Hughes was

[58] 295 U.S. 330 (1935).
[59] 295 U.S. at 349–50.
[60] *Ibid.*, at 362–63.
[61] 295 U.S. at 368.
[62] *Ibid.* at 374.

followed by Justices Stone, Brandeis, and Cardozo in dissent on the grounds that the Court should have sustained the act as an exercise of the commerce power, since the provisions objectionable on due process grounds were separable. "It could not be denied," the Chief Justice wrote, "that the sovereign power to govern interstate carriers extends to the regulation of their relations with their employees who likewise are engaged in interstate commerce. The scope of this sort of regulation has been extensive. There has been not only the paramount consideration of safety, but also the recognition of the fact that fair treatment in other respects aids in conserving the peace and good order which are essential to the maintenance of the service without disastrous interruptions, and in promoting the efficiency which inevitably suffers from a failure to meet reasonable demands of justice." [63] Unfortunately for the proponents of the Wagner Act, these comments were the views of only a minority of the Court. The exercise of regulatory power in relation to the railroads had been one of the most extensive uses of the commerce clause by Congress and one of the uses of the commerce power most readily accepted by the Court. The majority's failure to accept a relation between a pension for railroad employees and the promotion of interstate transportation under the commerce power did not bode well for judicial validation of the Wagner Act's declaration of a broad conception of commerce.

Among the opponents of the Wagner Act, the *Alton* and *Schechter* cases bolstered belief in the act's unconstitutionality and encouraged resistance to its enforcement.[64] In Richmond, Virginia, for example, organizers for the Amalgamated Clothing Workers held a unionization meeting for employees of the Friedman-Harry Marks Clothing Company on June 27. The meeting was held in the Trinity Methodist Church and was addressed by Jacob S. Potofsky, vice president of the ACW, but only eight employees attended. Harry Marks, co-owner of the company, and Irving November, a company superintendent, however, observed the meeting through a window, and the following day four of the eight employees attending the meeting were fired.[65] On July 6, one day after the Wagner Act became effective, an ACW organizer charged that the company officials were of the opinion "that they can not only intimidate their workers and fire them unjustly, but that they can also violate the Wagner labor disputes bill and the social pronouncements of Jewish, Catholic and Protestant religious leaders; all of which declare that the workers have the right to organize and bargain collectively." [66] ACW officials were soon pressing the NLRB for action as the company continued its anti-union campaign. In Detroit, this pattern of employer resistance was the same, as the Fruehauf Trailer Company continued the firing of union members among its employees. About forty employees had been discharged before the effective date of the act, but others were to follow, and many resigned from the union because of threats from company officials.[67]

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[63] 295 U.S. at 376-77.

[64] Milton Derber and Edwin Young (eds.), *Labor and the New Deal* (Madison: University of Wisconsin Press, 1957), p. 290.

[65] NA—Case No. C-40, Friedman-Harry Marks Clothing Co., Folder No. 1, Memorandum from Gerhard Van Arkel to Charles Fahy, Sept. 19, 1935; Miscellaneous Correspondence Folder, Letter from Charles C. Webber to Bennet Schauffler, June 29, 1935.

[66] Richmond *Times Dispatch* (July 6, 1935), p. 1.

[67] NA—Case No. C-2, Fruehauf Trailer Co., Folder No. 1, Memorandum from G. L. Patterson to NLRB, Sept. 24, 1935.

The resistance of employers such as the Fruehauf and Friedman-Harry Marks companies to recognition of the rights guaranteed by the Wagner Act was complemented by broader attacks by employer groups on the constitutionality of the act as well as resistance to any action by the NLRB. Having decided upon the issue of the Constitution as a defensive tactic, the Liberty League and other hostile groups soon issued public and private briefs holding the act invalid and encouraging a legal attack which sought to stymie the Board at every turn. Thus, employer groups which had effectively resisted enforcement of the right to organize during the NRA period, but had lost the crucial congressional battle over the passage of the Wagner Act, were now forced to pursue their aims in the area of legal and constitutional adjudication.

7. (74th Congress, 1st Session, Senate, Report No. 573)

NATIONAL LABOR RELATIONS BOARD

May 1 (calendar day, May 2), 1935.—Ordered to be printed

Mr. Walsh, from the U.S. Congress, Senate Committee on Education and Labor, submitted the following

REPORT

[To accompany S. 1958]

The Committee on Education and Labor, to whom was referred the bill (S. 1958) to promote equality of bargaining power between employers and employees, to diminish the causes of labor disputes, to create a National Labor Relations Board, and for other purposes, after holding hearings and giving consideration to the bill, report the same with amendments and recommend the passage of the bill as amended.

In view of the impending expiration on June 16, 1935, of the National Industrial Recovery Act, with its fair promise in section 7(a) of promoting industrial peace by the recognition of the rights of employees to organize and bargain collectively, and of Public Resolution 44, Seventy-third Congress, under which the present National Labor Relations Board was created, the time has come for a clean decision either to withdraw that promise or to implement it by effective legislation. Under the conditions existing a year ago the Congress was perhaps justified in passing Public Resolution 44 in lieu of a comprehensive dealing with the problem. But the compelling force of another year's experience, demonstrating that the Government's promise in section 7(a) stands largely unfulfilled, makes unacceptable any further temporizing measures. In the committee's judgment the present bill is a logical development of a philosophy and a consistent policy manifest in many acts of Congress dealing over a period of years with labor relations.

GENERAL OBJECTIVES OF THE BILL

(1) *Industrial peace.*—The first objective of the bill is to promote industrial peace. The challenge of economic unrest is not new. During the period from 1915 through 1921 there were on the average 3,043 strikes per year, involving the vacating of 1,745,000 jobs and the loss of 50,242,000 working days every 12 months. From 1922 through 1926 the annual average totaled 1,050 strikes, 775,000 strikers, and 17,050,000 working-days lost. From 1927 through 1931 the yearly average for

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disputes was 763, for employees leaving their work 275,000, and for days lost 5,665,000. In 1933 over 812,137 workers were drawn into strikes, and in 1934 the number rose to 1,277,344. In this 2-year period over 32,000,000 working-days were lost because of labor controversies. While exactitude is impossible, reliable authority has it that over a long range of time the losses due to strikes in this country has amounted to at least $1,000,000,000 per year. And no one can count the cost in bitterness of feeling, in inefficiency, and in permanent industrial dislocation.

Prudence forbids any attempt by the Government to remove all the causes of labor disputes. Disputes about wages, hours of work, and other working conditions should continue to be resolved by the play of competitive forces, so far as the provisions of codes of fair competition are not controlling. This bill in no respect regulates or even provides for supervision of wages or hours, nor does it establish any form of compulsory arbitration.

But many of the most fertile sources of industrial discontent can be segregated into a single category susceptible to legislative treatment. Competent students of industrial relations have estimated that at least 25 percent of all strikes have sprung from failure to recognize and utilize the theory and practices of collective bargaining, under which are subsumed the rights of employees to organize freely and to deal with employers through representatives of their own choosing. Figures compiled by the Bureau of Labor statistics of the United States Department of Labor confirm this estimate. And of the 6,355 new cases received by the regional agencies of the present National Labor Relations Board during the second half of 1934, the issue of collective bargaining was paramount in 2,330, or about 74 percent.

It is thus believed feasible to remove the provocation to a large proportion of the bitterest industrial outbreaks by giving definite legal status to the procedure of collective bargaining and by setting up machinery to facilitate it. Furthermore, by establishing the only process through which friendly negotiations or conferences can operate in modern large-scale industry, there should be a tremendous lessening of the strife that has resulted from failure to adjust wage and hour disputes.

This opinion is substantiated by experience in the United States. For over half a century, beginning with the act of October 1, 1888 (25 Stat. 501), and culminating in the 1934 amendments to the Railway Labor Act (48 Stat. 1185), Congress has constantly elaborated and perfected its protection of collective bargaining in the railroad industry. Largely in consequence, our main arteries of commerce have been remarkably free from the paralyzing effect of industrial disputes since the great strike of 1894. During the World War, when it became imperative that production should be maintained without interruption, the Government set up the War Labor Board and without hesitation applied to industry generally the principles that had been tested upon the railroads. Not until after the armistice was a single award of the War Labor Board violated, and our country remained singularly free from the industrial strife that harassed the other belligerent nations. Only after the war, when the Government withdrew its support of the practice of collective bargaining, was the country faced with a rising tide of labor disputes.

And in this connection it must not be overlooked that the present National Labor Relations Board and its predecessor, the National Labor Board, despite the handicaps under which they have operated, handicaps which the present bill is designed to remove, have succeeded in keeping over 1,000,000 men at work upon terms satisfactory to all.

For these reasons, the committee believes that the present bill, by promoting peace in industry, will confer mutual benefits upon employers, workers, and the general public.

(2) *Economic adjustment.*—The second major objective of the bill is to encourage, by developing the procedure of collective bargaining, that equality of bargaining power which is a prerequisite to equality of opportunity and freedom of contract. The relative weakness of the isolated wage earner caught in the complex of modern industrialism has become such a commonplace of our economic literature and political vocabulary that it needs no exposition. This relative weakness of position has been intensified by the technological forces driving us toward greater concentration of business, by the tendency of the courts to narrow the application of the antitrust laws, and more recently by the policy of the Government in encouraging cooperative activity among trade and industrial groups.

Congress long ago recognized that it must play some part in redressing this inequality of bargaining power. A ready example has been the extensive role played by the Federal Government in the railroad industry, to which this report has referred. Another instance is the Norris-LaGuardia Act (U.S.C., title 29, secs. 101–115). And a marked enlargement of Federal activity in the field of labor relations was one of the consequences of the Nation-wide depression beginning in 1929.

Between 1929 and February 1933, the index of industrial production dropped from 119 to 63, while construction activities fell from 117 to 19, and commodity prices from 95.3 to 59.8. Pay rolls receded from 107 to 40. In the 3 years following 1929, the income received by individuals in the United States shrunk from 81 billion dollars to 49, a reduction of 40 percent. At the height of the crisis, from 12 to 16 million people were unemployed.

While neither economists nor statesmen agreed entirely as to the causes or remedies for the depression, the overwhelming preponderance acknowledged that the disregard of economic forces for State lines, the interpenetration of various industries throughout the country, and the Nation-wide character of the prolonged calamity made national action essential. To speed business revival Congress therefore abetted Nation-wide cooperation among business men to outlaw unfair trade practices, to rationalize production, and to coordinate the distribution of goods. Supplementary to this, Congress accepted and acted upon the tested hypothesis that the depression had been provoked and accentuated by a long-continued and increasing disparity between production and consumption: that this disparity had resulted from a level of wages that did not permit the masses of consumers to relieve the market of an ever-increasing flow of goods; and that even business men who recognized these evils—and very many of them did—were powerless to act because of the uncontrolled competition in regard to wages and other working conditions. Having

in mind both the temporary expediency of priming the pump of business and the permanent objective of crystallizing antidepressive forces for the future, Congress commenced the regulation of minimum wages and maximum hours to stabilize competitive conditions and to spread adequate consumer purchasing power throughout the Nation at large.

Congress recognized at the outset, however, that governmental regulation of wages and working conditions was not a complete solution, and that far from being a substitute for self-help by industry and labor, it was merely a bedrock upon which both might build. In order that industry might help itself, there was some relaxation of the antitrust laws; in order that labor might help itself, the prospectus of collective bargaining was set forth in section 7(a) of the National Industrial Recovery Act (48 Stat. 198), supplemented in June 1934 by Public Resolution 44 (48 Stat. 1183), providing for governmentally supervised elections of representatives of employees.

Whatever divergence of opinion there may be as to the validity of some of the steps in the program above discussed, the committee believes that the desirability of collective bargaining, as it bears upon industrial peace and equality of bargaining power, is sufficiently well established and sufficiently divorced from the temporary aspects of the present economic situation to justify its affirmance in adequate and permanent Federal law.

WEAKNESSES IN EXISTING LAW

It is not necessary to cite extensive evidence of the break-down of section 7(a) of the National Industrial Recovery Act and of Public Resolution 44. That fact is not only a matter of common knowledge, but has been admitted publicly by officials of the National Recovery Administration, by those connected with the National Labor Relations Board, and by many others whose experience merits attention.

A recital of the weaknesses in these laws, however, will indicate that the defects are neither intrinsic nor irremediable, but may be cured by the corrective steps taken in the present bill.

(1) *Ambiguity.*—The language of section 7(a) has been subjected to a variety of interpretations by persons whose opinions weighed heavily with public opinion, either because they were specifically charged with the administration of that law or because they were intimately connected with some other phase of the Government's program. It is clear that both employers and employees are entitled to and will benefit by a greater precision and certainty in the law.

(2) *Excessive generality.*—While section 7(a) states the principles of collective bargaining in general terms, it contains no particularities as to what practices are contrary to its purposes. This has greatly hampered not only administrative and enforcing agencies, but also all those subject to the law who wish to obey it.

(3) *Excessive diffusion of administrative responsibility.*—Today a wide variety of independent industrial boards, from 13 to 15 in number, are entrusted with the administration of section 7(a). The present National Labor Relations Board has no appellate jurisdiction over any board established pursuant to an industrial code, either in respect to findings of fact or interpretations of law. And as there are

now over a hundred codes which make some provisions for the creation of such boards, it could be only a matter of time until this diffusion of authority would reach extraordinary proportions.

None of these boards has any actual power within itself to enforce section 7(a). And even if such power could be granted wisely to a multitude of agencies, these boards are unsuited to the purpose. Largely bipartisan in character, they live in an atmosphere of conciliation and compromise that may be admirably suited to the settlement of wage and hour disputes where shifting standards must be applied to variegated local needs. But section 7(a) is a uniform national policy established by law of Congress. As such it must receive uniform interpretation everywhere; it must be enforced by a judicial process rather than broken by compromise; and its enforcement must reside with governmental rather than with quasi-private agencies.

(4) *Disadvantages of tie-up with codes of fair competition.*—The incorporation of section 7(a) in codes of fair competition entrusts the enforcement of that section largely to the National Recovery Administration. For example, even after the National Labor Relations Board decides that 7(a) has been violated, ultimate decision as to whether the Blue Eagle shall be removed and Government contracts canceled rests with the Recovery Administration.

This arrangement is undesirable because policies admirably suited to the administration of canons of fair competition that have been written largely with the advice and consent of industry are not suited at all to the enforcement of section 7(a), which is a law of Congress that becomes of moment precisely when it is defied. The tendency is to force the Recovery Administration upon the horns of a dilemma where it must decide either to speak softly about 7(a) of disturb the amicable atmosphere in which the cooperative formation and execution of codes of fair competition thrives.

This evil is accentuated because section 7(a) is now applicable only to codified industries. Thus recalcitrants are in a strategic position to threaten constantly the abandonment of their code if 7(a) is invoked against them.

(5) *No power vested in National Labor Relations Board.*—The present National Labor Relations Board, which is the primary agency entrusted with the safeguarding of section 7 (a), has no quasi-judicial power. It must seek enforcement through reference to the Department of Justice. Since the Board has no power of subpena, except in connection with elections, the records which it builds up are based in many cases upon the testimony of complainants alone, supplemented at best by the testimony of such witnesses as the defendants voluntarily present. This makes it necessary for the Department of Justice, in any event, to make further investigations before bringing suit in court, and if suit is brought at all, it must commence entirely *de novo* in court, with the defendant having 30 days to answer, or moving to dismiss, or applying for a bill of particulars. Thus is defeated the very purpose of an administrative agency, which is to provide specialized treatment of the factual aspects of a specialized type of controversy.

(6) *Obstacles to elections.*—Under Public Resolution 44, any attempt by the Government to conduct an election of representatives may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact. This means that the Government can be delayed indefinitely before it takes the grst step toward industrial peace. After almost a year not a single case, in which a company has chosen to contest an election order of the Board, has reached decision in any circuit court of appeals.

This break-down of the law is breeding the very evil which the law was designed to prevent. During the past year and a half the country has lived under the constant shadow of actual or impending warfare in factory and in mine. A large portion of this strife, which falls so heavily upon the general public, may be attributed to the evils enumerated above.

ANALYSIS OF THE BILL

Section 1. Findings and declaration of policy.—This section states the dual objective of Congress to promote industrial peace and equality of bargaining power by encouraging the practice of collective bargaining and protecting the rights upon which it is based.

Section 2. Definitions.—It will be sufficient to discuss the more important definitions.

The term "employer" excludes labor organizations, their officers, and agents (except in the extreme case when they are acting as employers in relation to their own employees). Otherwise the provisions of the bill which prevent employers from participating in the organizational activities of workers would extend to labor unions as well, and thus would deprive unions of one of their normal functions.

The term "employee" is not limited to the employees of a particular employer. The reasons for this are as follows: Under modern conditions employees at times organize along craft or industrial lines and form labor organizations that extend beyond the limits of a single-employer unit. These organizations at times make agreements or bargain collectively with employers, or with an association of employers. Through such business dealings, employees are at times brought into an economic relationship with employers who are not their employers. In the course of this relationship, controversies involving unfair labor practices may arise. If this bill did not permit the Government to exercise complete jurisdiction over such controversies (arising from unfair labor practices), the Government would be rendered partially powerless, and could not act to promote peace in those very wide-spread controversies where the establishment of peace is most essential to the public welfare.

The term "employee" also includes any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice, who has not attained any other regular or substantially equivalent employment. The bill thus observes the principle that men do not lose their right to be considered as employees for the purposes of this bill merely by collectively refraining from work during the course of a labor controversy. Recognition that strikers may retain their status as employees has frequently occurred in judicial decisions. (See, for example, *Michaelson* v. *United States* (291 Fed. 940), reversed on other grounds in 266

U.S. 42.) To hold otherwise for the purposes of this bill would be to withdraw the Government from the field at the very point where the process of collective bargaining has reached a critical stage and where the general public interest has mounted to its highest point. And to hold that a worker who because of an unfair labor practice has been discharged or locked out or gone on strike is no longer an employee, would be to give legal sanction to an illegal act and to deny redress to the individual injured thereby.

For administrative reasons, the committee deemed it wise not to include under the bill agricultural laborers, persons in domestic service of any family or person in his home, or any individual employed by his parent or spouse. But after deliberation, the committee decided not to exclude employees working for very small employer units. The rights of employees should not be denied because of the size of the plant in which they work. Section 7 (a) imposes no such limitation. And in cases where the organization of workers is along craft or industrial lines, very large associations of workers fraught with great public significance may exist, although all the members therein work in very small establishments. Furthermore, it is clear that the limitation of this bill to events affecting interstate commerce is sufficient to prevent intervention by the Federal Government in controversies of purely local significance.

The term "labor organization" is phrased very broadly in order that the independence of action guaranteed by section 7 of the bill and protected by section 8 shall extend to all organizations of employees that deal with employers in regard to "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." This definition includes employee-representation committees and plans in order that the employers' activities in connection therewith shall be equally subject to the application of section 8.

The term "affecting commerce" is inserted as a short cut to prevent the repetition of lengthy jurisdictional phraseology throughout the bill. The bill limits Federal action to areas sanctioned by the commerce clause. The bill does not project the Federal Government into matters of purely intrastate concern. It applies only in matters which burden or affect or obstruct interstate commerce, or which have led or tend to lead to a labor dispute that might have such effect upon interstate commerce. (The more general discussion of constitutional questions is deferred until the last section of this report.)

The term "labor dispute" includes cases where the disputants do not stand in the proximate relation of employer and employee. An identical provision is contained in section 13(c) of the Norris-LaGuardia Act (U.S.C., title 29, secs. 101–115), and in most recent labor legislation dealing with disputes. This definition does not mean that the Government could intervene in a "dispute" between an employer and, let us say, a critical college professor; for jurisdiction under this bill depends upon the charge of an unfair labor practice affecting commerce, and there could be no such practice involving the employer and the college professor. But unfair labor practices may, by provoking a sympathetic strike for example, create a dispute affecting commerce between an employer and employees between whom there is no proximate relationship. Liberal courts and Congress have already

recognized that employers and employees not in proximate relationship may be drawn into common controversies by economic forces. There is no reason why this bill should adopt a narrower view, or prevent action by the Government when such a controversy occurs.

Section 3. National Labor Relations Board.—This section creates as an independent agency in the executive branch of the Government, a board to be known as the National Labor Relations Board. The Board shall be composed of three members, appointed for 5-year terms by the President by and with the advice and consent of the Senate.

Section 4. Organization of the Board.—This section provides that members of the Board shall receive salaries of $10,000 a year each. It also provides for the appointment of employees, for the transfer to the Board of the cases, records, and employees of the present National Labor Relations Board, and for the method of paying the expenses of the Board. These provisions are all in accordance with commonly accepted practice in setting up administrative agencies.

It is of special import that the National Labor Relations Board is not empowered to engage in conciliation of wage and hour disputes insofar as that activity can be carried on by the Department of Labor. Duplication of services is thus avoided, and in addition the Board is left free to engage in quasi-judicial work that is essentially different from conciliation or mediation of wage and hour controversies. And of course the binding effect of the provisions of this bill forbidding unfair labor practices are not subjects for mediation or conciliation.

The committee does not believe that the Board should serve as an arbitration agency. Such work, like conciliation, might impair its standing as an interpreter of the law. In addition, there is at present no dearth of arbitration agencies in this country. If arbitration lags, it is only because parties are not ready to submit to it. And compulsory arbitration has not received the sanction of the American people.

Section 5. Prosecution of inquiry.—This section follows the customary policy of allowing the Board or its agencies to move to the scene of action, rather than compelling all parties at all times to come to Washington.

Section 6. Rules and regulations.—This section follows the customary policy of giving the Board the power to make and amend rules and regulations. Such rules and regulations become effective only upon publication and there are no criminal penalties attached to their breach.

RIGHTS OF EMPLOYEES—UNFAIR LABOR PRACTICES

Sections 7 and 8. Rights of employees—Unfair labor practices.—These sections are designed to establish and protect the basic rights incidental to the practice of collective bargaining. At this juncture the committee wishes to emphasize two points. In the first place, the unfair labor practices under the purview of this bill are strictly limited to those enumerated in section 8. This is made clear by paragraph 8 of section 2, which provides that "The term 'unfair labor practice' means any unfair labor practice listed in Section 8", and by

Section 10 (a) empowering the Board to prevent any unfair labor practice "listed in Section 8." Unlike the Federal Trade Commission Act, which deals somewhat analogously with unfair trade practices, this bill is specific in its terms. Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair. Secondly, as will be shown directly, the unfair labor practices listed in this bill are supported by a wealth of precedent in prior Federal law.

Section 7 provides that—

> employees shall have 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.

In conjunction with section 7, the first unfair labor practice enumerated in section 8 makes it illegal for an employer—

> to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

This familiar statement calls to mind the language of section 7 (a) of the National Industrial Recovery Act (48 Stat. 198, U. S. C., title 15, sec. 707 (a)), which provides that—

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Similarly, section 2 of the Railway Labor Act of 1934 (48 Stat. 1185) provides:

> The purposes of the Act are * * * (3) to provide for the complete independence of carriers and of employees in the matter of self-organization * * *. Employees shall have the right to organize and bargain collectively through representatives of their own choosing * * *. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice * * *.

Similar statements will be found in section 2 of the Railway Labor Act of 1926 (44 Stat. 577, U. S. C., title 45, sec. 152); section 2 of the Norris-La Guardia Act (47 Stat. 70, U.S.C., title 29, sec. 102); section 77 (p) and (q) of the 1933 amendments to the Bankruptcy Act (47 Stat. 1481, U. S. C., title 11, sec. 205 (p) and (q); and section 7 (e) of the act creating the office of the Federal Coordinator of Transportation (48 Stat. 214, U. S. C., title 49, sec. 257 (e)).

The four succeeding unfair-labor practices are designed not to impose limitations or restrictions upon the general guaranties of the first, but rather to spell out with particularity some of the practices that have been most prevalent and most troublesome.

THE COMPANY-UNION PROBLEM

The second unfair labor practice deals with the so-called "company-union problem." It forbids an employer—

> to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.

(The proviso will be discussed subsequently.)

With identical objectives in view, section 2 of the Railway Labor Act of 1934 provides:

> The purposes of the Act are * * * (3) * * * it shall be unlawful for any carrier to interfere in any way with the organization of its employees. * * * (4) It shall be unlawful for any carrier * * * to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency or collective bargaining, or in performing any work therefor.

To the same effect are the provisions of the Bankruptcy Act as amended in 1933 and 1934, and section 7(e) of the Emergency Railroad Transportation Act of 1933. Under these sections it is unlawful for a carrier (whether under control of a judge, trustee, receiver, or private management) or for a judge, trustee, or receiver in a corporate reorganization under the Bankruptcy Act—

> * * * to interfere in any way with the organizations of employees or to use the funds of the (property) under his jurisdiction in maintaining so-called "company unions."

This bill does nothing to outlaw free and independent organizations of workers who by their own choice limit their cooperative activities to the limits of one company. Nor does anything in the bill interfere with the freedom of employers to establish pension benefits, outing clubs, recreational societies, and the like, so long as such organizations do not extend their functions to the field of collective bargaining, and so long as they are not used as a covert means of discriminating against or in favor of membership in any labor organization. Such agencies, confined to their proper sphere, have promoted amicable relationships between employers and employees and the committee earnestly hopes that they will continue to function.

The so-called "company-union" features of the bill are designed to prevent interference by employers with organizations of their workers that serve or might serve as collective bargaining agencies. Such interference exists when employers actively participate in framing the constitution or bylaws of labor organizations; or when, by provisions in the constitution or bylaws, changes in the structure of the organization cannot be made without the consent of the employer. It exists when they participate in the internal management or elections of a labor organization or when they supervise the agenda or procedure of meetings. It is impossible to catalog all the practices that might constitute interference, which may rest upon subtle but conscious economic pressure exerted by virtue of the employment relationship. The question is one of fact in each case. And where several of these interferences exist in combination, the employer may be said to dominate the labor organization by overriding the will of employees.

The committee feels justified, particularly in view of statutory precedents, in outlawing financial or other support as a form of unfair pressure. It seems clear that an organization or a representative or agent paid by the employer for representing employees cannot command, even if deserving it, the full confidence of such employees. And friendly labor relations depend upon absolute confidence on the part of each side in those who represent it.

But the committee has been extremely careful not to work injustice by carrying these strictures too far. To deny absolutely by law the right of employees to confer with management during working hours without loss of time or pay would interrupt the very negotiations which it is the object of this bill to promote. For these reasons, there is attached to the second unfair labor practice the following proviso:

That, subject to rules and regulations made and published by the Board pursuant to section 6 (a), and employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

This proviso is surrounded by adequate safeguards. Where the right to receive normal pay while conferring is bestowed upon favored employees or organizations rather than equally upon all, it will run up against many of the prohibitions of section 8. In addition, the proviso in entirety is made subject to the rules and regulations of the Board, thus enabling the Board to confine it to whatever extent may be necessary to effectuate the purposes of the bill.

The committee's decision to prevent company interference with employee organizations has been influenced by recent events.

Practically 70 percent of the employer-promoted unions have sprung up since the passage of section 7(a) of the National Industrial Recovery Act. The testimony before the committee has indicated that the active entry of some employers into a vigorous competitive race for the organization of workers is not conducive to peace in industry. It is the wish of the committee to prevent insofar as possible the perpetuation of bitterness or strife.

The third unfair labor practice forbids 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.

(The proviso will be discussed subsequently.)

This provision rounds out the idea expressed in section 7(a) of the National Industrial Recovery Act to the effect that—

No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing * * *.

Of course nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform. But if the right to be free from employer interference in self organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in discriminatory treatment or loss of the opportunity for work.

PROBLEM OF THE CLOSED SHOP

The proviso attached to the third unfair-labor practice deals with the question of the closed shop. Propaganda has been wide-spread that this proviso attaches special legal sanctions to the closed shop or seeks to impose it upon all industry. This propaganda is absolutely false. The reason for the insertion of the proviso is as follows: According to some interpretations, the provision of section 7(a) of the Na-

tional Industrial Recovery Act, assuring the freedom of employees "to organize and bargain collectively through representatives of their own choosing", was deemed to illegalize the closed shop. The committee feels that this was not the intent of Congress when it wrote section 7(a); that it is not the intent of Congress today; and that it is not desirable to interfere in this drastic way with the laws of the several States on this subject.

But to prevent similar misconceptions of this bill, the proviso in question states that nothing in this bill, or in any other law of the United States, or in any code or agreement approved or prescribed thereunder, shall be held to prevent the making of closed-shop agreements between employers and employees. In other words, the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal; it does not interfere with the *status quo* on this debatable subject but leaves the way open to such agreements as might now legally be consummated, with two exceptions about to be noted.

The assertion that the bill favors the closed shop is particularly misleading in view of the fact that the proviso in two respects actually narrows the now existent law regarding closed-shop agreements. While today an employer may negotiate such an agreement even with a minority union, the bill provides that an employer shall be allowed to make a closed-shop contract only with a labor organization that represents the majority of employees in the appropriate collective-bargaining unit covered by such agreement when made.

Secondly, the bill is extremely careful to forestall the making of closed-shop agreements with organizations that have been "established, maintained, or assisted" by any action defined in the bill as an unfair labor practice. And of course it is clear that no agreement heretofore made could give validity to the practices herein prohibited by section 8.

The fourth unfair labor practice, which prohibits the discharge of or discrimination against an employee for filing charges or giving testimony under the bill, is self-explanatory.

DUTY TO BARGAIN COLLECTIVELY

The fifth unfair labor practice makes it illegal for an employer—

to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.

But, after deliberation, the committee has concluded that this fifth unfair labor practice should be inserted in the bill. It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives as they have been designated (whether

as individuals or labor organizations) and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement. Furthermore, the procedure of holding governmentally supervised elections to determine the choice of representatives of employees becomes of little worth if after the election its results are for all practical purposes ignored. Experience has proved that neither obedience to law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment. Such a course provokes constant strife, not peace.

Subsequently, in this report the committee adverts to proposals for including in the bill prohibitions against practices by employees.

THE MAJORITY RULE

Section 9. Selection of representatives.—Section 9(a) sets forth the majority rule. It provides that—

> Representatives designated or selected for the purpose 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 purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

(The proviso will be discussed later.)

The principle of majority rule has been applied successfully by governmental agencies and embodied in laws of Congress. It was promulgated by the National War Labor Board created by President Wilson in the spring of 1918. It has been followed without deviation by the Railway Labor Board, created by the Transportation Act of 1920. Public Resolution No. 44, approved June 1934, contemplated majority rule in that it provided for secret elections. The 1934 amendments to the Railway Labor Act provided:

> 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 the rule is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions.

The object of collective bargaining is the making of agreements that will stabilize business conditions and fix fair standards of working conditions. Since it is well-nigh universally recognized that it is partically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is imparticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remained divided among themselves. Employers likewise, where majority rule has been given a trial of reasonable duration, have found it more conducive to harmonious labor relations to negotiate with representatives chosen by the majority than with numerous warring factions.

Majority rule carries the clear implication that employers shall not interfere with the practical application of the right of employees

to bargain collectively through chosen representatives by bargaining with individuals or minority groups in their own behalf, after representatives have been picked by the majority to represent all. But majority rule, it must be noted, does not imply that any employee can be required to join a union, except through the traditional method of a closed-shop agreement, made with the assent of the employer. And since in the absence of such an agreement the bill specifically prevents discrimination against anyone either for belonging or for not belonging to a union, the representative selected by the majority will be quite powerless to make agreements more favorable to the majority than to the minority. In addition, the bill preserves at all times the right of any individual employee or group of employes to present grievances to their employer.

Another protection for minorities is that the right of a majority group through its representatives to bargain for all is confined by the bill to cases where the majority is actually organized "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." An organization which is not constructed to practice genuine collective bargaining cannot be the representative of all employees under this bill.

Section 9(b) empowers the National Labor Relations Board to decide whether the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit. Obviously, there can be no choice of representatives and no bargaining unless units for such purposes are first determined. And employees themselves cannot choose these units, because the units must be determined before it can be known what employees are eligible to participate in a choice of any kind.

This provision is similar to section 2 of 1934 amendments to the Railway Labor Act (48 Stat. 1185), which states that—

> In the conduct of any election for the purpose herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election.

ELECTIONS

Section 9(c) empowers the National Labor Relations Board, whenever a question affecting commerce arises concerning the representation of employees, to conduct an investigation either by secret ballot or otherwise to determine such representatives. In any such investigation, an appropriate hearing must be held.

Section 9(d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing. But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by any aggrieved party in the Federal courts in the manner provided in section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board.

PREVENTION OF UNFAIR LABOR PRACTICES

Section 10. Procedure before the Board.—This is the most important procedural section. Despite the widespread charges that the bill invokes novel procedure and vests unusual powers in an administrative agency, the bill is modeled closely upon numerous Federal statutes setting up administrative regulatory bodies of a quasi-judicial character. The common procedure is so well known that the committee deems it unnecessary in substantiation of this statement to refer to any analogous statutes save the Federal Trade Commission Act, section 5.

The bill empowers the National Labor Relations Board to hold hearings, either itself or through its agents, upon charges of unfair labor practices. After such hearings the Board, and the Board alone, may issue orders requiring the person complained of to cease and desist from the unfair labor practice and to take such affirmative action, including reinstatement with or without back pay, as may be necessary to effectuate the policies of the bill. If no sufficient case is made out, the Board shall issue an order dismissing the complaint.

If an order of the Board is disobeyed, the Board may petition for enforcement in any circuit court of appeals of the United States in any circuit wherein the unfair labor practice in question occurred or wherein the disobedient person resides or transacts business or in the appropriate district court if all circuit courts are in vacation. In such instances, the court shall have power to grant temporary relief or a restraining order, and to make and file a decree enforcing, modifying, or setting aside in whole or in part the order of the Board. Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may likewise obtain review in the appropriate court.

Section 10(a) gives the National Labor Relations Board exclusive jurisdiction to prevent and redress unfair labor practices, and, taken in conjunction with section 14, establishes clearly that this bill is paramount over other laws that might touch upon similar subject matters. Thus it is intended to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining.

INVESTIGATORY POWERS

Section 11. Investigation.—This section confers upon the Board the usual investigatory powers vested in administrative agencies, but these powers are limited to the functions imposed in sections 9 and 10.

Section 12. Protection of Federal officials.—This section imposes a criminal penalty, not exceeding imprisonment for more than 1 year, or a fine not exceeding $5,000, or both, upon any person who willfully interferes with any member or agent of the Board in the performance of duties pursuant to the bill. Neither this nor any other section of the bill provides any criminal penalty (other than the usual penalty for contempt) for engaging in an unfair labor practice, even after a court had ordered its cessation.

LIMITATIONS

Section 13. The right to strike.—This section provides that "nothing in this act shall be construed so as to interfere with or impede or diminish in any way the right to strike." It is taken in substance from section 6 of Public Resolution No. 44, Seventy-third Congress.

Section 14. Relationship to other legislation.—This section is designed to resolve conflicts between this bill and other laws.

Section 15. Separability.—This section contains the standard provision for separability in the event that the application of some part of the bill might be invalid.

Section 16. Title.—This section provides that the bill may be cited as the "National Labor Relations Act."

REASONS FOR CONFINING THE BILL TO UNFAIR LABOR PRACTICES BY EMPLOYERS

One suggestion in regard to this bill has been advanced so frequently that the committee deems it advisable to set forth its reason for rejecting it. This proposal is that employees and labor organizations, as well as employers, should be prohibited from interfering with, restraining, or coercing employees in their organization activities or their choice of representatives.

The argument most frequently made for this proposal is the abstract one that it is necessary in order to provide fair and equal treatment of employers and employees. The bill prohibits employers from interfering with the right of employees to organize. The corresponding right of employers is that they should be free to organize without interference on the part of employees; no showing has been made that this right of employers to organize needs Federal protection as against employees. Regulation of the activities of employees and labor organizations in regard to the organization of employees is no more germane to the purposes of this bill than would be regulation of activities of employers and employer associations in connection with the organization of employers in trade associations.

This erroneously conceived mutuality argument is that since employers are to be prohibited from interfering with the organization of workers, employees and labor organizations should also be prohibited from engaging in such activities. To say that employees and labor organizations should be no more active than employers in the organization of employees is untenable; this would defeat the very objects of the bill.

There is an even more important reason why there should be no insertion in the bill of any provision against coercion of employees by employees or labor organizations. Courts have held a great variety of activities to constitute "coercion": A threat to strike, a refusal to work on material of nonunion manufacture, circularization of banners and publications, picketing, even peaceful persuasion. In some courts, closed-shop agreements or strikes for such agreements are condemned as "coercive." Thus to prohibit employees from "coercing" their own side would not merely outlaw the undesirable activities which the word connotes to the layman, but would raise in Federal law the ghosts of

many much-criticized injunctions issued by courts of equity against activities of labor organizations, ghosts which it was supposed Congress had laid low in the Norris-LaGuardia Act.

Nor can the committee sanction the suggestion that the bill should prohibit fraud or violence by employees or labor unions. The bill is not a mere police court measure. The remedies against such acts in the State and Federal courts and by the invocation of local police authorities are now adequate, as arrests and labor injunctions in industrial disputes throughout the country will attest. The Norris-LaGuardia Act does not deny to employees relief in the Federal courts against fraud, violence or threats of violence. See 29 U. S. C. § 104 (e) and (i).

Racketeering under the guise of labor-union activity has been successfully enjoined under the antitrust laws when it affected interstate commerce. The latest case along these lines is *United States* v. *Local No. 167 et al.* (291 U.S. 293).

In addition, the procedure set up in this bill is not nearly so well suited as is existing law to the prevention of such fraud and violence. Deliberations and hearings by the Board, followed by orders that must be referred to the Federal courts for enforcement, are methods of procedure that could never be sufficiently expeditious to be effective in this connection.

The only results of introducing proposals of this sort into the bill, in the opinion of the committee, would be to overwhelm the Board in every case with countercharges and recriminations that would prevent it from doing the task that needs to be done. There is hardly a labor controversy in which during the heat of excitement statements are not made on both sides which, in the hands of hostile or unsympathetic courts, might be construed to come under the common-law definition of fraud, which in some States extends even to misstatements innocently made, but without reasonable investigation. And if the Board should decide to dismiss such charges, its order of dismissal would be subject to review in the Federal courts.

Proposals such as these under discussion are not new. They were suggested when section 7(a) of the National Industrial Recovery Act was up for discussion, and when the 1934 amendments to the Railway Labor Act were before Congress. In neither instance did they command the support of Congress.

CONSTITUTIONALITY

The committee is convinced that this proposal keeps within the confines of the constitutional power of Congress. The two main questions involved are: (1) Are the regulations of the employer-employee relationship herein contemplated within the boundaries of due process of law and (2) can Federal jurisdiction be sustained under the commerce clause.

On the due-process point, the case of *Texas & New Orleans Railroad* v. *Brotherhood* (281 U.S. 548) completely sustained the authority of Congress to protect full freedom of organization and to prevent employer domination of employee organizations. This was a suit by a railway brotherhood 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, which was sustained in full by the Supreme Court, compelled the company (1) to completely disestablish its company union as representative of its employees; (2) to reinstate the brotherhood (which was the recognized representative chosen by the majority before the company began its unlawful interference) as the representative of all employees until they should make another free choice; (3) to restore to service and to stated privileges certain employees who had been discharged for activities in behalf of the brotherhood. The opinion of a unanimous Court was written by the present Chief Justice.

Turning to the question of interstate commerce, the figures cited earlier in this report can leave no doubt that widespread industrial disturbances burden the flow of commerce. That fact has received recognition by our highest tribunal in such well-known cases as *In re Debs* (158 U.S. 564), *Duplex Printing Press Co.* v. *Deering* (254 U.S. 443), *American Steel Foundries* v. *Tri-City Central Trades Council* (257 U.S. 184); *Coronado Coal Co.* v. *United Mine Workers* (268 U.S. 295), and *Bedford Cut Stone Co.* v. *Stone Cutters Association* (274 U.S. 37). Equally true it is that failure to accept the procedure of collective bargaining has been the cause of some of the most violent of these industrial disputes. That issue was paramount in the *Debs case*, the *Coronado case*, and *International Organization* v. *Red Jacket C. C. & C. Co.* (18 Fed. (2d) 839, cert. den. 275 U.S. 536). And the remedy has been as well recognized as the cause. Whenever given a fair trial, machinery for facilitating collective bargaining has promoted industrial peace.

It is clear, in addition, that unfair labor practices which tend to promote strife may be enjoined before the stife occurs. Civilized law is preventive as well as punitive. As Chief Justice Taft said in the first *Coronado case* (259 U.S. 344):

> 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 restrain.

See also *Wilson* v. *New*, 243 U.S. 322; *United States* v. *Ferger* (250 U.S. 199); *Stafford* v. *Wallace* (258 U.S. 495); *Chicago Board of Trade* v. *Olson* (262 U.S. 1); *Texas & New Orleans Railroad* v. *Brotherhood*, *supra*.

Cases under the antitrust laws, cited for the proposition that the Federal Government cannot deal with the employer-employee relationship, are not in point. They turned not on any question of constitutional limitations, but upon statutory construction of the extent of equity jurisdiction over labor activities under the antitrust laws. But the Federal Government has power to prevent burdens upon interstate commerce that reach beyond the intent of those laws in regard to labor disputes, and it is intended in this bill to exercise the full constitutional power of Congress to prevent the described unfair labor practices, which have no extenuating social values operating in their favor.

The committee is further of the opinion that congressional power to prevent these unfair labor practices exists and should be exercised

even where the threat of strife is not imminent. It line with modern economic developments, the courts have recognized that unsound economic practices have a marked effect upon the volume and stability of commerce. This is illustrated in the cases prohibiting unfair methods of competition under the Federal Trade Commission Act. Again, the general proposition is aptly stated in *Chicago Board of Trade* v. *Olsen* (262 U.S. 1) upholding Federal regulation of future sales on grain exchanges, an activity in itself purely local. The court said:

> The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it. For this reason, Congress has the power to provide the appropriate means adopted in this act by which this abuse may be restrained and avoided.

In effect upon commerce, wage levels are as significant as price levels, for the exchange of goods depends as much upon the consumer's income as upon the price which he must pay. Income and cost of living must be indexed in terms of each other. An analysis of the effect of a decline in mass purchasing power upon all commercial transactions forces the conclusion that the protection of Nation-wide commerce depends as much upon a floor for wages an upon a ceiling for prices. And in stabilizing wages, no factor plays a more important role than collective bargaining.

In the case of *Appalachian Coals, Inc.*, v. *United States* (288 U.S. 344), Chief Justice Hughes 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 statement is a landmark of contemporary realism in regard to the commerce power. While this bill of course does not intend to go beyond the constitutional power of Congress, as that power may be marked out by the courts it seeks the full limit of that power in preventing these unfair labor practices. It seeks to prevent them, whether they burden interstate commerce by causing strikes, or by occurring in the stream of interstate commerce, or by overturning the balance of economic forces upon which the full flow of commerce depends.

8. (74th Congress, 1st Session, House of Representatives, Report No. 1147)

NATIONAL LABOR RELATIONS BOARD

June 10, 1935.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. Connery, from the U.S. Congress, House Committee on Labor, submitted the following

REPORT

[To accompany S. 1958]

The Committee on Labor, to whom was referred the bill (S. 1958) to promote equality of bargaining power between employers and employees to diminish the causes of labor disputes, to create a National Labor Relations Board, and for other purposes, having had the same under consideration, report it back to the House with amendments and recommended that the bill, as amended, do pass.

The committee amendments are as follows:

On page 1, line 3, strike out "declaration of".

On page 1, line 4, strike out all beginning with "The" down through line 24 on page 2 and insert in lieu thereof the following:

The denial by employers of the right to employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing interstate and foreign commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of interstate and foreign commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of interstate and foreign commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of interstate and foreign commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure 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.

On page 4, line 10, 11, and 12, strike out "or commerce, or any transportation or communication relating thereto", and insert in lieu thereof "commerce, transportation, or communication".

On page 4, strike out lines 19 to 23, both inclusive, and insert in lieu thereof the following:

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

On page 5, lines 17 and 18, strike out "as an independent agency in the executive branch of the Government" and insert in lieu thereof "in the Department of Labor".

On page 6, line 5, after the period insert the following:

Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

On page 7, line 15, strike out all after "exist" down through "hearing" in line 23.

On page 8, strike out and insert in lieu thereof the following: "amended. All records, papers, and property".

On page 9, line 25, insert after "U.S.C.," the following: "Supp. VII,".

On page 11, strike out lines 3 to 6, both inclusive, and insert in lieu thereof:

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit.

On page 11, line 12, after the word "hearing" insert "upon due notice".

On page 13, line 3, strike out "appear" and insert "intervene".

On page 13, line 4, after "proceeding" insert "and."

On page 14, line 8, strike out "If such person fails or neglects to obey such order of the Board while the same is in effect, the Board may", and insert in lieu thereof "The Board shall have power to".

On page 15, line 2, strike out the word "shall" and insert in lieu thereof the word "to".

On page 15, line 4, after "modifying," insert "and enforcing as so modified".

On page 17, strike out lines 2 and 3 and insert in lieu thereof the following: "and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order".

On page 17, line 12, after the word "modifying", insert "and enforcing as so modified".

On page 17, line 17, strike out "(U.S.C.," and insert in lieu thereof "approved March 23, 1932 (U.S.C., Supp. VII,".

On page 21, line 7, insert after "U.S.C.," the following: "Supp. VII,".

On page 21, line 8, strike out "(b)" and insert in lieu thereof "B".

(A bill (H.R. 6288) to promote equality of bargaining power between employers and employees, to diminish the causes of labor disputes, to create a National Labor Relations Board, and for other purposes, was referred to the Committee on Labor and was made the subject of extended hearings. H.R. 7978, a somewhat amended version of the original bill, conforms to the considered views of the committee after consideration of H.R. 6288, and was favorably reported.

The provisions and objects of this bill have been subjected to preposterous exaggerations and misrepresentation. Various associations of employers have expressed unwanted solicitude for the rights of employees, which they profess to believe are jeopardized by the bill. But the bill is merely an amplification and further clarification of the principles enacted into law by the Railway Labor Act and by section 7 (a) of the National Industrial Recovery Act, with the addition of enforcement machinery of familiar pattern. Curiously, few opponents of the bill have had the hardihood to avow an opposition to the principles of section 7(a); they take alarm, however, when a serious effort is proposed to enforce the mandate of that law.

Upon the passage of the National Industrial Recovery Act it was hailed by the President as giving to workers "a new charter of rights long sought and hitherto denied." Section 7(a) provided:

> Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment approved or prescribed by the President.

No special agency was provided by law with power to administer and enforce section 7(a). Pursuant to his general authority in section 2(a) of the National Industrial Recovery Act, the President created the National Labor Board, under the chairmanship of Senator Wagner, with power "to settle by mediation, conciliation, or arbitration all controversies between employers and employees which tend to impede the purposes of the National Industrial Recovery Act" (Executive Order No. 6511, Dec. 16, 1933); and to conduct elections among the employees for designation of representatives (Executive Orders No. 6580, Feb. 1, 1934, and No. 6612–A, Feb. 23, 1934).

All that the National Labor Board could do, if it found a violation of section 7(a), was to report the case to the National Recovery Administration, which might take away the employer's "blue eagle", or to the Department of Justice, which was authorized to institute, de novo, proceedings in equity or a criminal prosecution, under subsections (c) and (f) of section 3. The provision of section 3(b), that viola-

tions of the codes (including the labor provisions of section 7(a) embodied therein) shall be deemed unfair methods of competition within the meaning of the Federal Trade Commission Act, has in practice become a dead letter, probably because the Federal Trade Commission in justice to its other functions could not have undertaken the general enforcement of the codes.

In the first flush of national fervor that greeted the inauguration of the National Industrial Recovery Act, the National Labor Board was able, by moral rather than the legal authority, to accomplish a good deal in the interpretation and application of the section. But resistance to the law gradually stiffened, as reactionary employers got their second wind, and as the National Labor Board, by a series of fair interpretations of section 7(a), made it clear that it was illegal for an employer to discharge or discriminate in any way against an employee because of his union affiliation or activities; that an employer must not interfere with the self-organization of employees by foisting upon them a plant organization or a "company union" which the employer might think best for them; that an employer must deal with the chosen representative of his employees, even though such representative may be an "outside" union; that the representative chosen by the majority of the employees in an appropriate unit is entitled to speak for all the employees in that unit in collective bargaining negotiations with the employer.

After several months of experience as chairman of the National Labor Board, Senator Wagner reported to the Congress last year that section 7 (a) could not be enforced unless a statutory board especially charged with its administration were given powers analogous to those of the Federal Trade Commission in preventing unfair trade practices. The so-called "Wagner bill", providing for such a board, was the subject of lengthy hearings by the Committee on Education and Labor of the Senate, but failed of passage in the pressure for adjournment. Congress did, however, make a gesture toward better enforcement by the passage of Public Resolution 44, Seventy-third Congress, which gave the President express statutory authority to establish a board or boards "authorized and directed to investigate issues, facts, practices, or activities of employers or employees in any controversies arising under section 7 (a) of said act or which are burdening or obstructing, or threatening to burden or obstruct, the free flow of interstate commerce."

But, apart from somewhat improved machinery for the conduct of elections, such boards established under the public resolution have all the weaknesses of the old National Labor Board in the matter of preventing and restraining violations of section 7 (a). An interesting contemporaneous commentary upon Public Resolution 44 recently found its way into the record of the Senate Munitions Investigating Committee. It is a letter written by the vice president of a large industrial corporation on the day the public resolution passed which letter read in part as follows:

> My guess is Congress will today pass the joint resolution proposed as an alternate to the Wagner bill, and that will end for the time being at least, many of our troubles in that respect.
>
> Personally, I view the passage of the joint resolution with equanimity. It means that temporary measures which cannot last more than a year will be

substituted for the permanent legislation proposed in the original Wagner bill. I do not believe that there will ever be given as good a chance for the passage of the Wagner Act as exists now, and the trade is a mighty good compromise.

I have read carefully the joint resolution, and my personal opinion is that it is not going to bother us very much. For one thing, it would be necessary, if the newly formulated boards are to order supervised elections in our plants, that they first set aside as invalid the elections just completed. I do not think this can be done.

If in 1935 our elections should occur in the second half of June rather than the first half, the Board would automatically be legislated out of existence before that date. If they try to horn in on us in any situation in the meantime, I think we have our fences pretty securely set up.

Therefore, and for other reasons, I am in favor of compromising by not opposing the passage of the joint resolution. This, of course, is my personal opinion. I have not yet had a chance to clear it with our people here.

This prophesy that the public resolution "is not going to bother us very much" has to a large extent been verified by the experience of the past year. On June 29, 1934, pursuant to the public resolution, the President by Executive order created the National Labor Relations Board. This Board consisted originally of Lloyd K. Garrison, dean of the University of Wisconsin Law School, chairman; Harry A. Millis, chairman of the department of economics at the University of Chicago; and Edwin S. Smith, formerly Massachusetts commissioner of labor and industries. In October 1934 Mr. Garrison was succeeded as chairman by Francis Biddle, Esq., of Philadelphia. The National Labor Relations Board, following the lead of its predecessor, the National Labor Board, has enriched the body of labor law by a notable series of decisions interpreting and applying section 7 (a). Its decisions and those of its regional boards have received some measure of compliance by the acquiescence of employers involved; but in the crucial cases of recalcitrant employers the Board has been up against a stone wall of legal obstacle.

This has been true both in cases where the Board found violation of section 7 (a) and in cases where it ordered elections, as Chairman Biddle frankly testified in the hearings before this committee. A brief recitation of the course of proceedings in both types of cases will make clear why this has been so.

When complaint is made to the Board of a violation of section 7(a), the evidence is heard and transcribed by the proper regional board established by the National Labor Relations Board. The board has no power to subpena witnesses or administer oaths. If the employer chooses to ignore the hearing, he can do so with impunity except that his "blue eagle" may be put in jeopardy by the subsequent action of the National Recovery Administration. If the regional board finds a violation of section 7 (a), and the employer fails to comply with its recommendation for appropriate restitution, the case is referred to the National Labor Relations Board, which reviews the record, usually upon hearing in Washington. If the National Labor Relations Board confirms the finding of violation it publishes its findings of fact and announces that unless the employer in default makes proper restitution, it will refer the case to the Compliance Division of the National Recovery Administration, and to other agencies of the Government.

At this point there is no legal compulsion upon the employer to comply with the Board's decision. Suppose he refuses to comply.

The Board then transmits the case to the National Recovery Administration, which, though it is bound by the President's Executive order to accept the Board's findings of fact as final, nevertheless has a discretion whether to deprive the employer of the N. R. A. insignia as recommended by the Board. Assuming that the National Recovery Administration decides to remove the "blue eagle", compliance is by no means assured. The nature of the business may be such that the deprivation of the "blue eagle" has only a neglible effect, in which case the employer may still ignore the decision. If, however, the possession of the N. R. A. insignia is of substantial value to the particular employer, he may apply to the Supreme Court of the District of Columbia for an injunction to restrain the National Recovery Administration from acting to deprive him of the right to display such insignia. These injunction suits are becoming almost a routine procedure. To date, none of them has gone to hearing on the merits. Of course, the National Labor Relations Board does not control this litigation.

When the Board refers a case to the Department of Justice, the most glaring defect in the present procedure is that the record made up by the Board goes for naught, and weeks or more after the alleged violation the Department must prepare the case for court, de novo. The Department does not go into court on the record before the Board to enforce the decision of the Board; indeed the Board's findings of fact have not even prima facie weight in the subsequent proceedings. Furthermore, due to the lack of power in the Board to subpena witnesses and documents, the Department in many cases finds it necessary to make extensive investigations before instituting legal proceedings. The stark fact is that after 2 years of section 7 (a) the Government has succeeded in getting in the courts only 4 cases for enforcement, 2 being proceedings in equity and 2 criminal proceedings; and only 1 of thees cases (the *Weirton case*) has come to trial. While in the public mind the National Labor Relations Board is probably regarded as responsible for the enforcement of section 7 (a), the complete control of litigation is vested in the Department of Justice and its various United States attorneys throughout the country.

Public Resolution 44 has not proved much more satisfactory even in its provisions which had some virtue over the preexisting law, namely, the provisions for elections. By section 2 of the resolution the Board is empowered, when it shall appear in the public interest, to order and conduct elections by secret ballot of any of the employees of any employer, to determine by what person, persons, or organization they desire to be represented. For the purposes of such elections the Board is authorized to order the production of documents and the appearance of witnesses to give testimony under oath. Any order issued by the Board under the authority of this section may be enforced or reviewed, as the case may be, by petition in the appropriate circuit court of appeals, following the procedure of the Federal Trade Commission Act.

The weakness of this procedure is that under the provision for review of election orders employers have a means of holding up the election for months by an application to the circuit court of appeals.

Thus, in the *Firestone* and *Goodrich cases*, where the Board ordered elections in November 1934, the cases were not argued in the circuit court of appeals until April; decisions have not yet been rendered, and if the decisions happen to be favorable to the Board, the companies will undoubtedly appeal to the Supreme Court, with further inevitable delay. At the persent time 10 cases for review of the Board's election orders are pending in the circuit courts of appeals. Only three have been argued and none have been decided.

The election is but a preliminary determination of fact, and there is no reason why employers should have an opportunity for court review prior to the holding of the election. The ability of employers to block elections has been productive of a large measure of industrial strife. When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuses to accord such recognition, the union, unless an election can promptly be held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power. Such strikes have been called when election orders of the National Labor Relations Board have been held up by court review.

In the *Firestone* and *Goodrich cases*, strikes were imminently threatened, and were only averted at the last minute by appeals to the men to await the decisions of the court on the election orders. The companies in these cases had made every preparation to wage a war with striking employees, rather than to submit to the orderly democratic process of a governmentally supervised election to determine by whom the employees desired to be represented in collective bargaining negotiations.

The result of all this nonenforcement of section 7 (a) has been to breed a wide-spread and growing bitterness on the part of workers, who feel, with much justification, that they have been given fair words, but betrayed by the Government in the execution of its promises. Time after time employees who have sought to organize in pathetic reliance upon section 7 (a) have found themselves discriminated against by the employer, and appeals to the Government for redress have been in vain. If such a situation is allowed to continue uncorrected, it will become a menace to industrial peace that cannot be exaggerated.

The time for appropriate action by the Congress is at hand, because on June 16, 1935, the National Industrial Recovery Act, and Public Resolution 44, Seventy-third Congress, expire by limitation. The Congress does not propose to withdraw the "new charter of rights" enacted in section 7 (a). The only honest thing for the Congress to do, therefore, is to provide adequate machinery for its enforcement which is the object of the present bill.

Before proceeding to detailed comment on the bill, it may be helpful to state in broad outline the structure of the bill. Section 7 (a), as it now appears in the National Industrial Recovery Act, is amplified by the specific prohibition of certain unfair-labor practices, which by fair interpretation would constitute infringements upon the sub-

stantive rights of employees declared in section 7 (a). These prohibitions, and the substantive rights, are made applicable, to the extent of Congress' power under the commerce clause, to employers and employees irrespective of whether the industry in question is subject to a code of fair competition. The bill, therefore, rests upon a basis entirely independent of the National Recovery Administration, and should be considered on its merits quite apart from the ultimate disposition of the legislation affecting the National Recovery Administration. As a means of enforcing the provisions of the bill, there is created a permanent Board, with appropriate powers to make investigations of alleged violations of the law, to make orders, and to apply directly to the proper circuit court of appeals for enforcement of such orders, in the general manner provided for the enforcement of the orders of the Federal Trade Commission.

A detailed analysis of the bill follows:

FINDINGS AND DECLARATION OF POLICY

Section 1 states the underlying factual basis for the regulation provided in the bill. The committee wishes to emphasis particularly the objective of the bill to remove certain important sources of industrial unrest engendered, first, by the denial of the right of employees to organize and by the refusal of employers to accept the procedure of collective bargaining, and second, by failure to adjust wages, hours, and working conditions traceable to the absence of processes fundamental to the friendly adjustment of such disputes. Such unrest, as a matter of common knowledge and in judicial experience, leads to strikes and other forms of economic pressure which obstruct and burden the free flow of interstate and foreign commerce. In brief, such obstructions and burdens occur because of the stoppage of the flow of goods from and into the channels of such commerce, because of the effect on related or dependent industries or establishments, and because of the cessation of employment and wages, sometimes prostrating whole communities or otherwise impairing such commerce. By protecting the right of employees to organize and bargain collectively, and as a direct result by promoting just and appropriate practices for friendly adjustment, the bill eliminates many of the most important causes of unrest and strife, and so fosters, protects, and promotes the free flow of commerce, increases the amount thereof, and removes obstacles and obstructions thereto.

The loss in wages, trade, and commerce from such strife has been enormous, as competent investigation demonstrates. Cf. Daugherty, Labor Problems in American Industry (1933), pp. 356, 358, 360; Douglas, An Analysis of Strike Statistics, Journal of American Statistical Association (September 1923), pp. 866–877; Monthly Labor Review, June 1932, pp. 1353–1362; W. I. King, The National Income and Its Purchasing Power (National Bureau of Economic Research, 1930), p. 56; United States Commissioner of Labor, Twenty-first Annual Report: Strikes and Lockouts (1906); Strikes and Lockouts in the United States, 1916–32; Monthly Labor Review, June 1933, pp. 1295–1304; Monthly Labor Review, July 1934, pp. 68–82; Monthly Labor Review, March 1935, pp. 677 ff.; United States Coal Com-

mission, Labor Relations in the Bituminous Coal Industry (1923); National Association of Manufacturers, Convention Proceedings, 1926, p. 136; Hammond and Jenks, Great American Issues (1921), p. 99; N. Olds, The High Cost of Strikes (1921), p. 210; Fitch, Causes of Industrial Unrest (1924); Common and Andrews, Principles of Labor Legislation (1920), p. 125; Congressional Record, vol. 78, pt. IV, p. 3443; Report on the Steel Strike of 1919; Commission of Inquiry for the Interchurch World Movement (1920); Report of the Anthracite Coal Strike Commission, United States Bureau of Labor, Bulletin No. 46 (1903); Labor Relations in the Bituminous Coal Industry, United States Coal Commission (1923); Report of the Board of Inquiry for the Cotton Textile Industry (1934) (appointed by President Roosevelt under Public Resolution No. 44).

Particularly has the attempt in section 7(a) of the National Industrial Recovery Act to confer upon employees their charter of rights met with stubborn resistance by certain groups of employers. The absence of effective enforcement and election machinery, and the diffusion of responsibility and conflicting interpretation in regard to section 7(a), have forced workers to resort to industrial warfare to gain the rights which by law were justly theirs. Throughout the period of the operation of the National Industrial Recovery Act, there existed or were impending serious conflicts burdening or threatening to burden the free flow of commerce in some of our largest industries, such as coal and copper mining, textile manufacturing, steel, automobiles, rubber, and shipping. These conflicts have had their counterpart in other industries as well, on perhaps a smaller scale, but equally bitter and fraught with dangerous possibilities.

The bill seeks, to borrow a phrase of the United States Supreme Court, "to make the appropriate collective action (of employees) an instrument of peace rather than of strife" (*Texas & New Orleans R.R. Co. v. Brotherhood* (281 U.S. 548)). The efficacy of such regulation is amply demonstrated by the history of labor relations on the railroads of the country and by the experience of the National War Labor Board during the Great War. Chairman William M. Leiserson, of the National Mediation Board, has made some interesting observations upon the results that follow when the recognition of labor organizations ceases to be a fighting issue and the processes of collective bargaining become the habitual course of dealing. He said:

> I think this is important to note, that so long as the employers question the right of the employees to hire personnel managers, a right that they have themselves, or sales agents, whichever you want to call them, then the employees have to fight for their rights. And a mild gentlemanly sort does not get very far, and the type that survives is a more blustering, fighting kind of a representative of labor. And that is the type of people, the fighting kind, that survived in the railroad business, 20 years ago, when they had to fight for their right to do business on a cooperative basis.
>
> As soon as the railroads began to say, "Sure, you have a right to represent the employees, let us sit down and make a contract or an agreement", and there are thousands of these agreements on the railroads, and from that time on the type of labor leader or personnel manager, for the labor was a more business-like type, and he is a good deal like the fellow on the employer's side.

The committee amendment to this section reformulates the declaration of policy in order to emphasize the intent of the bill to promote industrial peace, and therefore to bring it more clearly outside of the

ruling in the *Schechter case*. It is believed that the cases which have sustained Federal intervention in labor disputes under the antitrust laws are broad enough to sustain this bill, which is designed to give labor Federal protection in those same areas which previously were subjected to Federal restraint.

DEFINITIONS

In section 2 are listed various definitions of terms. These definitions are for the most part self-explanatory. The committee wishes to emphasize the need for the recognition as expressed in subsections 3 and 9, that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer. This is so plain as to require no great elaboration. We may point simply to the words of Chief Justice Taft in the case of *American Steel Foundries* v. *Tri-City Central Trades Council* [257 U.S. 184, at 209):

> They (labor unions) were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic force to make it more valuable to them and it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint production of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the community united, because in the competition between employers that are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those who labor at lower wages will injure their whole guild.

This statement is a sufficient answer to those who, with questionable disinterestedness, proclaim that rugged individualism is the great boon of the American workman; or that there is something "un-American" in a movement by workers to pool their economic strength in a type of labor organization most effective in approximating the economic power of their employers, namely, in so-called "outside unions", thereby establishing that "equality of position between the parties in which liberty of contract begins." While the bill does not require organization along such lines, and indeed makes no distinction between such organizations and others limited by the free choice of the workers to the boundaries of a particular plant or employer, it is imperative that employees be permitted so to organize, and that unfair labor practices taking in workers and labor organizations beyond the scope of a single plant be regarded as within the purview of the bill.

The definitions in subsections 6 and 7 are intended as the basic jurisdictional definitions, as used in their appropriate setting in sections 9 and 10. The bill is based squarely on the power of Congress

to regulate commerce among the several States and with foreign nations. It does not apply to controversies or practices of purely local significance which do not presently or potentially burden or obstruct the free flow of such commerce.

The committee amendment to subsection 6 narrows the definition of interstate commerce by not making it extend to transportation or communication that is merely "related to" interstate commerce. This change has been made in view of the doubts that the *Schechter case* casts upon the validity of regulating practices that are merely "related to" or "indirectly" interstate commerce.

The new definition inserted by the committee amendments to subsection 7 also helps to confine the bill to the proper sphere under the Schechter decision by removing from its purview practices which merely "affect" interstate commerce. Under this amendment the bill is confined to practices "burdening or obstructing" interstate commerce. These words have received repeated recognition in court decisions as fit bases for Federal jurisdiction.

NATIONAL LABOR RELATIONS BOARD

Section 3: This section establishes a nonpartisan board of three members appointed by the President by and with the advice and consent of the Senate. The committee has departed from S. 1958, as it passed the Senate, by providing that the Board shall be "created in the Department of Labor" instead of being established "as an independent agency in the executive branch of the Government."

The committee does not intend, by this change, to subject the Board to the jurisdiction of the Secretary of Labor in respect of its decisions, policies, budget, or personnel. An amendment offered by the Secretary of Labor, requiring that the Board's appointments of employees shall be subject to the approval of the Secretary, was not accepted by the committee. We recognize the necessity of establishing a board with independence and dignity, in order that men of high caliber may be persuaded to serve upon it, and in order to give it a national prestige adequate to the important functions conferred upon it. While it is convenient to locate the Board in the Department which deals with labor problems, this nominal connection will not impair the independence of the Board, which will be free to administer the statute without accountability except to Congress and the courts.

For the information of the House, we insert letters from the Secretary of Labor and the Chairman of the National Labor Relations Board, expressing their respective views on this point.

LABOR DEPARTMENT,
Washington, May 13, 1935.

Hon. WILLIAM P. CONNERY, JR.
House of Representatives,
Washington, D.C.

MY DEAR MR. CONGRESSMAN: I have your letter of May 10 enclosing a copy of H.R. 7978, your bill "to promote equality of bargaining power between employers and employees, to diminish the cause of labor disputes, to create a National Labor Relations Board, and for other purposes." As you know, I am deeply interested in the success of this legislation, and therefore, was very pleased to learn that the House Committee on Labor had voted to report the bill favorably.

The bill which your committee has approved embodies the principles of the measure introduced by you earlier in the session, the principal objectives of which I commended in my testimony before your committee. Briefly summed up, it proposes to write into the statute law of the United States the legal right of collective bargaining to clarify that right by precise definition, and to provide machinery for its enforcement by creating a new National Labor Relations Board, vested with quasi-judicial powers.

I am very grateful to your committee for the careful consideration which it accorded to my testimony when I appeared before it, and I note that several of the suggestions I made at that time have been incorporated in the present text of the bill. One of the most important of these changes has been the revision of section 3 (a), so that in its present form it makes the National Labor Relations Board a part of the Department of Labor. Although I believe that the judicial independence of the Board should be insured, by making its decisions subject to review only in the courts, I think it would have been unwise to have recommended a bill creating the Board as an entirely separate agency dissociated from all the permanent executive departments.

Your bill recognizes the importance of constant integration of the problems of collective bargaining with other labor problems, which is essential if the Department and the Board are to have the greatest possible understanding of the ramifications of their decisions in the field of industrial relations. Despite any restrictions which legislation might define, there would always be pressure upon a labor board to engage in conciliation and research. If the Board was separate this would mean an unnecessary duplication of functions already performed by the Department of Labor. Moreover, your bill, by providing for a unified administrative structure, guards against the confusion produced in the public mind by an increase in governmental agencies, and brings the Board more closely within the sphere of the problems of Government which ordinarily come to the attention of the President and Cabinet.

Moreover, it seems to me that your bill tends to make the proposed Board more judicial in character than would be possible were it an independent agency whose attention would be subject to distraction from specific cases by the temptation to strengthen its prestige through educational and administrative activities. A court is free from such temptation because the groove of its activity is so well defined that it can ignore all propaganda in an administration and devote its entire time to the quiet unimpassioned performance of the judicial processes. Anyone interested in making the proposed labor board as much as possible like a court should favor provisions restricting the scope of its activities to actual cases rather than to encourage it to enter the disconcerting tasks of administration. I am not sure that your bill goes as far as it might in relieving the Board of administrative responsibilities, for it charges the Board with the duty of making all the appointments to its own staff without the advice and consent of the head of the Department (sec. 4 (a)), and the task of reporting directly each year to the President and Congress (sec. 3 (c)). It would seem to me that these duties are possibly administrative in character and might consistently be given to the Secretary of Labor.

The other changes which your committee has made in the original draft also impress me favorably, particularly the omission of the section giving Federal district courts jurisdiction of unfair labor practices. I am glad that you concur with me in thinking that this section would have been productive of a welter of conflicting decisions, and that greater promise of uniform interpretation of the law will result from confining original jurisdiction to the Board or its subordinate agencies. I also feel that section 10 (c), defining the Board's procedure, considerably clarifies the phraseology of the original section. The redrafting of section 9 (a) dealing with the troublesome question of majority rule and the rights of minority groups also strengthens the bill by preventing any questions of minority representation being raised. The original wording was not altogether clear on this point.

Sincerely yours,

FRANCES PERKINS.

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C., May 17, 1935.

Hon. WILLIAM P. CONNERY, Jr.,
House Office Building, Washington, D.C.

MY DEAR MR. CONGRESSMAN: In answer to your favor of the 10th, enclosing a copy of H.R. 7978, National Labor Relations bill, I note that this bill is identical with Senator Wagner's bill as it came out of the Senate Committee on Education and Labor, with the exception of section 3(a) of the House bill. The language in the Senate bill is: "There is hereby created as an independent agency in the executive branch of the Government." The language of the House bill reads: "There is hereby created in the Department of Labor." Otherwise the two bills are identical.

We are of opinion that the amendment proposed by your committee is distinctly harmful to the general purposes of the bill. It may be a matter of doubt what are the implications of the unexplained phrase "created in the Department of Labor." Were it not for the fact that your committee declined to accept one of the amendments proposed by the Secretary of Labor specifically subjecting to the approval of the Secretary the Board's appointment of employees, it might have been assumed that putting the Board "in the Department of Labor" carried with it automatic control by the Secretary over personnel. The phrase "created in the Department of Labor" might also carry the implication of budgetary control, which inevitably, though indirectly, enables the Secretary to influence the policy of the Board. Believing as we do that the independence of the Board should be established upon an unquestionable basis, we favor the unequivocal Senate version creating the Board "as an independent agency in the executive branch of the Government."

The value and success of any quasi-judicial board dealing with labor relations lies first and foremost in its independence and impartiality. After all, although the bill deals with the rights of labor, for the success of the machinery contemplated by the act it must in the long run have the confidence of industry and of the public at large. In our view it is in derogation of such independence and such impartiality to attach the Board to any department in the executive branch of the Government, and particularly to a department whose function in fact and in the public view is to look after the interests of labor.

The Board is to administer an act of Congress laying down a specific policy. If the Board is subject to the control of the Secretary of Labor as to personnel and budget, there will be an inevitable tendency to conform the administrative policies of the Board to the policies of the particular administration in power.

Where Congress has defined a policy and created an administrative board to carry out that policy, it has with marked consistency recognized that the board so created should be appointed for comparatively long terms of office and be free of control by the executive departments or by any particular administration. The arguments advanced for putting the Board in the Department of Labor would, if accepted by the Congress, have resulted in putting the Interstate Commerce Commission, the Federal Trade Commission, the Communications Commission in the Department of Commerce, and the Reconstruction Finance Corporation in the Treasury Department, instead of their being given an independent status. A similar observation may be made with reference to the Securities Exchange Commission and the National Mediation Board. It is of profound significance that the four outstanding permanent administrative agencies created by the last Congress to effectuate declared congressional policies were established as independent agencies; these are the Securities Exchange Commission, the Communications Commission, the Federal Housing Administration, and the National Mediation Board. Considering the specific quasi-judicial functions of the proposed National Labor Relations Board, there are even stronger reasons why it should have the prestige of independent status, than there were for establishing the National Mediation Board, to quote the words of its organic act, "as an independent agency in the executive branch of the Government."

It may be further observed that the multiplication of the functions of Cabinet officers has already proceeded to such a point that the practical supervision of any further agencies set up by the Congress, if entrusted to the departments, would necessarily be exercised by subordinates, themselves often overworked, and often not intimately acquainted with the special problems.

We wish to emphasize the essential difference between mediation and conciliation in adjusting disputes over wage and hour demands, and the work of the National Labor Relations Board in handling 7(a) cases under the present law, or the work of the proposed new Board in handling complaints that an employer has been guilty of unfair labor practices under the pending legislation. Wages and hours, apart from minimum standards prescribed by the codes, are a matter of give and take, in which conciliation serves a useful function. But the rights of labor under section 7(a), or under the Wagner-Connery bill, are written into the law to be enforced, not to be bargained about or compromised. When a complaint of law violation is presented to the National Labor Relations Board or one of its regional boards, it is the function of the Board to see that the law is vindicated. Compliance with the law is often obtained without the necessity of formal hearings, or after hearing and before enforcement processes are involved; but obtaining such compliance is quite different from the mediation which is the function of the Conciliation Service of the Department in settling disputes about wages and working conditions.

As Senator Wagner said in his testimony before the Senate Committee on Education and Labor:

"The atmosphere of compromise and adaptation is perfectly suited to the settlement of disputes concerning hours and wages where shifting scales are fitting to particular conditions. But it is unsuited to section 7 (a) which Congress intended for universal application, not universal modification. The practical effect of letting each disputant bargain and haggle about what section 7 (a) means is that the weakest groups which need its basic protection most receive it the least."

The National Labor Relations Board, as set up by Executive order of June 29, 1934, though it was directed to make its reports to the President through the Secretary of Labor, and directed not to duplicate the mediatory and statisical work of he Department, has nevertheless been, in its administration of section 7 (a) and in its control of its own personnel and expenditures, an agency independent of the Department. This independence has not resulted in the duplication of work which the Secretary fears as likely to result from the bill as it passed the Senate. The Board has taken pains not to encroach upon the work of the conciliation service of the Department.

It has proceeded under a harmonious working arrangement with the Department, specifying the respective functions of the board and the Department. It has found no difficulty, indeed has had the warmest cooperation of the Department, in the matter of making use of the Department's statistical and research agencies and other facilities. To make it abundantly clear that there shall be no duplication of work, the Senate committee inserted an amendment, which was entirely agreeable to the board, forbidding the board to appoint persons to engage in mediation, conciliation, or statistical work when the services of such persons may be obtained from the Department of Labor. That provision also appears in section 4 of H.R. 7978. A similar provision in section 1 (b) of the Executive order under which the board now operates has proven entirely satisfactory.

The fact that the administrative and quasi-judicial functions of the board should be kept distinct from the work of mediation and conciliation is an added reason why its functions should not be transferred to the jurisdiction of the Secretary of Labor. The tendency toward confusion of the two functions is enhanced by confiding them both to the Labor Department.

We conclude that every consideration of congressional precedent in like cases of efficiency, of giving the board an assured independence in its judicial and administrative work, requires that the board be established as an independent agency in the executive branch of the Government.

With this one exception noted, the National Labor Relations Board heartily endorses H.R. 7978 as a statesmanlike contribution to healthy labor relations and industrial peace.

Sincerely yours,

FRANCIS BIDDLE, *Chairman.*

The other amendment to this section is merely clarifying. It provides that the decision of the Supreme Court in the recent *Humphreys case* shall be embodied in this statute so as not to leave the matter

open to further litigation. The Court held that a Federal Trade Commissioner could not be removed by the President except for neglect of duty. There was considerable language in the opinion indicating that a quasi-judicial body would stand a better chance of favorable treatment if it were divorced from the executive branch of the Government.

Section 4: This section deals with matters such as the appointment and salaries of members of the Board, the appointment of personnel by the Baord, the transfer of the personnel and records of the old Board established on June 29, 1934, by Executive Order No. 6763, pursuant to Public Resolution No. 44. It is also made clear that orders and proceedings in the courts pursuant to the public resolution, to which the old Board is a party, shall be continued by the Board in its discretion, in order that the important questions of law therein involved may be brought to final determination in the highest courts. In connection with this section, the committee wishes to emphasize two points.

First, there is no conflict with or duplication of the functions of the Department of Labor in its statistical and conciliation work. The bill expressly provides that:

> Nothing in this act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor.

Conciliation or mediation is desirable in disputes or differences as to wages and hours or conditions of work, where friendly adjustment requires give and take and the compromising of conflicting views.

The work of the Board and its agents or agencies, on the other hand, is quasi-judicial in character, dealing with the investigation and determination of charges of unfair labor practices as defined in the bill, and questions of representation for the purposes of collective bargaining. This of course does not preclude securing compliance, either by a stipulation procedure or otherwise, prior to formal hearing or application to the courts. But the Board and its agents or agencies are required to carry out the declared will of Congress as provided in this definite legislation; the law must have application in all cases, and must not be haggled about or compromised because of the exigency of a particular situation or the weakness of a particular employee group as against a more powerful employer. Under the bill it is contemplated that the Board, its agents or agencies, will not confuse the quasi-judicial nature of their function by intruding upon the regular work of the Conciliation Service of the Department of Labor.

Second, the section authorizes the Board to appoint regional directors and to establish such regional, local, or other agencies as may from time to time be needed. The Board itself cannot be expected in the ordinary case to travel to the scene of dispute; nor can it be expected that the parties or their witnesses must be brought before the Board at the center of government in Washington. Upon the efficiency of permanently established, compensated regional officers and regional agencies operating under the direction of the Board at the source of dispute, will thus depend in an important measure the effective administration of the law.

The effect of the first amendment to subsection (b) is merely to strike out the provision that proceedings in cases of the present National Labor Relations Board shall be conducted by the new Board. Since the President through the Attorney General has already ordered the discontinuance of these cases, the old language in the bill providing for their continuance should certainly be deleted.

The purpose of the second amendment to subsection (b) is to give a permanent civil-service status to those employees transferred from the old Board who are required to be under the civil service by section 4(a) of the bill.

Section 5: This is a provision commonly incorporated in similar statutes. The importance of holding inquiries necessary to the functions of the Board at places convenient to their proper and expeditious handling, has already been pointed out above.

Section 6: This is a common provision authorizing the Board to make, amend, and rescind such rules and regulations as may be found necessary to implement and carry out the provisions of the bill. It is important to note that the rules will be effective only upon due publication, so that there may be no claims of doubt or ignorance as to their content.

RIGHTS OF EMPLOYEES

The first unfair labor practice in section 8, taken in conjunction with the rights stated in section 7, is merely a restatement of a portion of the language of section 7(a) of the National Industrial Recovery Act, quoted previously in this report. Similar pronouncements have been made in the Railway Labor Act of 1934, and in other acts of Congress (48 Stat. 1185, sec. 2 (Railway Labor Act of 1934); 44 Stat. 577, sec. 2 (Railway Labor Act of 1926); 47 Stat. 70, sec. 2 (Norris Anti-Injunction Act); 47 Stat. 1481, secs. 77 (p) and (q) (Bankruptcy Act); 48 Stat. 214, sec. 7(e) (Emergency Transportation Act)).

Objection is constantly made that the bill is limited to unfair labor practices by employers. It is contended that the bill should prohibit "anyone", including of course, an employee or labor organization, from interfering with, restraining or coercing employees in the exercise of these rights, and that without such provision, the bill is "unfair", "one-sided", and would lead to the domination of industry by organized labor. But it is clear that corresponding to the right of employees to be free from interference, etc., by their employer in their organizational activities, is the right of the other party to the negotiations, the employer, to be free in his designation of representatives for that purpose. The Railway Labor Act contains such a reciprocal provision that neither employers nor employees shall in any way interfere with, influence, or coerce the other in their choice of representatives (sec. 2 (3)), but does not read with organizational activities by employees or labor organizations. Such a reciprocal provision, forbidding employees to interfere with the right of employers to choose their representatives for collective bargaining, would be a merely formal requirement, ignoring the realities of the situation. In the light of common knowledge, it can hardly be said that this right of employers needs protection under this bill. Organizations of em-

ployers in trade associations and in national organizations of such trade associations, have blanketed the country; the integration of business into larger corporate units and the formation of such trade associations has not been stopped by the antitrust laws.

Furthermore, a provision forbidding employees to interfere with the right of employers to choose their representatives would not satisfy the opponents of the bill. What is really sought is a legal straitjacket upon labor organizations, on the specious theory that such organizations have no more legitimate concern in the organization of employees than have the employers themselves. But the bill seeks to redress an inequality of bargaining power by forbidding employers to interfere with the development of employee organization, thereby removing one of the issues most provocative of industrial strife and bringing about a general acceptance of the orderly procedure of collective bargaining under circumstances in which the employer cannot trade upon the economic weakness of his employees.

The report on S. 1958 by the Senate Committee on Education and Labor deals fully and conclusively with this topic. We incorporate a portion of that report:

> There is an even more important reason why there should be no insertion in the bill of any provision against coercion of employees by employees or labor organizations. Courts have held a great variety of activities to constitute "coercion": A threat to strike; a refusal to work on material of nonunion manufacture; circularization of banners and publications; picketing; even peaceful persuasion. In some courts, closed-shop agreements or strikes for such agreements are condemned as "coercive." Thus, to prohibit employees from "coercing" their own side would not merely outlaw the undesirable activities which the word connots to the layman, but would raise in Federal law the ghosts of many much-criticized injunctions issued by courts of equity against activities of labor organizations, ghosts which it was supposed Congress had laid low in the Norris-LaGuardia Act.
>
> Nor can the committee sanction the suggestion that the bill should prohibit fraud or violence by employees or labor unions. The bill is not a mere police-court measure. The remedies against such acts in the State and Federal courts and by the invocation of local police authorities are now adequate, as arrests and labor injunctions in industrial disputes throughout the country will attest. The Norris-LaGuardia Act does not deny to employers relief in the Federal courts against fraud, violence, or threats of violence. (See 29 U. S. C., sec. 104 (e) and (i).)
>
> Racketeering under the guise of labor-union activity has been successfully enjoined under the antitrust laws when it affected interstate commerce. The latest case along these lines is *United States* v. *Local No. 167 et al.* (291 U.S. 293).
>
> In addition, the procedure set up in this bill is not nearly so well suited as is existing law to the prevention of such fraud and violence. Deliberations and hearings by the Board, followed by orders that must be referred to the Federal courts for enforcement, are methods of procedure that could never be sufficiently expeditious to be effective in this connection.
>
> The only results of introducing proposals of this sort into the bill, in the opinion of the committee, would be to overwhelm the Board in every case with countercharges and recriminations that would prevent it from doing the task that needs to be done. There is hardly a labor controversy in which during the heat of excitement statements are not made on both sides which, in the hands of hostile or unsympathetic courts, might be construed to come under the common-law definition of fraud, which in some States extends even to misstatements innocently made, but without reasonable investigation. And if the Board should decide to dismiss such charges, its order of dismissal would be subject to review in the Federal courts.
>
> Proposals such as these under discussion are not new. They were suggested when section 7 (a) of the National Industrial Recovery Act was up for discussion, and when the 1934 amendments to the Railway Labor Act were before Congress. In neither instance did they command the support of Congress.

The succeeding unfair labor practices are intended to amplify and state more specifically certain types of interference and restraint that experience has proved require such amplification and specification. These specific practices, as enumerated in subsections (2), (3), (4), and (5), are not intended to limit in any way the interpretation of the general provisions of subsection (1).

The second unfair labor practice prohibits an employer from dominating or interfering with the formation or administration of any labor organization or contributing financial or other support to it. It is provided, however, that subject to rules and regulations made and published by the Board, an employer may permit employees to confer with him during working hours without loss of time or pay. This section has its counterpart in provisions of other Federal statutes, such as the Railway Labor Act amendments of 1934, section 2; the Bankruptcy Act amendments of 1933 and 1934; and the Emergency Transportation Act, section 7(e).

It is reliably estimated that about 70 percent of the company unions now in existence were established subsequent to the passage of section 7(a) of the National Industrial Recovery Act. According to the semiannual report of the National Labor Relations Board to the President, for the period July 9, 1934, to January 9, 1935, such company unions were a primary or attendant cause of the disputes in about 30 percent of the cases heard by the National Board; and the great majority of such company unions had become active in contemplation of or contemporaneously with a trade union organizing movement, or in close relation to a strike. Employer-promoted unions are most prevalent in the larger plants and industries, where the bargaining power of the individual worker is very weak, and, curiously enough, where the managements have hitherto been opposed to organization of their workers. It is of the essence that the right of employees to self-organization and to join or assist labor organizations should not be reduced to a mockery by the imposition of employer-controlled labor organizations, particularly where such organizations are limited to the employees of the particular employer and have no potential economic strength.

Nothing in the bill prohibits the formation of a company union, if by that term is meant an organization of workers confined by their own volition to the boundaries of a particular plant or employer. What is intended is to make such organization the free choice of the workers, and not a choice dictated by forms of interference which are weighty precisely because of the existence of the employer-employee relationship. The forms which such interference may take have been disclosed in the experience of the labor boards engaged in the investigation of charges of violation of section 7(a) during the past 2 years. These are of course matters for decision on the facts of the individual case. The most commonly recognized forms of interference have been financial support, participation in the formulation of the constitution or bylaws or in the internal management of the company union, espionage, and the like. An extremely common form of interference is the provision in the constitution or bylaws of company unions that changes may not be made except with the consent of the employer. The prohibition of financial support is particularly justified. Collective bargining is reduced to a sham when the employer sits

on both sides of the table by supporting a particular organization with which he deals, by the payment of added compensaton to their representatives, or by permitting such representatives to conduct organizational work among the employees during working hours without deduction of pay.

How often it has been said by employers who object to "outside unions" that their representatives "agitate" among employees during working hours and that employees affiliated with such organizations "disturb" other employees. No action could be more provocative of resentment, unrest, and strife than these forms of financial support. On this subject it is pertinent to quote a portion of the opinion of the National Labor Relations Board in *Matter* of *B. F. Goodrich Co.* (1 N.L.R.B. 181, 184 (1934)):

> Another feature of the plan which raises a serious problem is the fact that it is financed by the company, and that, in particular, the company pays extra salaries to the employee representatives under the plan. At the time when the plan was initiated by the company there existed a group of employees within the plant, we do not know how numerous, who favored affiliation with an outside union as their designated agency for collective bargaining. We may assume that there were also at the plant employees who preferred a plant organization. At this juncture we believe that the company interferred with the self-organization of its employees when it threw the great weight of its financial support in favor of the group of employees who wanted a plant organization, to the competitive disadvantage of the group of employees who wanted representation by an outside union. In effect this was a form of discrimination which handicapped the efforts of one group of employees on promting their ideas on self-orgaization. The tendency of the thing at the time of the inauguration of the plan was corrupting and the continuance of financial support by the company at the present time is corrupting. This is particularly true of the payment of salaries to representatives. However single-minded the elected representatives under the plan might be in their devotion to the interests of the employees, the provision for paying extra salaries to this approximatly 150 employee representatives causes their independence of employer domination to be highly dubious. It is improper for the company to influence the choice of employees in the manner described above, which involves, in substance, the subsidizing of an active group of propagandists among the employees for the type of employee representation the company would prefer to deal with.

The specific practices to which we have adverted have been recognized by our highest courts as forms of interference. In *Texas & New Orleans. R. R. Co.* v. *Brotherhood of Railway Clerks* (281 U.S. 548, 560), Chief Justice Hughes, writing for a unanimous Court, stated in a decision under the Railway Labor Act of 1926:

> The circumstances of the soliciting of authorizations and membership on behalf of the association, the fact that employees of the railroad company who were active in promoting the development of the Association were permitted to devote their time to that enterprise without deduction from their pay, the charge to the railroad company of expenses incurred in recruiting members of the association, the reports made to the railroad company of the progress of these efforts, and the discharge from the service of the railroad company of leading representatives of the brotherhood and the cancelation of their passes, gave support, despite the attempted justification of these proceedings, to the conclusion of the courts below that the railroad company and its officers were actually engaged in promoting the organization of the association in the interest of the company and in opposition to the brotherhood, and that these activities constituted an actual interference with the liberty of the clerical employees in the selection of their representatives.

It should be noted finally that the employer can be said to "dominate" the "formation or administration of a labor organization" where

several of these forms of interference exist in combination, and he is able thereby to corrupt or override completely the will of employees.

The third unfair labor practice prohibits 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 spells out in greater detail the provisions of section 7 (a) prohibiting "yellow-dog" contracts and interference with self-organization. This interference may be present in a variety of situations in this connection, such as discrimination in discharge, lay-off, demotion or transfer, hire, forced resignation, or division of work; in reinstatement or hire following a technical change in corporate structure, a strike, lock-out, temporary lay-off, or a transfer of the plant.

Nothing in this subsection prohibits interference with the normal exercise of the right of employers to select their employees or to discharge them. All that is intended is that the employer shall not by discriminatory treatment in hire or tenure of employment or terms or conditions of employment, interfere with the exercise by employees of their right to organize and choose representatives. It is for this reason that the employer is prohibited from encouraging or discouraging membership in any labor organization by such discrimination.

The proviso to the third unfair labor practice, dealing with the making of closed-shop agreements, has been widely misrepresented. The proviso does not impose a closed shop on all industry; it does not give new legal sanctions to the closed shop. All that it does is to eliminate the doubts and misconstructions in regard to the effect of section 7(a) upon closed-shop agreements, and the possible repetition of such doubts and misconstructions under this bill, by providing that nothing in the bill or in section 7(a) or in any other statute of the United States shall illegalize a closed-shop agreement between an employer and a labor organization, provided such organization has not been establised, maintained, or assisted by any action defined in the bill as an unfair labor practice and is the choice of a majority of the employees, as provided in section 9(a), in the appropriate collective bargaining unit covered by the agreement when made. The bill does nothing to legalize the closed-shop agreement in the States where it may be illegal; but the committee is confident that it would not be the desire of Congress to enact a general ban upon closed-shop agreements in the States where they are legal. And it should be emphasized that no closed shop may be effected unless it is assented to by the employer.

The fourth unfair labor practice relates to discharge or other discrimination against an employee because he has filed charges or given testimony under the bill.

The fifth unfair labor practice, regarding the refusal to bargain collectively, rounds out the essential purpose of the bill to encourage collective bargaining and the making of agreements.

REPRESENTATIVES AND ELECTIONS

Majority rule.—Section 9(a) incorporates the majority rule principle, that representatives designated for the purposes of collective bargaining by the majority of employees in the appropriate unit shall

be the exclusive representatives of all the employees in that unit "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." As a necessary corollary it is an act of interference (under sec. 8(1)) for an employer, after representatives have been so designated by the majority, to negotiate with individuals or minority groups in their own behalf on the basic subjects of collective bargaining.

The misleading propaganda directed against this principle has been incredible. The underlying purposes of the majority rule principle are simple and just. As has frequently been stated, collective bargaining is not an end in itself; it is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time, with results advantageous both to the worker and the employer. There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to nonmembers of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of that labor organization. On the other hand, if better terms were given to nonmembers, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all.

It would be undesirable if this basic scale should result from negotiation between the employer and unorganized individuals or a minority group, for the agreement probably would not command the assent of the majority and hence would not have the stability which is one of the chief advantages of collective bargaining. If, however, the company should undertake to deal with each group separately, there would result the conditions pointed out by the present National Labor Relations Board in its decision in the *Matter of Houde Engineering Corporation* (1 N. L. R. B. 35 (Aug. 30, 1934)):

> It seems clear that the company's policy of dealing first with one group and then with the other resulted, whether intentionally or not, in defeating the object of the statute. In the first place, the company's policy inevitably produced a certain amount of rivalry, suspicion, and friction between the leaders of the committees. * * * Secondly, the company's policy, by enabling it to favor one organization at the expense of the other, and thus to check at will the growth of either organization, was calculated to confuse the employees, to make them uncertain which organization they should from time to time adhere to, and to maintain a permanent and artificial division in the ranks.

Speaking of the company's suggested alternative that it deal with a composite committee made up of representatives of the two major conflicting groups, supplemented by other individual employees, the Board pointed out:

> This vision of an employer dealing with a divided committee and calling in individual employees to assist the company in arriving at a decision is certainly far from what section 7 (a) must have contemplated in guaranteeing the right of collective bargaining. But whether or not the workers' representation by a composite committee would weaken their voice and confuse their counsels in negotiating with the employer, in the end whatever collective agreement might be reached would have to be satisfactory to the majority within the committee. Hence the majority representatives would still control, and the only difference between this and the traditional method of bargaining with the majority alone would be that the suggestions of the minority would be advanced in the presence

of the majority. The employer would ordinarily gain nothing from this arrangement if the two groups were united, and if they were not united he would gain only what he has no right to ask for, namely, dissension and rivalry. * * *

Since the agreement made will apply to all, the minority group and individual workers are given all the advantages of united action. And they are given added protection in various respects. First, the proviso to section 9(a) expressly stated that "any individual employee or a group of employees shall have the right at any time to present grievances to their employer." And the majority rule does not preclude adjustment in individual cases of matters outside the scope of the basic agreement. Second, agreements more favorable to the majority than to the minority are impossible, for under section 8(3) any discrimination is outlawed which tends to "encourage or discourage membership in any labor organization." Nor does the majority rule in itself establish a closed shop or encourage a closed shop, that being a matter of negotiation and agreement requiring the assent of the employer, as discussed above.

In view of what has been said, it is apparent that those oppose majority rule in effect oppose collective bargaining and the making of collection agreements as the end thereof, by seeking to create conditions making such accomplishment impossible. Those who profess to favor collective bargaining and the general purposes of this bill should favor majority rule, which is the only practical method of achieving the desired ends. Majority rule is at the basis of our democratic institutions. The same organized employer groups who now oppose majority rule for workers have publicly announced their adherence to it as applied to the formulation of codes of fair competition. It has been the experience of the National Labor Relations Board in cases before it that employers opposing majority rule wished only to keep their responsibilities diffused and to maintain in the picture a complacent minority group, typically a company union, so that no collective agreement might be reached at all. This motivation has been brought to the surface in specific cases where employers refused to recognize the rule when trade unions represented the majority, although in the course of the previous history of the disputes in question, when the opposing employer-promoted company unions had a majority, the employers had invoked the majority rule as the excuse for their refusal to deal with the same trade unions. Thus in *Matter of Guide Lamp Corporation* (1 N. L. R. B. 48 (1934)), the Board said:

* * * The company has not always felt the same consideration it now expresses for minority groups. In October 1933 the union addressed a letter to the company requesting an opportunity to meet and bargain collectively.

The company's letter in reply stated that the Guide Employees' Association represented 70 percent of the employees and concluded:

"If we begin the practice of negotiation with each group which presents itself, we will not be complying with the provisions of the National Recovery Act, and a great deal of confusion would result. If there is any complaint or grievance which you wish to present, we shall be glad to consider it, but any negotiation or collective bargaining must be with the committee representing the great majority of our employees."

Many precedents for majority rule in labor relation may be cited. Thus it has been applied by the National War Labor Board, the Railway Labor Board, the National Labor Board, and by the three boards

established under Public Resolution 44; the National Steel Labor Relations Board, the National Textile Labor Relations Board, and the National Labor Relations Board. The rule was expressly written into the statute books by Congress in the Railway Labor Act of 1934: "Employees shall have the right to 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" (sec. 2 (4)).

Section 9 (b) provides that the Board shall determine whether, in order to effectuate the policy of the bill (as expressed in sec. 1), the unit appropriate for the purposes of collective bargaining shall be the craft unit, plant unit, employer unit, or other unit. This matter is obviously one for determination in each individual case, and the only possible workable arrangement is to authorize the impartial governmental agency, the Board, to make that determination. There is a similar provision in the Railway Labor Act of 1934 (sec. 2 (9); 2 (4)).

The purpose of the amendment to section 9 (b), which was suggested by the Attorney General's Office, is merely to provide some nominal standards in connection with the provision which allows the Board to designate units for the purpose of holding elections. These standards will make it more likely that the bill will receive a favorable reception in the courts.

Elections.—Section 9 (c) makes provision for elections to be conducted by the Board or its agents or agencies to ascertain the representatives of employees. The question will ordinarily arise as between two or more bona fide organizations competing to represent the employees, but the authority granted here is broad enough to take in the not infrequent case where only one such organized group is pressing for recognition, and its claim of representation is challenged. It is, of course, contemplated that pursuant to its authority under section 6 (a), the Board will make and publish appropriate rules governing the conduct of elections and determining who may participate therein.

The committee adheres, with the present National Labor Relations Board, to the common belief that the device of an election in a democratic society has, among other virtues, that of allaying strife, not provoking it. Obviously the Board should not be required to wait until there is a strike or immediate threat of strike. Where there are contending factions of doubtful or unknown strength, or the representation claims of the only organized group in the bargaining unit are challenged, there exists that potentiality of strife which the bill is designed to eliminate by the establishment of this machinery for prompt, governmentally supervised elections.

As previously stated in this report, the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9(d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9(c). The hear-

ing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to section 10 (e) or (f), the Board's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under sections 10(b) and 10(c).

The amendment to 9(c) merely provides for due notice in connection with hearings of the Board.

PREVENTION OF UNFAIR LABOR PRACTICES

The Board is empowered, according to the procedure provided in section 10, to prevent any person from engaging in any unfair labor practice listed in section 8 "affecting commerce", as that term is defined in section 2(7). This power is vested exclusively in the Board and is not to be affected by any other means of ajustment or prevention. The Board is thus made the paramount agency for dealing with the unfair labor practices described in the bill.

The procedure provided is analogous to that in the Federal Trade Commission Act (sec. 5) and is familiar to all students of administrative law. Provisions are made to assure the basic protections against arbitrary action which are generally regarded as prerequisite to due process of law. The provision that the technical rules of evidence shall not be controlling is but a restatement of the law generally recognized as applicable in comparable administrative tribunals. The court review afforded aggrieved parties under subsection (f) gives an adequate opportunity for review of the procedure before the Board. It is contemplated, of course, that the Board will establish rules governing procedure in greater detail, in such manner as will be conductive to the proper dispatch of business and to the ends of justice.

If upon all the testimony taken the Board decides that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board, according to the usual practice of similar administrative bodies, states its findings of fact and issues an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action as will effectuate the policies of the bill; i.e., as defined in section 1, to encourage the practice of collective bargaining and to protect the exercise by the worker of full freedom of association, self-organization, and designation of representatives of his own choosing. The orders will of course be adapted to the needs of the individual case: they may include such matters as refraining from collective bargaining with a minority group, recognition of the agency chosen by the majority for the purposes of collective bargaining, posting of appropriate bulletins, refraining from bargaining with an organization corrupted by unfair labor practices. The most frequent form of affirmative action required in cases of this type is specifically provided for, i.e., the reinstatement of employees with or without back pay, as the circumstances dictate. No private right of action is contemplated. Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the

Board, upon the Board's formal complaint. The form of injunctive and affirmative order is necessary to effectuate the purpose of the bill to remove obstructions to interstate commerce which are by the law declared to be detrimental to the public weal.

The form and nature of the Board's order will of course be subject to court review, along with the other determinations and actions of the Board in the case, both as to the facts and the law, in the manner provided in subsection (e) or (f).

The amendment to section 10(b) embraces merely an improvement in phraseology. The appropriate term for the interposition of a person in a quasi-judicial procedure is "intervene" rather than "appear."

If the person complained of fails or neglects to obey the Board's order, it is provided that the Board shall be empowered to petition any appropriate Circuit Court of Appeals of the United States for the enforcement of such order, and in the event that all the circuit courts to which application may be made are in vacation, the Board may in its discretion apply to the district court. Express provision is made for the granting of appropriate temporary relief or a restraining order, and the court is empowered to enter upon the pleadings, testimony, and proceedings set forth in the transcript a decree enforcing, modifying, or setting aside in whole or in part the order of the Board.

According to a similar procedure, any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may claim a review of such order in the appropriate circuit court of appeals, or in the Court of Appeals of the District of Columbia. It is intended here to give the party aggrieved a full, expeditious, and exclusive method of review in one proceeding after a final order is made. Until such final order is made the party is not injured, and cannot be heard to complain, as has been held in cases under the Federal Trade Commission Act.

The first amendment to section 10(e) embodies an improvement in procedure. It quickens action by allowing the Board to go into the courts for consideration of its order by first proving in a separate action that its order has been disobeyed. This short cut was effected in another way by an amendment to the Interstate Commerce Commission Act in 1920, and has been suggested in substance by the Attorney General's office.

The second amendment to section 10(e) is a modifying amendment. Instead of the court being ordered to enter a decree, the amendment provides that the court shall have power to enter a decree. It is believed that this amendment will meet with more favorable action in the courts than the prior language.

The third amendment to section 10(e) is merely clarifying, but it embodies no change in substance. A decree that is modifying has to be enforced as well as one that is enforced in full, and the new language covers this situation.

The other amendments in the section are to make the provisions correspond to the foregoing changes.

INVESTIGATORY POWERS

For the purpose of all hearings and investigations which in the opinion of the Board are necessary and proper for the exercise of the powers vested in it by section 9 and section 10, dealing with investigations of questions concerning the representation of employees and unfair labor practices, there is granted in section 11 the subpena powers typically provided for similar administrative bodies, without which their work would be ineffectual. The section grants no roving commission, but is limited to the exercise of powers and functions embodied in sections 9 and 10. Any member of the Board is empowered to issue subpenas requiring the attendance and testimony of witnesses (including, of course, the person complained of), and the production of any evidence that relates to matters under investigation or in question. In case of contumacy or refusal to obey a subpena, the Board may make application to the appropriate district court, which is empowered to issue orders requiring obedience, and to punish for contempt if necessary.

Section (11)(4) provides for the appropriate service of all process issued by the courts to which application may be made under section 11(2) or sections 10(e) or (f). This provision is comparable to that found, for example, in Securities Exchange Act, section 21(c) and 27; Clayton Act, section 12; and Petroleum Control Act of 1935, section 10(b).

Under section 12 any person who shall willfully resist, prevent, impede or interfere with any member of the Board or any of its agents or agencies in the performance of the duties pursuant to the bill shall be punished by a fine not in excess of $5,000 or by imprisonment not in excess of 1 year, or both. This guarantees that the Board will be protected in the conduct of its work, and, that tampering with records, interfering with witnesses, or the doing of other acts of like nature will be punishable as a criminal offense. The section of course can have no application to the exercise of the right to strike.

LIMITATIONS

Section 13 is designed to preclude the interpretation of any provision in the bill so as to "interfere with or impede or diminish in any way the right to strike." Public Resolution 44, passed by a unanimous Congress last year, likewise provided (sec. 6):

> Nothing in this resolution shall prevent or impede or diminish in any way the right of employees to strike or engage in other concerted activities.

Section 15 contains the usual separability provision.

Minority View

At the very outset I want to make my position clear. I am wholeheartedly in favor of this bill. I believe it to be a great step for the protection of the rights of organized labor of the United States; and irrespective of whether or not the following suggestions are adopted I shall vote for the bill.

I find myself unable to agree with the decision of the committee to affiliate the National Labor Relations Board with the Department of Labor. It is clearly immaterial whether this affiliation is accomplished merely by providing generally that the Board shall be located in the Department of Labor, or by providing in detail that the Secretary of Labor shall control the personnel, the regional agencies, and the budget of the Board. Regardless of variations in language, if the Board is placed within the Department, the Secretary of Labor will control the purse strings, and that control will be the decisive factor in determining the extent and the character of the personnel, the nature of the work done, and the administrative set-up of the Board, both in Washington and throughout the country. This in turn will be determinative of the major policies of the Board, as I shall presently discuss. On this issue there can be no compromise; either the Board must be completely independent or it must be reduced to the level of a departmental bureau.

I should have thought that even without regard for the past history of the National Labor Relations Board and the testimony before this committee, both of which seem to me compelling upon this point, precedent alone would have induced the establishment of the Board as an independent agency. The Board is to be solely a quasi-judicial body with clearly defined and limited powers. Its policies are marked out precisely by the law. That such an agency should be free from any other executive branch of the Government has been the recognized policy of Congress. Ready examples are the Interstate Commerce Commission, the Federal Trade Commission, the Communications Commission, the Securities and Exchange Commission, the National Mediation Board, and agencies that are even less judicial in character, such as the Federal Housing Administration and the Reconstruction Finance Corporation. It seems strange that this committee, which has built up so fine a record in the interests of labor, should be grudgingly unwilling to establish for the protection of labor's most basic rights an agency as dignified and independent, and as likely to attain the prestige that flows from such independence, as those which have been established to protect the interests of other groups.

The vital need for the complete independence of a quasi-judicial board that must enforce the law has been best illustrated by the collapse of section 7 (a) of the Recovery Act. The famous section broke down, not so much because the Recovery Act into which it was written did not contain adequate enforcement provisions, but because the actual enforcement of 7 (a) was tied up with the wrong agencies. The Labor Board, it is true, could make "decisions"; but actual enforcement rested with the National Recovery Administration and the Department of Justice. Since the N. R. A. had other functions, such as code making, etc., which required constant cultivation of friendly and conciliatory feelings between the N. R. A. and those with whom it had to deal, the N. R. A. has been forced repeatedly to compromise and bargain away the specific rights guaranteed by section 7 (a). And the Department of Justice likewise has been reluctant to act upon this touchy subject, because of entirely extrinsic consideration of government policy that should have had nothing to do with section 7 (a). The complete frustration of the present National Labor

Relations Board has resulted from this very simple failure to maintain the traditional and tested division between quasijudicial bodies on the one hand and the general work of executive departments tied up with the governmental policy of a particular administration on the other.

This anomalous situation would be perpetuated by placing the National Labor Relations Board in the Department of Labor. The Department is an executive arm of the Government. The Secretary of Labor is an officer of a particular administration, and I say this from the long-range point of view, and with due regard for the abilities of the present Secretary. The Department is thus quickly susceptible to political repercussion, and it is charged with many administrative duties involving constant compromise between industry and government. Thus the Board would quickly be swallowed up in the general policies of the Department of Labor.

These difficulties are not answered at all by insisting that the judicial decisions of the National Labor Relations Board would not be subject to review by the Secretary of Labor or by any officer in the executive branch of the Government. If in fact the Board were to be independent in its actions, there would be no reason for anyone wanting to set it up in the Department of Labor. But that is not the case: the final "judicial decisions" are only a small part of the work of such a Board, and by control over other stages in the enforcement process the Department of Labor would be the final arbiter of the policies of the Board.

For example, to be effective in enforcement, the Board must control complaints of unfair labor practices from their very inception. Yet this would not be the case were the Board in the Department. It is quite true that the proponents of placing the Board in the Department insist that there should be no mediation or conciliation done by the Board. But that does not preclude the possibility of mediation of an unfair labor practice by the Conciliation Service of the Department before the Board would act. And in the long run, that would inevitably result from locating the Board in the Department, while its advent would be hastened by an administration unsympathetic toward labor. This is the very worst kind of confusion of conciliation and quasi-judicial work, not in that the Board will do both but that both will be used at successive stages in attempting to enforce the law.

What will result from such a procedure? Conciliation at the source will not build up the kind of records that the Board might later refer to the courts for enforcement. Compromise of the law at the outset will constantly plague the Government when the time comes to vindicate the law. A wide variety of interpretations without any centralizing force will create uncertainty and distrust. The National Labor Relations Board will be called into operation only where there has been a record of failure rather than success: only when the prestige of the Government has already been impaired by the failure of its agencies. Moreover, the duplication of effort and the long delay before complaints of unfair practices finally reach the Board will wreak havoc upon workers' rights. The worker who is wronged must get help quickly if at all. The injury of the long delay can never be redressed. The occasion to protest by his own collective action,

once let past, can never be recalled. These are not fancied evils; they are present now because of the very policies which I do not wish to see continued.

To prevent unfair labor practices, the National Labor Relations Board must have control of enforcement not at the end of the trail but from the very beginning. It must follow the procedure that is followed by the Federal Trade Commission in preventing unfair trade practices. No one would suggest, when there is a claim of an unfair trade practice, that there should first be mediation by the Department of Commerce and then action by the Commission in the event of failure.

In addition, if the Department of Labor is to control the first steps in regard to the prevention of unfair practices, it will have the discretion to cut enforcement of its sources. "Judicial independence" will do the Board no good as to cases that never reach it.

Thus the issue raised is a very narrow one. If the purpose of placing the National Labor Relations Board in the Department of Labor is that the Department and the Board shall function jointly to protect the rights guaranteed by section 7(a), then the whole enforcement mechanism will collapse because of dispersion of responsibility and because of an overlapping of conciliation and judicial work. And if the Board should operate independently of the Department, it is unfair to make it subject to departmental control over budget and personnel.

In view of these major considerations, which have proved controlling in every other case where the Government has set up a quasi-judicial body, the point that there might be some overlapping of statistical work by the Board and the Department of Labor is trivial and unrealistic. In fact, it is entirely appropriate to amend the bill, as has been done, to provide that the Board should not do any statistical work, mediation, or conciliation, when such services are available in the Department of Labor.

It should be repeated that the National Labor Relations Board is to be purely a quasi-judicial commission. Its prestige and efficacy must be grounded fundamentally in public approval and in equal confidence in its impartiality by Labor and Industry. If the Board is placed in the Department it will suffer ab initio from the suspicion that it is not a court, but an organ devoted solely to the interests of laboring groups. Far from helping labor, this will impair the work of the Board and render more difficult the sustaining of its supposedly impartial decisions by the Federal courts.

Finally, let me emphasize the paramount consideration that the inclusion of the Board in the Department of Labor will injure not only the Board, but the Department itself, and through it the interests of labor. The Department was not established to handle all the industrial relation problems of the Government. It was not established to covet impartial or quasi-judicial functions, or to interpret laws of Congress. It was founded, as is too often forgotten now, as a department for labor, and to "foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment." There is more work of this type to be done than ever before and the Department is in no danger of lapsing into disuse if it is

aware of its duties. I believe that labor would have fared better under the codes if the Department had remained true to its function as a militant organ for working people, rather than attempted to appear as a labor relations bureau of the Federal Government, representing all interests alike, and overzealous to guard itself against supposed encroachments. The efforts to secure control over an impartial quasi-judicial board is a definite step by the Department away from those activities which can make it most useful to the working people of America.

The Senate bill very wisely has made the Board an independent agency. The House should follow the Senate on this very vital matter.

I also find myself unable to agree with the committee in its exclusion of agricultural workers. It is a matter of plain fact that the worst conditions in the United States are the conditions among the agricultural workers. They have been brought to the public attention many times; for example, by the investigations of the National Child Labor Committee into the horrible conditions, especially as affecting children, in the beet-sugar fields. The complete denial of civil liberty and the reign of terror in the Imperial Valley have been the subject of investigation by Government agents. Last summer saw a protracted and heroic strike by the terribly exploited union workers in the fertile fields of Hardin County, Ohio, against their employers. These workers were organized in a federal local of the A. F. of L. They were victims of the usual type of oppression which was called to public attention in the press.

However, the most conclusive proof that there must be Federal action to protect the right of agricultural workers to organize is to be found in the situation in Arkansas. In that State, within the last year, there has come into being an admirable union of agricultural workers, the Southern Tenant Farmers Union. It has been incorporated under the laws of the State. Its immediate demands are entirely reasonable and its methods have been extraordinarily peacefull. Yet that union is at present holding no meetings on advice of its counsel who says that it cannot be protected from terroristic attacks. Armed planters have patrolled the roads looking for the principal organizers of the union. The president of the union, a former rural school teacher, was driven out of the county by threats of lynching. Members of the union have been beaten up. Some of them have been cast in jail from which they are ultimately delivered but only in one or two cases after they had been confined on trumped charges for 45 days. Meetings have been forcibly broken up. The lawyer for the union is C. T. Carpenter, one of the outstanding lawyers of the State of Arkansas. He was waited on by an armed mob one night in his own home. He met them at the door with a pistol in his hand. The mob left but not without firing shots at the house.

What these people in Arkansas are organizing against is the most outrageous exploitation in America. The plantation system of itself is damnable. It combines the worst evils of feudalism and capitalism. The overseers on the plantations go armed.

A continuance of these conditions is preparing the way for a desperate revolt of virtual serfs. Unless the right to organize peacefully can be guaranteed we shall have a continuance of virtual slavery

until the day of revolt. The union and the exploited victims of this system have shown an amazing willingness, or rather a deep-seated anxiety, to avoid bloodshed.

I, therefore, respectfully submit that there is not a single solitary reason why agricultural workers should not be included under the provisions of this bill. The same reasons urged for the adoption of this bill in behalf of the industrial workers are equally applicable in the case of the agricultural workers, in fact more so as their plight calls for immediate and prompt action.

VITO MARCANTONIO.

CHANGES IN EXISTING LAW

The bill (S. 1958) does not repeal or amend expressly any provision of law, but refers to several provisions of law which are set forth for the information of the House.

JOINT RESOLUTION TO EFFECTUATE FURTHER THE POLICY OF THE NATIONAL INDUSTRIAL RECOVERY ACT

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to further effectuate the policy of title I of the National Industrial Recovery Act, and in the exercise of the powers therein and herein conferred, the President is authorized to establish a board or boards authorized and directed to investigate issues, facts, practices, or activities of employers or employees in any controversies arising under section 7a of said Act or which are burdening or obstructing, or threatening to burden or obstruct, the free flow of interstate commerce, the salaries, compensation and expenses of the board or boards and necessary employees being paid as provided in section 2 of the National Industrial Recovery Act.

SEC. 2. Any board so established is hereby empowered, when it shall appear in the public interest, to order and conduct an election by a secret ballot of any of the employees of any employer, to determine by what person or persons or organization they desire to be represented in order to insure the right of employees to organize and to select their representatives for the purpose of collective bargaining as defined in section 7a of said Act and now incorporated herein.

For the purposes of such election such a board shall have the authority to order the production of such pertinent documents or the appearance of such witnesses to give testimony under oath, as it may deem necessary to carry out the provisions of this resolution. Any order issued by such a board under the authority of this section may, upon application of such board or upon petition of the person or persons to whom such order is directed, be enforced or reviewed, as the case may be, in the same manner, so far as applicable, as is provided in the case of an order of the Federal Trade Commission under the Federal Trade Commission Act.

SEC. 3. Any such board, with the approval of the President, may prescribe such rules and regulations as it deems necessary to carry out the provisions of this resolution with reference to the investigations authorized in section 1, and to assure freedom from coercion in respect to all elections.

SEC. 4. Any person who shall knowingly violate any rule or regulation authorized under section 3 of this resolution or impede or interfere with any member or agent of any board established under this resolution in the performance of his duties, shall be punishable by a fine of not more than $1,000 or by imprisonment for not more than one year, or both.

SEC. 5. This resolution shall cease to be in effect, and any board or boards established hereunder shall cease to exist, on June 16, 1935, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 of the National Industrial Recovery Act has ended.

SEC. 6. Nothing in this resolution shall prevent or impede or diminish in any way the right of employees to strike or engage in other concerted activities.

[Joint Resolution of June 19, 1934.]

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[Judicial Code.] SEC. 239. In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and thereupon the Supreme Court may either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by writ of error or appeal.

[Judicial Code.] SEC. 240. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section.

(The writ of error referred to in the above sections has been abolished by the act of Jan. 31, 1928, 45 Stat. 54.)

* * * * * *

AN ACT To amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

SEC. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

SEC. 3. Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are here defined) from doing, whether singly or in concert, any of the following acts:

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

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

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

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

SEC. 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act.

SEC. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

SEC. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) Tat unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

SEC. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

SEC. 9. No restraining order of temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issurance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

SEC. 10. Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the circuit court of appeals for its review. Upon the filing of such record in the circuit court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings procedence over all other matters except older matters of the same character.

SEC. 11. In all cases arising under this Act in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: *Provided,* That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

SEC. 12. The defendant in any proceding for contempt of court may file with the court a demand for the retirement of the judge sitting in the proceding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. Upon the filing

of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding.

SEC. 13. When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employers; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of emplyees and one or more emplyees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) or "persons participating or interested" therein (as hereinafter defined).

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

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relations of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

SEC. 14. If any provision of this Act or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of the Act and the application of such provisions to other persons of circumstances shall not be affected thereby.

SEC. 15. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed. [Act of March 23, 1932.]

* * * * * * *

[National Industrial Recovery Act] SEC. 7. (a) Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

* * * * * * *

[Sec 77B of the Bankruptcy Act] (l) No judge, debtor, or trustee acting under this section shall deny or in any way question the right of employees on the property under the jurisdiction of the judge, to join the labor organization of their choice, and it shall be unlawful for any judge, debtor, or trustee to interfere in any way with the organizations of employees, or to use funds under such jurisdiction, in maintaining so-called company unions, or to coerce employees in an effort to induce them to join or remain members of such company unions.

(m) No judge, debtor, or trustee acting under this section shall require any person seeking employment on the property under the jurisdiction of the judge to sign any contract or agreement promising to join or to refuse to join a labor organization; and if such contract has been enforced on the property prior to the property coming under the jurisdiction of said judge, then the judge, debtor, or trustee, as soon as the matter is called to his attention, shall notify the employees by an appropriate order that said contract has been discarded and is no longer binding on them in any way.

9. (74th Congress, 1st Session, House of Representatives, Report No. 1371)

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[1] NATIONAL LABOR RELATIONS BOARD

June 26, 1935.—Ordered to be printed

Mr. Connery, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 1958]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 1958) to promote equality of bargaining power between employers and employees, to diminish the causes of labor disputes, to create a National Labor Relations Board, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its amendments numbered 9, 23, 24 and 25.

That the Senate recede from its disagreement to the amendments of the House numbered 1, 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22, and agree to the same.

Amendment numbered 2:

That the Senate recede from its disagreement to the amendment of the House numbered 2, and agree to the same with an amendment, as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

Section 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

[2] *The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract,*

and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

And the House agree to the same.

Amendment numbered 11:

That the Senate recede from its disagreement to the amendment of the House numbered 11, and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

And the House agree to the same.

WILLIAM P. CONNERY, Jr.,
ROBERT RAMSPECK,
GLENN GRISWOLD,
RICHARD J. WELCH,
W. P. LAMBERTSON,
Managers on the Part of the House.

DAVID I. WALSH,
ROBERT M. LA FOLLETTE, Jr.,
JAMES E. MURRAY,
WILLIAM E. BORAH,
LOUIS MURPHY,
Managers on the Part of the Senate.

[3] STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the bill (S. 1958) to create a National Labor Relations Board, and for other purposes, submit the following statement of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report:

The conference agreement accepts the first House amendment, striking out from the caption to section 1 the words "declaration of," so that the caption now reads "findings and policy." The omitted words were superfluous.

The Senate receded from its disagreement to House amendment no. 2 and the conferees agreed upon the same with minor amendments. The House redrafting of section 1 was thought by the conferees to contain a better statement of the jurisdictional basis of the bill. The conferees struck out the words "interstate and foreign" modifying the word "commerce" appearing at four places in the section. The word "commerce" is defined in subsection 6 of section 2 as meaning interstate and foreign commerce. It is therefore confusing to use the adjectives "interstate and foreign" in various places in section 1, especially when these adjectives are not consistently used each time the word "commerce" appears in the section. The slight verbal change at the end of section 1 simply uses the plural to conform to the use in the preceding paragraphs of the section and in conformity with the general statement of rights in section 7.

The conference agreement accepted House amendment no. 3 as constituting a more accurate definition of the term "commerce." As originally defined in subsection 6 of section 2 the term included "any transportation or communication relating thereto." This was thought to be too broad a statement.

House amendment no. 4 effects a minor change in subsection 7 of section 2 by removing a tautological phrase. The idea is preserved in the phrase "tending to lead to a labor dispute," etc. The conference agreement accepts this amendment.

When the Senate passed S. 1958 it was assumed that the bill would become a law before June 16, 1935, on which date the National Labor Relations Board, created pursuant to Public Resolution 44, Seventy-third Congress, expired. Meanwhile, the President by a new Executive order of June 15, 1935, reestablished and continued the Board in existence, pursuant to his authority under title I of the National Industrial Recovery Act, as amended. House amendment no. 5 makes it clear that the term "old Board" as defined in subsection 11 of section 2, describes the Board which is at present in existence. This amendment is important in view of the provision at the end of section 4 (b) transferring to the Board to be created by S. 1958 the unexpended funds and appropriations of the old Board. The conference agreement accepts this amendment.

[4] Section 3 (a) of the Senate bill provided:

> There is hereby created as an independent agency in the executive branch of the Government a board, to be known as the "National Labor Relations Board."

House amendment no. 6 strikes out the phrase "as an independent agency in the executive branch of the Government." The Board as contemplated in the bill is in no sense to be an agency of the executive branch of the Government. It is to have a status similar to that of the Federal Trade Commission, which, as the Supreme Court pointed out in the *Schechter* case, is a quasi-judicial and quasi-legislative body. The conference agreement accepts this amendment.

The conference agreement accepts House amendment no. 7, stating specifically the circumstances under which a member of the Board may be removed. This amendment is desirable in the light of the decision of the Supreme Court in *Rathbun* v. *U. S.*, decided May 27, 1935, involving the removal by the President of Commissioner Humphreys of the Federal Trade Commission. If Congress in creating the Board vests the appointing power in the President it might be implied that it is intended to vest also in the President a general power of removal as an incident to the power to appoint. This inference is negatived by an express provision stating the conditions under which a member of the Board may be removed. Similar provisions are found in the Railway Labor Act of 1934 and the Federal Trade Commision Act.

House amendment no. 8 strikes out from section 4 (b) the provision continuing the court proceedings and orders of the old Board. The conference agreement accepts this amendment. All cases of the old Board pending in the courts have already been dropped at the direction of the Attorney General, in view of the *Schechter* case which invalidated the codes of fair competition as having been founded upon an improper delegation of legislative power to the President. Section 7 (a) which was the basis of the old Board's activity became inoperative, because section 7 (a) was effective only insofar as its provisions were inserted in the codes.

Section 4 (b) of the Senate bill provided that all employees of the old Board should be transferred to and become employees of the Board "without acquiring by such transfer a permanent civil service status." House amendment no. 9 proposed to strike out this quoted phrase. The conference agreement rejects the House amendment and reinstates the language of the Senate bill. The result is that all employees of the old Board will be carried over as provided in the Senate bill but such transfer will not of itself confer a civil-service status upon such employees of the old Board as have not now such status. The conferees thought that employees of the old Board should not be blanketed into the civil service without the usual formalities provided by law.

The conference agreement accepted House amendment no. 10 as constituting a more accurate citation of the National Industrial Recovery Act.

House amendment no. 11, which redrafted section 9(b), embodied two changes from the Senate bill. The first change undertook to express more explicitly the standards by which the Board is to be guided in deciding what is an appropriate bargaining unit. The conference agreement accepts this part of the amendment. The [5] amendment also added a proviso designed to limit the otherwise broad connotation that might be put upon the phrase "or other unit." The proviso, however, was subject to some misconstructions, and the conferees have

agreed that the simplest way to deal with the matter is to strike out the undefined phrase "other unit." It was also agreed to insert after "plant unit" the phrase "or subdivision thereof." This was done because the National Labor Relations Board has frequently had occasion to order an election in a unit not as broad as "employer unit," yet not necessarily coincident with the phrases "craft unit" or "plant unit"; for example, the "production and maintenance employees" of a given plant.

House amendment no. 12 inserts the phrase "upon due notice" in section 9(c) providing for hearings by the Board on the issue of collective bargaining representation. The conference agreement accepted this amendment out of abundant caution; though it would perhaps be implied that a requirement of a hearing includes due notice to the parties.

House amendment no. 13 was accepted by the conference agreement. It is a purely formal matter. The appropriate term for the intervention of a person in a quasi-judicial person is "intervene" rather than "appear." House amendment no. 14 was accepted by the conference agreement as a verbal change to conform with the preceding amendment.

Section 10(e) of the Senate bill provided that "if such person fails or neglects to obey such order of the Board while the same is in effect, the Board may" petition any circuit court of appeals, etc. House amendment no. 15 strikes out the quoted phrase and substitutes "The Board shall have power to" petition any circuit court of appeals, etc. The conference agreement accepts this amendment. The purpose is to provide for more expeditious procedure. Delay in enforcement procedure due to technicalities would be especially harmful under this act. It is the purpose of this amendment to authorize the Board to apply to the courts for an enforcement order, without encountering the delay resulting from certain court decisions (a small minority) under the Federal Trade Commission Act, requiring the Commission to show in every case that its order is being disobeyed before the court will even proceed to consider the matter on its merits, or render a decree enforcing the Board's order. As the majority of courts have declared under the Federal Trade Commission Act, neither the administrative body nor the courts are required to assume in the ordinary case that the unlawful practice in question, even though presently terminated will not be resumed in the future. If such practice is resumed there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings.

House amendment no. 16 was accepted in the conference agreement as conforming to the language of the Federal Trade Commission Act, in using the language of authorization rather than mandatory language in empowering the court to enter the appropriate decree.

House amendment no. 17 is clarifying language to cover the contingency where the court has occasion to modify an order of the Board. In such case the court is given by the amendment the power to enforce the Board's order as modified, as fully as in the case where the court affirms the Board's order without modification.

[6] The conference agreement accepts House amendment no. 18. This amendment to section 10(f), applying to a case where a party

petitions the Circuit Court of Appeals to review the order of the Board, brings that subsection in conformity with section 10(e) as amended.

House amendment no. 19, adding the phrase "and enforcing as so modified" to section 10(h) was accepted by the conference agreement as conforming to the changes in the previous amendments.

The conference agreement accepted House amendments nos. 20, 21, and 22, as constituting merely formal correction in the citations of the various statutes.

House amendment No. 23 inserted a new section providing that—

> Nothing in this act shall abridge the freedom of speech, or of the press as guaranteed in the first amendment to the constitution.

The conference agreement rejected this amendment as having no proper place in the bill. There is no reason why the Congress should single out this provision of the Constitution for special affirmation. The amendment could not possibly have had any legal effect, because it was merely a restatement of the first amendment to the Constitution, which remains the law of the land irrespective of congressional declaration.

House amendments nos. 24 and 25 merely renumbered the sections as made necessary by House amendment No. 23 inserting a new section. Since the conference agreement has stricken out House amendment no. 23, House amendments nos. 24 and 25 become unnecessary and are rejected by the conference agreement.

The conference agreement accepts the House amendment to the title of the bill, because it describes more accurately the jurisdictional basis for the bill.

WILLIAM P. CONNERY, Jr.,
RICHARD J. WELCH,
GLENN GRISWOLD,
ROBERT RAMSPECK,
W. P. LAMBERTSON,
Managers on the Part of the House.

B. FROM THE WAGNER ACT TO THE TAFT-HARTLEY ACT (1947)

The first item is, of course, the Wagner Act itself (item 10). Patterned after the Federal Trade Commission Act, it reflected in its substantive clauses the problems of securing recognition, the rights to organize and to bargain collectively, and the ending of discrimination against workers attempting to exercise these rights. These were the major problems which had arisen under section 7(a) of the NIRA.

This section, it will be recalled, was enacted to provide a means to the end of bringing about economic recovery by enabling workers to have adequate representation in the establishment of codes of fair competition. By 1935 it had become clear that there were "other" problems facing the country besides recovery, which continued to elude Americans. Until these "other" problems were solved, it was agreed that recovery could not be achieved. There remained deep dispute over what were these "other" problems which were holding up recovery—the reform efforts of the New Deal or a lack of such reform efforts.

The next item (11) is a long chapter from a major study of the Wagner Act and of its administration by the NLRB, written some years later by two participants, Dr. Harry A. Millis, Chairman of the Board during the Second World War, and Dr. Emily Clark Brown, who served under Dr. Millis in 1942–44 as an operating analyst. This summary account of the administrative history of the Board from 1935 to 1947 is admittedly partial, but it is also objective and accurate (item 62). It will serve to provide the necessary historical background for this period in the life of the Board.

The next item is a key document in the early history of the Board, the famous Liberty League brief on the constitutionality of the Wagner Act. From 1935 to 1937 this *Report on the Constitutionality of the National Labor Relations Act* prevented the Wagner Act from having its full effect. Long out of print, this report by the National Lawyers Committee of the American Liberty League has been read by few persons. Reference is made to the "Subject Index" of the report, toward its end, which is in reality a table of contents. One will find that included in the report is an account, from management's point of view, of the antecedent history of labor legislation both before and since the NIRA. In addition the brief marshalls not only the argument that the Wagner Act is unconstitutional, but also that it is one-sided, discriminatory, and restrictive of the basic rights of both employers and employees. These latter are continuing allegations, although the constitutionality issue was dead after 1937.

Thus, while history remembers the report only for the fact that it said that the Wagner Act was unconstitutional and was proven wrong, it actually presented systematically for the first time the case

against the Wagner Act. Many of the criticisms made in this report will be found repeated later as arguments for provisions of the Taft-Hartley Act. It is a lawyers' brief—indeed, an advocate's brief—but one still to be usefully consulted (item 12).

With the question of constitutionality settled by the Jones and Laughlin Steel Corporation case, criticism of the Board shifted more to procedural matters and to what the Board was doing. A substantial body of criticism arose, some of which is evaluated in the Columbia Law Review article (item 13) by Walter Gellhorn and Seymour Linfield.

The major item of pre-World War II criticism and defense of the Board is the Smith Committee Intermediate report with Minority Views (item 14). This is included in its entirety. The Final Report of the Smith Committee (House Report 3109, 76th Congress, 3d session), which appeared in early 1941, is not reproduced. It added a substantial body of criticism of individual members and employees of the Board, but little else not already included in the Intermediate Report.

The Smith Committee's investigations were the plowing of the soil from which sprang the post-war criticisms of the Board, the Taft-Hartley Act, and especially the contribution of the Hartley bill. The extent to which the substantive criticisms of the Smith Committee and the rebuttal of the Minority still have value may be left to each reader to decide. We note here only that some of its recommendations for administrative changes have been subsequently adopted, while others have persisted as proposals for reform of the structure or proceedings of the Board. The Smith Committee was the first Congressional body to suggest giving greater finality to the reports of Trial Examiners, for example. The idea of establishing an independent administrator to investigate and prosecute cases before a quasi-judicial board, shorn of administrative responsibilities, was incorporated in the Hartley bill as it passed the House in 1947. This proposal was adopted in a limited form with the establishment of the office of General Counsel of the Board under the Taft-Hartley Act. Thus, much of the Smith Committee report has a continuing interest, even to this day, for students of the administrative process. And its Minority views are a sturdy defense of the Wagner Act and the pre-war Board.

Item 15 is one of the monographs issued by the Attorney General's Committee on Administrative Procedure in 1941. It should be read in conjunction with the Final Report of this Committee; with item 13, above; and with items 17 and 18, below. It should be noted that Walter Gellhorn, one of the authors of item 13, directed the staff which produced item 15.

The next item (16) is an early example of an approach to the problems of the Board which has become more common in the years since Taft-Hartley, and especially since Landrum-Griffin; the purely administrative approach, largely independent of bias for or against the Board or its work. Dr. James Burns' article bases its analysis of the need for administrative reform of the Board on materials collected by the Smith Committee. It comes to a similar conclusion of the need to separate the administrative and judicial functions of the Board. But its rationale is that of the President's Committee on Administrative Management: the existence of independent regulatory agencies prevents the President from acting in their area of responsibility in an

effective manner. The agency has "power without responsibility" while the Chief Executive has "responsibility without power." (Some may know James MacGregor Burns better as a biographer of Franklin D. Roosevelt.)

As has been noted, this proposal of the Committee on Administrative Management to centralize power in the President by abolishing the independent boards and commissions did not meet with ready acceptance. It was, in fact, ignored. There was no widespread feeling in 1937 that FDR had too *little* power.

Similarly, the article by Harry Shulman (item 17) centers its consideration of "Reforming Procedure of the N.L.R.B." on the recommendations of the Attorney General's Committee on Administrative Procedure. It also reviews some of the internal changes being made in the Board's procedures as a response to contemporary pressures. These changes made it possible, after the war, for the Board to satisfy the requirements of the Administrative Procedure Act with only minor further changes in procedure. For an account of this period emphasizing substantive matters, one may refer to the article by Julius and Lillian Cohen, item 18, below. This shows that internal procedural adjustments made by the Board were accompanied by changes in position on various substantive issues, made, in the hope of satisfying critics, by new members of the Board.

The period of World War II presents a problem. The subject of labor-management relations during the war merits a volume of documents on its own. For present purposes, however, this period is important as setting the stage for the Taft-Hartley drama to follow, but is rather unimportant itself from a legislative viewpoint. It is, save for the Smith-Connally Act, an interlude. Fortunately, it was possible to sum up the war period and add a brief related account of the events leading to the enactment of the Taft-Hartley Act by including three chapters from the standard history of labor relations during World War II, Joel Seidman's *Labor from Defense to Reconversion* (item 19).

Because of the continuing importance of the Taft-Hartley Act, extensive coverage is given here both to the events preceding and to the enactment of the law. In addition to the item cited above, three additional chapters from the Millis and Clark book are included, which give an account of previous attempts to amend the Wagner Act, as well as the legislative history of Taft-Hartley (item 20). For the position of the two authors of the law, item 21 is Senator Taft's introduction to Representative Hartley's book, *Our New National Labor Policy*, while item 22 comprises five short chapters from that work. The Taft-Hartley selections are completed with the House and Senate reports on the bills and the conference report (items 23, 24, and 25). It should be noted that both the House and Senate reports include substantial minority views, defending the Wagner Act and its administration.

The most substantive discussion of the administrative changes actually made by the Taft-Hartley amendments is in the Conference Report (item 25). This is under the heading "Administration" and is only a paragraph or two long.

We have noted above that the Hartley bill, H.R. 3020, reported by the House, would have abolished the NLRB and established in its

stead two separate and independent agencies to administer the new law. A "Labor-Management Relations Board" would have had only quasi-judicial powers, while all powers of administering the law, initiating cases and prosecuting them would have been placed in the responsibility of an "Administrator of the National Labor Relations Act" (item 23, Report (majority views)).

The Senate bill (item 24, Report (majority views)) made only minor administrative changes in the Wagner Act and contained no provision for any further separation of the prosecutory and adjudicative aspects of the work of the Board. The safeguards afforded by the passage of the Administrative Procedure Act the year before had apparently satisfied Senator Taft that further procedural changes were not needed. Thus, the legislative history of the Office of General Counsel begins in the Conference Report, and, aside from what little appears in the debate and elsewhere in the *Congressional Record*, ends there.

10. (National Labor Relations Act, ch. 372, Act of July 5, 1935 (49 Stat. 449))

CHAPTER 372

AN ACT

To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

July 5, 1935.
[S. 1958.]
[Public, No. 198.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND POLICY

National Labor Relations Act. Findings and policy.

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stablization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing

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certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Definitions.

DEFINITIONS

SEC. 2. When used in this Act—

"Person." (1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

"Employer." (2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

"Employee." (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

"Representatives." (4) The term "representatives" includes any individual or labor organization.

"Labor organization." (5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country. "Commerce."

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing comerce or the free flow of commerce. "Affecting commerce."

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8. "Unfair labor practice."

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. "Labor dispute."

(10) The term "National Labor Relations Board" means the National Labor Relations Board created by section 3 of this Act. "National Labor Relations Board."

(11) The term "old Board" means the National Labor Relations Board established by Executive Order Numbered 6763 of the President on June 29, 1934, pursuant to Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), and reestablished and continued by Executive Order Numbered 7074 of the President of June 15, 1935, pursuant to Title I of the National Industrial Recovery Act (48 Stat. 195) as amended and continued by Senate Joint Resolution 133 [1] approved June 14, 1935. "Old Board." Executive Order 6763. Vol. 48, p. 1183. Executive Order 7074. Vol. 48, p. 195. *Ante*, p. 375.

NATIONAL LABOR RELATIONS BOARD

National Labor Relations Board. Composition; appointment. *Post*, p. 1177.

SEC. 3. (a) There is hereby created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only Terms of office.

[1] So in original.

for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

Chairman.

Removals.

(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

Quorum, seal, etc.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

Annual report.

SEC. 4. (a) Each member of the Board shall receive a salary of $10,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint, without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended, an executive secretary, and such attorneys, examiners, and regional directors, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary for the proper performance of its duties and as may be from time appropriated for by Congress. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor.

Salaries.
Post, p. 1112.

Appointment of personnel.

Vol. 46, p. 1003; U.S.C., p. 85.

Attorneys, regional directors, etc.

Agencies available.

Appointment of mediators; restriction.

(b) Upon the appointment of the three original members of the Board and the designation of its chairman, the old Board shall cease to exist. All employees of the old Board shall be transferred to and become employees of the Board with salaries under the Classification Act of 1923, as amended, without acquiring by such transfer a permanent or civil service status. All records, papers, and property of the old Board shall become records, papers, and property of the Board, and all unexpended funds and appropriations for the use and maintenance of the old Board shall become funds and appropriations available to be expended by the Board in the exercise of the powers, authority, and duties conferred on it by this Act.

Old Board abolished. Transfer of employees, records, etc.

(c) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incured by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose. Expense allowances.

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case. Principal office. Prosecution of inquiries.

SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe. Administrative rules.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have 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. Rights of employees specified.

SEC. 8. It shall be an unfair labor practice for an employer— Unfair labor practices.

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) 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: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 Vol. 48, p. 195; *Ante*, p. 375.

(a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

Representatives and elections.

REPRESENTATIVES AND ELECTIONS

Majority rule principle in collective bargaining, etc.

SEC. 9. (a) 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: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

Proviso. Individual right to present grievances.

Standards for appropriate bargaining, etc.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

Representatives of employees. Method for selecting, etc.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, 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 [1] such representatives.

Hearings.

Board orders based on foregoing results.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Enforcement or review.

[1] So in original.

PREVENTION OF UNFAIR LABOR PRACTICES

Prevention of unfair labor practices, affecting commerce. Authority of Board.

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may eb established by agreement, code, law, or otherwise.

Complaints; filing.

Service of charges.

Notice of hearing.

Amendment of complaint.

Appearance and answer accused.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended compaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

Prevailing rules of evidence; effect of.

Preservation of testimony.

Cease and desist orders.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

Reports of compliance; requirement.

Dismissal of complaint.

Modification, etc., of order.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

Enforcement.

Board authorized to petition any circuit court of appeals.

Temporary restraining order provided.

Papers to be filed.

Notice; jurisdiction and powers of court.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidences to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, an shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court

Objections; consideration of.

Findings conclusive of facts.

Additional evidence.

Modification by Board.

Jurisdiction of court. Decree final; review allowed.

of the United States upon writ of certioriari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347). U. S. C., p. 1271.

Application to set aside orders.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

Procedure, etc.

Board's order not stayed by commencement of proings.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

Jurisdiction of equity courts not impaired.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101–115). Vol. 47, p. 70. U.S.C., p. 1326.

Expeditious hearings.

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

INVESTIGATORY POWERS

Investigatory powers.

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10— *Ante*, p. 453.

Examinations, securing evidence, etc.

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the

purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

Subpena powers.

Administration of oaths, etc.

Witnesses, etc.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any District Court of the United States or the United States courts of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Contumacy or refusal to obey subpena. Punishment for.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Privilege of witnesses.

Personal immunity.

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Wit-

Service of orders, etc.

nesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Witness fees etc.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

Venue provisions.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

Government agencies to assist.

SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

Protection of Board members, etc.

LIMITATIONS

Limitations.

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

Right to strike.

SEC. 14. Wherever the application of the provisions of section 7(a) of the National Industrial Recovery Act (U.S.C., Sup. VII, title 15, sec. 707(a)), as amended from time to time, or of section 77 B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

Conflicts with other Acts.
National Recovery Act.
Vol. 48, p. 198; U.S.C., p. 584.
Ante, p. 375.
Bankruptcy Act, amendments.
Vol. 48, p. 922.
National industrial Labor boards.
Vol. 48, p. 1183.

Proviso.
Validity provision.

SEC. 15. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which is held invalid, shall not be affected thereby.

Separability clause.

SEC. 16. This Act may be cited as the "National Labor Relations Act."

Title.

Approved, July 5, 1935.

11. (Source: Harry A. Millis and Emily Clark Brown, ch. 2 of *From the Wagner Act to Taft-Hartley,* Chicago, The University of Chicago Press [1950])

THE NATIONAL LABOR RELATIONS ACT AND ITS ADMINISTRATION

The National Labor Relations Act of 1935,[1] the Wagner Act, brought to fruition in a brief, carefully drawn statute a revolutionary national labor policy—that workers were to be protected in the right to organize and bargain collectively through freely chosen representatives. Through the twelve years' life of the statute, in the face of widespread hostility of the press and continuing opposition of influential groups in industry, the Board sought to solve the new and difficult problems of administering such a law and making its policies effective. Experience showed that industry increasingly accepted these policies. But the Board never obtained the public understanding of its purposes, powers, methods, and accomplishments as well as of the limits of its functions which might have protected the Act from the attack of critics many of whom wished not so much to improve it as to destroy it.

The Act itself was essentially simple, with a limited purpose. That purpose is set forth in the statement of findings and policy:

> . . . to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[2]

Congress found that the denial by employers of these rights and the refusal of employers to bargain collectively led to strikes and unrest which interfered with interstate commerce and that inequality of bargaining power between unorganized employees and employers "organized in the corporate or other forms of ownership association" tended to depress wages and prevent stabilization of competitive wage rates and hence to aggravate recurrent business depressions. Experience had proved, Congress stated, that protection by law of the right to organize and bargain collectively promotes the flow of commerce by removing "certain recognized sources of industrial strife and unrest," encouraging the friendly adjustment of industrial disputes, and making for equality of bargaining power.

The Act was not intended to deal with all types of labor relations questions, or the prevention of strikes in general, and more than it was

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[1] 49 U.S. Stat. 449.

[2] Cited in full, with additions made by the Taft-Hartley Act in 1947, *infra,* ch. 11, p. 397.

with issues over wages or with possible abuse of power by unions or by employers in other areas of activity. Whether wise or not, whether or not experience would show need for additional legislation to deal with matters growing out of the experience under this Act, the Wagner Act gave to the Board which was to administer it only limited powers, to prevent practices of employers which interfered with the right of workers freely to organize and bargain collectively and to determine questions of fact as to whether groups of workers had chosen labor organizations to represent them in dealing with their employers.

The basic rights of employees were stated in Section 7.

> Employees shall have 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.

Five unfair labor practices were defined and forbidden to employers: (1) any interference, restraint, or coercion of employees in the exercise of the rights guaranteed: (2) domination or interference with the formation or administration of a labor organization or contributing financial or other support to it; (3) discrimination to encourage or discourage union membership, except that closed-shop contracts were not illegal if made with a union representing the majority of the employees in an appropriate bargaining unit and without illegal assistance by the employer: (4) discrimination against an employee for filing charges or testifying under this Act; and (5) refusal to bargain collectively with the legal representative of employees in an appropriate bargaining unit.

A National Labor Relations Board of three members, appointed by the President with the advice and consent of the Senate, was to administer the Act. Like other independent administrative agencies, the Board was to investigate, to hold hearings, and to issue decisions and orders. Its orders were not self-enforcing, however: it could petition a circuit court of appeals for the enforcement of an order in an unfair labor practice case, and similarly any person aggrieved by such an order could petition the circuit court for review. As was the case with other similar agencies, the Board was not bound by the technical rules of evidence, and its findings of fact, if supported by evidence, were to be controlling in the courts. There were no penalties for violation of the Act, only the power to prevent unfair labor practices by cease-and-desist orders and the power to require affirmative action to effectuate the policies of the Act.

Throughout its history, operating as it was in a highly controversial field, in which old established habits were being forced to change under pressure from the government, the Board was subject to sharp criticism. A minority of a House of Representatives committee in 1940 said:

> Justly or unjustly, the consensus of public opinion is that the Board is biased, prejudiced, and has been guilty not only of grabbing and using power never delegated to it by the act, but that it has been unfair and unjust in its actions.[3]

[3] U.S. House of Representatives, Committee on Labor, *Minority Report, Proposed Amendments to the National Labor Relations Act*, Report No. 1928, Pt. 3, 76th Cong., 3d Sess., April 12, 1940, p. 10, cited as House Committee on Labor, *Minority Report, NLRA (1940)*.

Similarly the Hartley report in 1947 stated:

> The committee's investigations, as well as those of preceding Congresses, have shown bias and prejudice to be rampant in the Board's staff, and among some members of the Board itself.[4]

Many criticisms were badly informed, failing to understand the functions of the Board and its limitations or simply reflecting dislike of the purposes of the Act. Most of them ignored large segments of the evidence as to the work of the Board. Yet real issues were raised as to proper administrative procedures for the enforcement of such a law as this. Now that an era has ended with the substitution of the Taft-Hartley Act for the Wagner Act, it is desirable to review the experience as objectively and with as much perspective as is possible at this time. What were the problems in administration? Did the Board succeed in solving them? What was the testimony of courts and impartial investigators on these questions? Was need for changes in the law indicated by the experience? The present chapter is concerned only with these questions of administrative procedures and their results. Policies as to the actual rights and duties under the law will be discussed later.

In fairness to the Board the factors which made its job tremendously difficult must be recognized. First was the novelty of the problems. For the first time the federal government was attempting to enforce widely its policy of outlawing employer interference with the right of workers to organize and to bargain collectively. The Board itself, and ultimately the courts on review of Board orders, had to define what this meant in the innumerable different situations which came before the Board. Unions had to learn what this Act could and could not do, employers to learn their duties under the new statute, courts to learn the points at which former protection of property rights had to give way to other rights. And the Board and its staff and the courts had to develop the meaning of "due process" in the enforcement of this new type of law. Moreover, personnel had to be trained for a task needing objectivity and thoroughness as well as tact and common sense in dealing with emotionally charged situations. Especially after April, 1937, when, as Chairman Madden pointed out, "no ready-made personnel, experienced in the field of labor relations, was available," [5] the Board needed quickly to recruit and train a large staff to meet an avalanche of cases. It was not surprising if not all employees were as objective and efficient as the Board desired or as they became later through experience and training.

Another crucial factor in the difficulties of the Board was the continuing opposition in industry and in Congress. The fight on the constitutionality issue consumed much of the energy of the Board until April, 1937. When that issue was settled by the Supreme Court, the major associations of industry began a drive for amendment [6] which continued, with a partial recess during the war, until its success in 1947.

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[4] U.S. House of Representatives, Committee on Education and Labor, *Labor-Management Relations Act, 1947*, Report No. 245, 80th Cong., 1st Sess., April 11, 1947, p. 26, cited as *Hartley Report*.

[5] U.S. House of Representatives, Committee on Labor, *Hearings, Proposed Amendments to the National Labor Relations Act*, 76th Cong., 1st Sess., May 23, 1939. Vol. 2, p. 317, cited as House Committee on Labor, *NLRA Hearings* (1939).

[6] Cf. Chamber of Commerce of U.S., *Federal Regulation of Labor Relations* (Washington, D.C., May, 1937), p. 4. National Association of Manufacturers, *Why and How the Wagner Act Should Be Amended* (New York, June, 1938), pp. 19–20.

The three lengthy congressional investigations in both House and Senate in 1939–40 took much time and harassed the Board at a period when it was overwhelmed with a heavy case load and inadequate staff. When this attack upon the Act failed to result in amendment, opposition took the form of hostility in the appropriations committees and inadequate appropriations.[7] Again at the close of the war the drive for amendment or repeal was renewed, actively promoted by the National Association of Manufacturers, and the relations with Congress, as to appropriations and the necessity of supplying material for the investigating committees, once more absorbed a large share of the time and energy of the Board and its staff. Through most of its life the Board worked in a hostile atmosphere, in which opposition and misunderstanding were promoted by much of the press.

The division in the labor movement also added enormous complications which had not been foreseen when the Act was passed. The rapid growth of labor organization increased the number of cases, while the rivalries between AFL, CIO, and independent unions brought to the Board cases which sometimes posed touchy and difficult questions and exposed the Board to harsh criticisms of "bias," from whichever group lost as a result of particular policies.

Finally, the abnormal conditions of the defense, war, and postwar periods ruled for more than half of the life of the Wagner Act. They gave the Board difficult questions of policy, swamped it for a time with the irrelevant job of conducting War Labor Disputes Act strike votes, and in the two years of strife following V-J Day turned public ire against the NLRB for conditions which were outside the area of the powers of the Board.

It has been said truly that the Board never had a chance to function in a "normal" period, with adequate staff and speed and efficiency in handling of cases, and to show what it might have done for the elimination of strife. Instead it had first the bitter opposition of most of industry and the fight on constitutionality; then the deluge of cases after the establishment of the constitutionality of the Act and the increase of union membership following the organization of the CIO; then, before it could get its work onto a current basis, the hampering congressional investigations; next the war; and, finally, the postwar avalanche and the renewed attack upon the Act. And through most of the twelve years' history, appropriations and staff were inadequate, and the backlog of cases grew. It may be added also that the constant shift in personnel of the Board, none being reappointed after a full five-year term,[8] while giving certain advantages in fresh points of

[7] Cf. U.S. Senate, Subcommittee of the Committee on the Judiciary, *Hearings, Investigation of the National Labor Relations Board*, 75th Cong., 3d Sess., January 28, 1938, pp. 47–48, cited as Senate Committee on the Judiciary, *NLRB Hearings*, quoting David Lawrence in the *Washington Star*; U.S. Senate, Subcommittee of the Committee on Appropriations, *Hearings, Labor-Federal Security Appropriations Bill for 1948*, 80th Cong., 1st Sess., April 7, 1947, p. 867, cited as Senate Appropriations Committee, *Hearings, 1948*.

The Board's total expenditures and obligations, by fiscal year, were as follows, from *Annual Reports*. For a comparison with the much more sharply rising work load, see *infra*, ch. 3, Table 1.

1935–36	$620,571	1941–42	$3,069,275
1936–37	788,528	1942–43	3,598,992
1937–38	2,456,884	1943–44	3,435,780
1938–39	2,845,771	1944–45	3,623,867
1939–40	3,184,021	1945–46	4,250,951
1940–41	2,867,212	1946–47	4,436,650

[8] Mr. Edwin S. Smith was reappointed for five years after serving a one-year term. Mr. Houston and Mr. Herzog each served short periods before their five-year terms.

view, lost what might have been a more consistent and increasingly efficient administration by an expert and experienced Board.

The Board, facing all these problems and difficulties, worked at solutions along four main lines. First, it improved its personnel and methods by careful selection and training and by building upon the experience of the most efficient of the staff, getting their advice and making it available to others through staff committees and field conferences. Second, it improved the Washington control over work in the field and gradually developed standard procedures which did much to eliminate regional differences in handling of cases and to put the work on a high level of efficiency. Third, the Board itself over the years developed a high degree of separation of functions within the agency and clear and extensive delegation of authority to officers and committees in Washington and to Regional Directors in handling cases in the field. Finally, the policies of the Board developed through the years on the basis of experience, influenced by court decisions on Board cases, public and congressional criticism, the Board's study of its own experience, and the attitudes of the members of the Board. The problems of the NLRB were of special difficulty because of the complex relationships with which it dealt. Nevertheless, in many respects the Board's experience and the attacks upon it paralleled that of other administrative agencies during these years.

1935–37

The members of the Board, who were appointed by the President late in August, 1935, were Chairman J. Warren Madden, professor of law at the University of Pittsburgh, Edwin S. Smith, a member of the old NLRB and with other experience in labor relations, and John M. Carmody, member of the National Mediation Board. Mr. Carmody resigned a year later and was replaced by a lawyer, Donald Wakefield Smith.

The Board inherited from the old NLRB a small staff, divided between Washington and some twenty-one regional offices, much of which it retained as an experienced group. It appointed a Regional Director and a Regional Attorney in each regional office. In Washington the General Counsel through a Litigation Section and a Review Section was responsible for conducting hearings and for representing the Board in all judicial proceedings and for the review of records of hearings and assisting the Board in preparing formal decisions. He also supervised the work of attorneys in the field. The Secretary of the Board was responsible for the general administrative work and the supervision of the regional offices as well as for the administrative handling of cases inWashington and the field. He acted also as Chief Trial Examiner in charge of the Trial Examiners' Division, whose members presided over hearings and prepared reports for the Board. He had of course nothing to do with the decision-making process following hearing. An Economic Division prepared necessary materials for the Board on questions of fact as to the interstate commerce aspects of cases and on labor relations questions.

Even before the Board had completed its organization and published its first rules and regulations the attempt to prevent administration of

the Act began. On September 5, 1935, the American Liberty League published a report of a committee of prominent lawyers which held that the Act was clearly unconstitutional, as an unreasonable interference with individual rights, and beyond the power of Congress to regulate interstate commerce.[9] This issue would have to be decided by the Supreme Court before real enforcement of the Act could begin.

Nonetheless, cases began to come in; 203 in October, 1935, and from then on through the early months of 1937 an average of some 100 or more cases were filed each month.[10] In the first year four-fifths of them charged employers with unfair labor practices. In the second year over 70 percent were such charges, while representation cases increased to about 30 percent of the cases filed. At the start there was only loose supervision of the field offices, and the handling of cases varied from region to region depending upon the experience and personalities of the staff. But the general outlines of Board procedures began to be set. When a charge was filed that an employer had discriminated against employees for union activity, maintained a company-dominated union, or otherwise interfered with the rights guaranteed by the Act, the Regional Director or a field examiner investigated, with the help of the Regional Attorney on legal points. Interviews with complaining employees and others and with employers and management—often bitterly hostile and unco-operative—and study of records were all designed to learn whether in fact the Act was being violated. If it appeared from the investigation that the employer was violating the law, an attempt was made to show him what would be necessary to bring himself into compliance with the requirements of the Act and to settle the case on that basis by agreement. If, however, the charge proved not to be well founded, unions were asked to withdraw the charge, or, failing that, the Regional Director would dismiss it, refusing to issue a formal complaint. Appeal could be made to the Board against his action.

Somewhat similarly, when a petition was filed by an employee or a labor organization asking for an investigation of a question as to the right of employees to a representative chosen by the majority of the group, it was handled in the regional office. Sometimes in the course of this preliminary investigation the case could be settled by an agreement of the employer to recognize the union, on proof of its majority, or by agreement for a secret election to be held by the Regional Director to determine the desires of the employees. If the investigation failed to support the claim that a real question of representation existed, the Regional Director could report to the Board, recommending either that the union be permitted to withdraw its petition or that the peition be dismissed.

It was surprising, in view of the organized opposition to the Act, that it proved possible to settle some cases by these informal procedures.[11] In the first year, 865 complaint cases filed, over 60 per cent

[9] National Lawyers Committee of the American Liberty League, *Report on the Constitutionality of the National Labor Relations Act*, September 5, 1935, quoted in House Committee on Labor, *NLRA Hearings (1939)*, Vol. 8, pp. 2241–87. Cf. *infra*, ch. 8, p. 295.

[10] For complete data on cases handled by years see *infra*, ch. 3, Table 1.

[11] Cases handled in the regional offices without the necessity of issuing a formal complaint, or a formal notice of hearing, or carrying the case up to the Board for formal order in either a representation case or an unfair labor practice case are called "informal cases." Conversely those requiring "formal" action, hearing and Board order, are called "formal cases."

were disposed of informally. More than 30 per cent were withdrawn or dismissed when the evidence did not support the charge that violations had occurred. But 240 cases, nearly 28 per cent, were "settled" in compliance with the Act by the reinstatement of employees who had been discriminated against, by payment of back pay, by recognition of a labor organization, by abolition of a company union, or by agreement by employers to cease interfering with employees' rights and to post notices to this effect. Of the 203 representation cases filed in this first year, too, 90, or 44 per cent of those closed, were disposed of informally. Some were withdrawn or dismissed, but in 29 cases employers agreed to recognize the union, and in 23 there were elections by consent to determine the issue.[12] These settlements in many instances occurred where strikes were in process or threatened. They showed that industrial strife could be reduced by use of the peaceful processes of the Board.

Where cases could not be disposed of by these informal processes, however, the Board proceeded to use its full powers of formal action. In a complaint case the Regional Director requested authorization from the Board to issue a formal complaint. In the hearing held before a Trial Examiner of the Board, or sometimes before Board members themselves, an attorney for the Board was responsible for getting into the record the evidence as to the alleged violations. The employer and his counsel had every opportunity to present evidence and argument in defense. Often the hearing could be completed in a day or a few days. Occasionally, as when mass discriminatory discharges on a complex of other violations were charged, it might run for weeks.[13] After the hearing the Trial Examiner prepared an Intermediate Report giving his findings of fact on the evidence and his recommendations. This report was served on the parties and opportunity given to file exceptions. Oral argument before the Board would be granted on request of the employer or union party to the case. The Review Section analyzed the record for the Board and gave any assistance required by the Board in making its final decision and order.

In representation cases which could not be disposed of by informal methods the Regional Director similarly requested from the Board authorization to proceed to a hearing. The hearing was held before a Trial Examiner, before whom both sides had full opportunity to present the evidence on the issues. After an informal report by the Trial Examiner and review of the record by the Review Section, the Board made its decision, either dismissing the case, certifying a union as representative of the employees in an appropriate unit, or ordering an election conducted by the Regional Director to determine whether the employees had chosen a representative. After the election, if a majority of the votes were for a union, that union was certified by the Board.[14]

The Board's orders against employers in unfair labor practice cases could be enforced only by petitioning the proper circuit court of

[12] National Labor Relations Board, *First Annual Report* (Washington: Government Printing Office, 1936), pp. 35, 40.

[13] The Remington Rand hearing extended from October 14 to December 11, 1936. *Second Annual Report*, p. 161.

[14] For more discussion of Board methods in these first years see J. Warren Madden, "Birth of the Board," in Louis G. Silverberg, *The Wagner Act: After Ten Years* (Washington: Bureau of National Affairs, 1945), pp. 34–42. Also *First* and *Second Annual Reports* of the National Labor Relations Board.

appeals to enforce the order, subject to review by the Supreme Court. The obstructionists, however, were unwilling to follow this orderly procedure and tried by injunction suits in federal district courts to prevent the Board from functioning at all. This campaign beginning in November, 1935, resulted in the filing of nearly one hundred such suits to prevent the Board from holding hearings. The Board fought these cases vigorously. Fortunately the majority of the district courts, all but one of the circuit courts, and finally the Supreme Court completely upheld the Board, denying that district courts had any power or jurisdiction in these cases. But in the meantime for much of the first two years the work of the Board was seriously hampered; in fact, "in some areas where the District Judges were particularly hostile, the Board's work was forced to a standstill." [15]

Even more important for the long run was the Board's success in establishing the constitutionality of the Act. Recognizing how essential it was to establish the work on a "firm and broad constitutional basis," the Board was on the lookout for important cases which would test squarely the major issues as to constitutionality. Meantime it encouraged the regional offices to settle informally the small and less significant cases and, if necessary, induce employees to postpone pushing their cases. The Board refused to take jurisdiction of some cases which it considered beyond its constitutional authority or where it did not yet wish to test the issue of its jurisdiction.

In a number of important early cases the Board went in person to hear the case in place of a Trial Examiner, and in many others individual members of the Board were appointed Trial Examiner. This meant that they had the experience themselves of sitting for days and hearing the evidence as to discrimination, espionage, violence against union adherents, or other interference with the rights of employees under the Act, and then analyzing for themselves the record on which they based their decision. The Board insisted in all cases going to hearing that there be the most careful investigation and preparation of the case and "legal craftsmanship" in order to build a sound foundation for the court tests. In the first year the Board issued only 56 decisions finding unfair labor practices and ordering employers to cease and desist and 3 decisions dismissing charges. In the second year there were only 39 cease-and-desist orders and 8 dismissals.[16] Petitions for the enforcement of orders were filed promptly in a few carefully selected cases which would test broadly the constitutionality and application of the Act.

That Congress and the Board had built soundly was demonstrated when the Supreme Court on April 12, 1937, issued its five crucial decisions holding the Act constitutional and applicable to manufacturing industries as well as those in transportation and communication. The Court held also that the procedures afforded "adequate opportunity to secure judicial protection against arbitrary action." [17]

By the end of the Board's second year, despite the action of the courts, there had been only four cases in which companies had complied with the Board's order against unfair labor practices. But as in

[15] Charles Fahy, "The NLRB and the Courts," in Silverberg, *op. cit.*, pp. 44-45; *First Annual Report*, pp. 46–50; *Second Annual Report*, pp. 31–32.

[16] Madden, in Silverberg, *op. cit.*, pp. 38–42; *First Annual Report*, pp. 35–37; *Second Annual Report*, pp. 21–22.

[17] NLRB *v.* Jones and Laughlin Steel Corp., 301 U.S. 1, 47 (1937).

the first year the regional offices had been able to settle a substantial number of both the complaint and the representation cases by informal methods.[18] In addition, elections had been held, 31 in the first year and 265 in the second, to determine whether employees desired representation for collective bargaining purposes. In many instances, however, the Board had been unable to prevent discrimination or other illegal tactics under which many workers were still suffering. The Board felt that it had made a sound start, nevertheless. It had established the legal basis for its work and also the informal procedures which could handle cases expeditiously with the co-operation of employers and unions, in order to achieve the purposes of the Act which was now established as the law of the land.

The next three years, the final period of the leadership of Chairman Madden, were years of greatly increased activity and considerable strain, as the Board sought to develop the concrete meaning of the Act in practice and to obtain acceptance of its purposes by employers and unions. Any hope that after the constitutionality of the Act was established employers would promptly accept the law proved mistaken. The Chairman early in 1938 reported to a Senate committee that widespread violations had continued. "The resistance to that law has continued and has been encouraged by very important people." [19] Moreover, the dramatic organization campaigns following the establishment of the CIO brought disputes including union rivalry as well as those over the basic right of organization and collective bargaining. The Supreme Court decisions were followed by a flood of new cases, many of whihc had been held up pending the court tests, and which came from the period when employers, on what they considered good authority, had believed that the law would not stand. While earlier cases filed had averaged 130 a month, in April, 1937, they increased to 477, in May to 1,064, in June to 1,283, and in July to 1,325. Then the tide receded slightly, but for the year ending July 30, 1938, a total of 10,430 cases were filed, about two-thirds of them unfair labor practice cases. The year before had seen 4,068 cases filed. In the next two years the case load leveled off at 6,000–7,000.[20]

The Board received additional funds in August, 1937, in order to be able to expand its staff and handle its cases.[21] Its personnel increased from 272 in June, 1937, to 692 a year later, and to over 800 in 1939 and 1940. Slightly more than half of the staff were in the regions in 1938, slightly less than half in 1939 and 1940.[22] The Chairman, in retrospect, called the 1937 addition to the funds "adequate," [23] but he always chose to operate as economically as possible, and during these years in spite of hard work and long hours the staff was never able to get its work on a current basis, the backlog of pending cases grew, and unions complained bitterly of delay in handling cases. Salaries were relatively low, and as a matter of policy the Board employed many young and inexperienced people, believing that it could thus

[18] *First Annual Report*, pp. 37, 45; *Second Annual Report*, pp. 20–22, 25–27, 29–30.
[19] Senate Committee on the Judiciary, *NLRB Hearings* (1938), pp. 70–71.
[20] *Eleventh Annual Report*, p. 75; *Third Annual Report*, p. 285.
[21] See *supra*, n. 7.
[22] D. O. Bowman, *Public Control of Labor Relations* (New York: Macmillan Co., 1942), p. 379, from U.S. House of Representatives, Subcommittee of the Committee on Appropriations, *Hearings, Department of Labor-Federal Security Agency Appropriations Bill for 1942* 77th Cong. 1st Sess., 1941, Pt. 1 p. 535.
[23] Silverberg, *op. cit.*, p. 41.

obtain a more able staff if it took older men who would come for such salaries.[24]

It would have been surprising indeed if a staff collected under these circumstances had not been on the whole of a liberal disposition, believing in the purposes of the Act, and sympathetically disposed toward the employees and labor organizations that filed their charges and petitions with the Board. Some of the staff had had labor relations experience, more of them had not. There were among them some "zealots" and some "crackpots, prima donnas, and irresponsibles." The Board had to train its enlarged staff, both in techniques of the job and in the necessary objectively, and eliminate those who could not be trained. There were warnings from Washington against improper fraternization with unions or union attorneys, or improper pressure on employers to accept settlements, or the various indiscretions which were sometimes brought to the attention of the Board, and insistence upon absolute impartiality in dealing with employers and unions.[25] Impartiality was difficult to maintain when so many prominent companies proved to be hostile to the Act and the Board, were unco-operative during the investigations, sometimes even encouraged or instigated threats of violence against Board staff as well as union representatives, and continued interfering with the rights of their employees. It was not to be wondered at that when hostile congressional investigations got under way in 1939 it was possible to find for the record instances in which employers and sometimes unions claimed that there had been bias or inefficiency or at least a lack of understanding of the realities of industrial relations.

The Board turned out an enormous volume of work during these years. In the crisis year of 1937–38 it closed 8,799 cases, about 70 per cent of all on its docket of both the complaint and the representation cases. About half of all those closed were settled informally by agreement for the adjustment of the charge or for settling a representation dispute by a consent election, check of union cards against pay rolls, or agreement for recognition. Another large group were withdrawn or dismissed before formal action. In a few cases, only 29, there was compliance with a Board cease-and-desist order. The problem of getting compliance with Board and court orders was to plague the Board for a long time. The backlog of cases pending for investigation or in the later stages before the Board cast a heavy shadow, as it rose to over 3,700 cases on June 30, 1938, and to over 4,000 a year later, although it was finally reduced to about 2,800 in the year 1939–40.[26] In 1938–39 the Board closed only 61.5 per cent of the cases on docket, but in 1939–40, with some improvements in administration and a level load, it closed 72 per cent of its cases.

By the summer of 1938 the Board became very much concerned about the increased proportion of cases which were going to formal hearing, with the result that the Washington staff was swamped with

[24] Bowman, *op. cit.*, pp. 375–83. The staff considered the Chairman a hard bargainer, and there were many inequities in salaries especially in the field offices, until Civil Service Classification was applied to the entire staff after 1941. In 1939 the most common salary for field examiner, for example, was $2,600 or $2,900, and only very few were paid as much as $3,500 or $4,000. House Committee on Labor, *NLRA Hearings (1939)* Vol. 2 pp. 391–402.

[25] Cf. Board memos M–629 to Regional Directors, August 23, 1938, and M–851 to Regional Attorneys, May 1, 1939.

[26] *Twelfth Annual Report*, p. 83, and others.

cases waiting decision. It was becoming more difficult to get agreement of the parties to informal settlements. The Board decided therefore to limit the number of cases heard, to select cases which were strong on jurisdiction or on the merits and key cases in the region or industry, even if small, less important, or weaker cases had to be compromised or dropped. "The Act will become more quickly and firmly established if the Board succeeds in winning a limited number of key cases rather than . . . a larger number of run-of-the-mill cases. . . . The Board desires to conserve its energies for the major effort of getting itself generally accepted."[27] The Secretary circulated also a CIO memo, indicating that the CIO planned to concentrate its Board cases on key employers and clear cases, in the hope that other companies would "give up without a fight" if the dominant employers were "brought into line."[28] But, in spite of the efforts to increase the number of settlements, the cases requiring formal action increased for 1938–39 to nearly 10 per cent for complaint cases and 27 per cent for representation cases closed. The problem of delay was extremely serious. The average number of days between the filing of an unfair labor practice charge and the issuance of the Board's decision, in cases which went to hearing, was 389 in 1937–38 and 210 in 1938–39. Even the informal cases took more than two months from filing to closing in a third of the complaint cases and a fifth of the representation cases in 1938.[29]

A major difficulty during this period was that the Board had no adequate administrative plan and organization to handle expeditiously the mass of its work. When the flood of cases struck in 1937–38, the Board and its Washington staff were swamped, and no one of the Board or staff had the time or the authority, even if the ability, to solve the administrative problem. By 1939–40, when the Board was fully aware of the problem, the pressures of work in connection with the congressional investigations delayed the solution.[30] When Dr. William M. Leiserson replaced Donald Wakefield Smith on the Board in 1939, he was extremely critical of some phases of the administration and supervision. Instructions were going to regional offices from a number of different officers in Washington—the General Counsel, the Secretary, and members of the Secretary's staff—and there was no clear line of authority or provision for prompt handling of the relations between the field and the central office.

The Board had felt that a large degree of centralization of authority was necessary, in order that policies should be very carefully developed to meet the court tests. For all formal cases, therefore,

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[27] Memo M–611 from Secretary to Regional Directors, August 8, 1938.

[28] Memo to Regional Directors, September 30, 1938.

[29] U.S. Senate, Attorney-General's Committee on Administrative Procedure, *Monograph, National Labor Relations Board*, Sen. Doc. No. 10, Pt. 5, 77th Cong., 1st Sess., p. 37, cited as Attorney-General's Committee, *Monograph*; Report of the NLRB in U.S. Senate, Committee on Education and Labor, *Hearings, National Labor Relations Act and Proposed Amendments*, 76th Cong., 1st Sess., April 26, 1939, Pt. 3, pp. 604–5, cited as Senate Committee on Education and Labor, *NLRA Hearings* (1939).

In an effort to decrease the number of cases requiring decision, the Board developed also the stipulation for election and certification. "Consent elections" were considered private agreements by which the parties agreed to an election to be conducted by the Regional Director, but no certification by the Board of a winning union resulted. The new system provided that the parties waive their right to hearing and agree upon an election, but the results would be certified by the Board. Stipulated elections were never very numerous, however, in comparison with either consent or ordered elections. Bowman, *op. cit.*, pp. 313–14; *Twelfth Annual Report*, p. 89.

[30] Cf. statement of Chairman Madden to House Appropriations Committee, cited in Bowman, *op. cit.*, pp. 392–93.

the Regional Director could proceed only after authorization from the Board. Novel questions as to how to proceed, cases to be taken to hearing, and methods of investigation needed to be decided as matters of policy by the Board.[31] The Secretary's office, through which all case supervision was channeled, proved the first bottleneck.[32] Often the regional offices had to be asked for further information. Many cases could be handled as a matter of routine, but where necessary the Secrtary reported to the Board for decision. Rapid disposal was hampered by "inadequacies in interoffice communication."[33] and by the mass of cases coming through the office, although requests for authorization or for dismissal or withdrawal were seldom denied. There was difference of opinion among Board members as to the efficiency of the Secretary. Dr. Leiserson criticized the work on authorization requests and reports to the Board and believed that the Board sometimes acted on inadequate understanding of the facts.[34]

In 1939 a committee of four Regional Directors was appointed by the Board to report on the administrative organization. Their report criticized the concentration of functions in the Secretary's office which overburdened it with work and the poor co-ordination between different divisions in Washington and between Washington and regional offices. They thought that the Board itself was participating in too many administrative details and delegating too little responsibility. They urged the appointment of a director of personnel and of an administrative examiner to handle authorization requests[35] in the interest of eliminating the delays which caused so much criticism. In November, 1939, a personnel chief was appointed, and in February, 1940, a chief administrative examiner, to assist the Secretary; but there was not yet any relaxing of the central controls.

In spite of the desire of the Board at this time for centralization of responsibility and control over the work in the field, the regional offices to a considerable extent went their own way, with only loose supervision during the early years. The informal cases were the great bulk of the load, and their handling varied with the personality and attitudes of Regional Directors and others of the field staff, as well as the local pressures upon the office. Some Regional Directors took little responsibility and checked all important decisions with the Secretary. Others followed their own bent and persuaded, mediated, settled cases, or dismissed them or secured their withdrawal, according to their own patterns. Late in 1937 two special examiners had been appointed to visit regional offices in an effort to improve administration, but there was little immediate result.[36] Personnel difficulties in some of the offices, although known to the Board, were not all straightened out during this period. Handling of complaint cases varied from careful and objective

[31] Attorney-General's Committee, *Monograph*, pp. 8–10.

[32] Requests for authorization to proceed to hearing in both complaint and representation cases continued to be required, as well as requests to approve withdrawal or dismissal in representation cases at any time, and of complaint cases after authorization. Settlements after authorization also had to receive the approval of the Board. The requests were reviewed by the Secretary's office, consulting with the Litigation Division or the Division of Economic Research where necessary.

[33] Attorney-General's Committee, *Monograph*, p. 10.

[34] See quotations from Leiserson memos in U.S. House of Representatives, Special Committee To Investigate the National Labor Relations Board, *Intermediate Report*, Report No. 1902, 76th Cong., 3d Sess., March 29, 1940, Pt. 1, pp. 26–33, cited as *Smith Committee Report*. Cf. also Bowman, *op. cit.*, pp. 388–95.

[35] *Smith Committee Report*, pp. 30–31.

[36] Bowman, *op. cit.*, pp. 389–90.

investigation by many of the staff in accordance with the terms of the Act to instances at one extreme where almost all cases were found to be without merit and at the other where employers were "bulldozed" into settlements beyond the legal requirements, perhaps "shot-gun settlements." [37] In representation cases methods varied also, for example, in the arrangements for elections by consent or other informal methods of settling the question. The Secretary's office during this time tried by its correspondence on cases and by general instructions to improve methods of case handling.[38] But large variations in practice remained.

In the cases which went to hearing, the Board through the Legal Division made continuing efforts, by letters and advice on particular matters to improve the quality of the work of the field attorneys, so that the record would be complete and contain all the relevant evidence on the issues. In 1939, a more extensive system of supervision of field attorneys by the Litigation Division was established.[39]

The Trial Examiners' Division by 1938 was entirely separated from the Legal Division and under the supervision of a Chief Trial Examiner. Trial Examiners had strict instructions not to fraternize with the Board attorney trying a case and to provide a fair and full hearing. They could consult with the Chief Trial Examiner on matters of policy, however. Most of the Trial Examiners were lawyers. They were instructed to play an active role, questioning witnesses when necessary in order to get all the facts into the record.[40] After the hearing in an unfair labor practice case the Trial Examiner prepared his Intermediate Report containing his findings of fact, conclusions, and recommendations. At first there was little or no supervision, and reports were written hastily in the field in some cases between hearings. For a time, too, per diem men were used as Trial Examiners, sometimes with poor results. By 1939, however, there was a real effort to improve the quality of Intermediate Reports by a system of review within the Trial Examiners' Division on the basis of which the Trial Examiner made any revisions he wished in his report before final issuance.[41] But in 1940 the Attorney-General's Committee on Administrative Procedure criticized the reports as not being "of great value to either the parties or the Board," although they did serve as a useful outline of the issues.

In representation cases until 1940 staff Trial Examiners were used and wrote informal reports for the use of the Board. But after that time as a measure of economy it was found possible in all but the most complex cases to appoint a member of the field staff as Trial Examiner for representation case hearings. These hearings were not generally "adversary" in nature but rather a part of the Board's inves-

[37] Cf. statement of D. R. Clarke, Illinois Manufacturers Association, in House Committee on Labor, *NLRA Hearings (1939)*, Vol. 8, p. 2220.

[38] There were forms for the requests for authorization, for reports on closed and adjusted cases, and for notices of dismissal or withdrawal; instructions as to notices to employers and to competing unions; instructions to conform consent election procedure to Board policy for ordered elections by including a place on the ballot for a vote of "no union," the use of observers at the polls, the handling of challenged ballots, and run-off elections; instructions as to handling of settlements and that settlements should be in harmony with the Act and for efforts to secure compliance with Board and court orders. Early in 1940 a standard outline of forms was provided to be posted by employers in connection with compliance before unfair labor practice cases were closed.

[39] Attorney-General's Committee, *Monograph*, p. 20; *Third Annual Report*, p. 5; *Fourth Annual Report*, p. 11.

[40] *Fourth Annual Report*, pp. 19–51.

[41] *Ibid.*; Attorney-General's Committee, *Monograph*, pp. 21–22; Cf. also Bowman, *op. cit.*, pp. 274–276.

tigation of the question of representation and could be much less formal than the trial of an unfair labor practice case.

In unfair labor practice cases where the Trial Examiner found violations of the law, occasionally employers agreed to comply with the recommendations, and cases were closed upon completion of compliance. But usually the record along with briefs and exceptions of the parties, and oral argument before the Board on request, then went to the Board for formal decision. At this point the Review Section within the Legal Division took charge for a thorough review of the record of the hearing. Review attorneys had strict instructions not to consult with the Trial Examiner or (after March, 1939) to use the informals files which included the preliminary investigation material. They studied the record, exhibits, and briefs, as well as the Trial Examiner's report, listened to the oral argument, and analyzed the evidence and the issues. After thorough discussion with an experienced supervisor they reported orally to the Board, sometimes with written memos, on the issues and the evidence. The Board discussed the evidence, sometimes requested further study of certain points, and finally after thorough deliberation on the case in one or more such conferences made decisions on the various issues and instructed the review attorneys as to the decision to be drafted. Occasionally the Board consulted the Trial Examiner on matters of credibility. Sometimes matters of policy were discussed with the Chief Economist, the General Counsel, or the Secretary. But the decision, after final review, revision, and redrafting if necessary, was the decision of the *Board* itself, based on the record.[42] The Board members had had no contact with the prosecuting of the case since their usually routine authorization of the issuance of complaint, and they came freshly, some time later, to the consideration of the evidence and the issues. When the Board found the allegations not supported by the evidence, it dismissed the case. More usually, because the careful investigation at earlier stages had screened out most of the weak cases, it found the employer guilty of unfair labor practices and ordered him to cease and desist and to take appropraite action to bring himself into compliance with the law. In representation cases, if the Board found that a question of representation existed, it usually ordered an election, although occasionally until a 1939 decision it certified a union on the evidence in the record that it had a majority in the unit in question.[43]

The problem of getting compliance with Intermediate Reports Board orders, or even court decrees when they were secured, had rather haphazard attention in the stress of handling too many cases at the earlier stages. In August, 1938, the Secretary sent instructions to Regional Directors in an effort to obtain uniform procedure in reporting on compliance. It was the responsibility of the Regional Director to seek compliance with Intermediate Report or Board order and to report to the Board for approval any proposed settlement. After court orders the Regional Directors were to make no commitments without submission to the Litigation Division. Thus the regional offices did not have complete responsibility. When they could not get compliance, cases were referred to the Litigation Division to consider enforcement in the circuit court.

[42] Attorney-General's Committee, *Monograph*, pp. 2–25, 28; Bowman, *op. cit.*, pp. 283–87.
[43] Cf. *infra*, ch. 5, p. 133.

By fall and winter of 1938–39 the Board was swamped with cases in which there had been no compliance. Some were Board-order cases which had not been enforced; others had court decrees, but still compliance had not been achieved. It was impossible for the Board to take all cases to court, either for original enforcement or for contempt action. Some cases were too old, some not strong enough, and some were border-line cases as to details of compliance. The Board, facing a difficult situation, decided to try to clear the decks by a drive to "settle" many of these cases. It appointed a lawyer to specialize in settlement work and in January, 1939, established a special Settlement Section. Their efforts, with those of the field staff under pressure to put more work into compliance efforts, resulted in an increase in the number of cases closed "on compliance" after Board and court orders in the next two years—from 29 in 1937–38 to 207 in 1938–39 and 324 in 1939–40.[44] The settlements were supposedly in compliance with the Act and the orders. But inevitably many were compromises, some on minor points and entirely in harmony with the purposes of the Act; others the best compromise that could be obtained. This meant frequently that some of the victims of discrimination were not reinstated or that less than the full amount of back pay necessary to compensate for the loss of earnings of workers discriminated against was paid or that no mention was made in the notice posted by the employer of the fact that the employees were free to join a union if they so desired. Regional Directors were supposed to be consulted as to the merits of proposed settlements made from Washington.[45] However, the "Chamberlain squad" appellation which grew up among the Board's staff for the Settlement Section indicated the belief that unnecessary compromises were made and that "good cases" sometimes were "sold down the river." There was considerable criticism from unions to this effect, as well as some from employers of an opposite sort.[46] This system, which continued into 1940, speeded up some of the difficult cases and cleared the docket,[47] but bad effects from poor settlements were felt for a long time.

The Board continued, by taking its orders to the courts for enforcement, to get the check on its procedures and policies which was necessary in order to establish the policies of the Act. And in this it was strikingly successful. Occasionally courts disagreed with the Board in interpretation of the facts or of the law. But by June 30, 1940, the circuits courts had set aside only 27 orders of the Board out of 133 cases decided and had enforced the others in full or with modifications in about equal numbers. The Supreme Court in 22 decisions on Board orders had set aside only 2, modified and enforced 2, and enforced in full 18 of the orders of the Board.[48]

In addition to this check by the judiciary, the Board and the Act were subjected during the months of 1939–40 to three full-dress investigations by congressional committees, by the Senate and House Committees on Labor, and by the Special Investigating Committee sponsored by Congressman Howard Smith of Virginia. The Board itself was heard at considerable length and given opportunity to present

[44] *Annual Reports.*
[45] Memo M–S12 from Secretary to Regional Directors, March 2, 1939.
[46] Attorney-General's Committee, *Monograph*, p. 7.
[47] For further discussion cf. Bowman, *op. cit.*, pp. 320–31.
[48] From *Annual Reports.* See *infra*, ch. 3, Table 2.

statements, and the critics of the Board and the Act were encouraged to air their grievances. The Smith Committee supoenaed Board records and combed the files for instances where misconduct and bias or inefficiency could be charged. A few such instances were found, of which much was made. AFL officials gave substantial aid to the critics by their charges that the Board was pro-CIO. The Committee criticized the Board and its staff for bias and partiality, inefficiency and misconduct; and it claimed that the procedures did not afford fair protection of rights and that particular policies were unreasonable. It made much of isolated instances and disregarded the evidence from the large support given by the courts to the Board's procedures and policies.[49] It proposed sweeping amendments to the law, which were passed by the House but not by the Senate. Some of the issues raised then and again in 1945–47 will be discussed later. Suffice it to say here that criticism could legitimately be made, as we have indicated. But the sweeping attack upon the Board was not justified by any complete review of the available evidence.

The most thorough study of the Board's procedures to that time had been made at the Columbia Law School.[50] After an exhaustive study of the Board's handling of cases and the courts' review, it concluded: "The Board has made a largely successful effort to perform a difficult assignment by a procedure which, while minimizing the chance of mistake, fully preserves the basic values of traditional judicial processes."

In addition, the Attorney-General's Committee on Administrative Procedure made a detailed study of the NLRB during this period and reported as of January, 1940.[51] It made no sweeping criticisms. Its recommendations were chiefly designed to increase efficiency and the internal separation of functions, for example, by further delegation of autohrity and by increasing the importance of the hearing officers and of their reports.

Finally, the Board's own defense of its stewardship during these years deserves quotation.

> Our charter has been the statute itself, as enacted by the Congress. Our ambition has been to do an orderly, workmanlike, professional job within the limitations of that charter. We have seen millions of American workmen avail themselves of a freedom which they never had before. . . . We have seen thousands of employers put their relations with their employees upon a basis of equal and mutually self-respecting bargaining, who had never done so before. We have seen telling blows dealt at the despicable practice of corrupting American workingmen by hiring them to spy upon and betray their fellow workmen for exercising their natural and legal rights.
>
> Unquestionably we have made mistakes. We regret those mistakes. We have done our best to correct them when they have been called to our attention. We shall continue to do so.
>
> We have been severely criticized. Much of that criticism could have been avoided by compromising the principles of the act. We have chosen instead to vigorously put into effect the principles of the act. And we shall continue to do so.[52]

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[49] *Smith Committee Report*; cf. also its *Minority Report*, 76th Cong., 3d Sess., Report No. 1902, Pt. 2, April 11, 1940.

[50] Walter Gellhorn and S. L. Linfield, "Politics and Labor Relations—NLRB Procedure," *Columbia Law Review*, 39 (1939), 339–95.

[51] Atorney-General's Committee, *Monograph;* U.S. Senate, Attorney-General's Committee on Administrative Procedure, *Final Report*, Senate Document No. 8, 77th Cong., 1st Sess., pp. 158–60, cited as Attorney-General's Committee, *Final Report*.

[52] Chairman Madden to Senate Committee on the Judiciary, *NLRB Hearings* (1938), p. 68.

And the Board's General Counsel in 1939:

> . . . Changes leading to improvements in methods have from time to time been found desirable and put into effect. We will continue this process as experience justifies. But I say now, without hesitation, that our procedure has not only survived as fiery a testing as history affords an example of, but that it is as full and as fair as any ever devised for the administration of any law by any agency of government.[53]

Some of the improvements in administration which came during these years have already been indicated, and others were to come shortly. Two changes were made especially in response to criticism from employers. A new rule, adopted in 1939, permitted an employer to petition for an election when he was faced by conflicting demands of two unions for recognition, and instructions were given Regional Directors to notify employers as to the disposition of charges against them, which had not always been done before.

In addition, the Economic Research Division, which had done essential service in providing economic materials needed as background for establishing the application of the law in the early cases, but which had been much criticized by Congress, was abolished in October, 1940, after a rider banning it had been attached to the appropriation bill.[54] Its place was taken by a smaller Technical Service Unit, to work on technical problems such as pay-roll analysis in connection with discrimination cases and other such assignments.

1940–45

By 1940 under Chairman Madden's leadership, the major outlines of the application of the law had been established by Board and court decisions, and there were signs of increasing acceptance of the purposes of the Act by industry. The old preponderance of unfair labor practice cases in the Board's work was to give way increasingly to representation cases and the holding of elections. The great need in the Board's work was to improve administration, in the interest of prompt, efficient, and economical handling of cases, and to increase the emphasis on good and workable industrial relations practices, which had to some degree been lost sight of in the tendency to legalistic emphasis in the first five years. The war made these needs all the more urgent if the Board was to perform its wartime duty of removing causes of labor strife which might interfere with production. When Chairman H. R. Millis, economist, arbitrator, and former member of the old NLRB, took office in November, 1940, the Board proceeded promptly to act on problems of administration, some of which had been under consideration before. Gerard D. Reilly's appointment in October, 1941, following the expiration of the term of Edwin S. Smith, reintroduced a legalistic emphasis which was to grow in influence during his term. Mr. Reilly had been Solicitor for the Department of Labor. When Dr. Leiserson resigned in February, 1943, and was replaced by John M. Houston, former businessman and member of Congress, the experienced industrial relations slant on Board problems was somewhat subordinated for a time; but the

[53] Charles Fahy in Senate Committee on Education and Labor, *NLRB Hearings* (1939), Pt. 2, p. 338.
[54] *Fifth Annual Report*, pp. 9, 124.

basic improvements which had been introduced in administrative organization, personnel, and procedures were to continue.

The case load rose sharply in the first two years of defense and war production, reaching nearly 11,000 cases in the year 1941–42, then dropping to 9,000 or more for each of the next three years. But the work shifted in character, until in 1942 representation cases were more than half of all cases filed, and by 1944 and 1945 around 7,000 representation cases were filed each year, but only 2,500 complaint cases. To handle this load the Board at no time had more than 900 employees. Congressional antagonism had cut the appropriation for 1941, but a supplementary fund was later given. Again in 1942 a cut forced a reduction of staff from 889 in July, 1942, to 736 by October, 1943.[55] Throughout the war period the loss of experienced personnel, nearly 40 percent of the male employees during one year, made efficient operation even more difficult. By stringent economies and increased efficiency in methods, however, the Board succeeded in closing nearly 80 percent of the cases on the docket during the war years and in steadily reducing the backlog until 1945. In 1943, as a result of improved procedures, the time required for handling cases had been greatly reduced.[56] But the delays were still too great and a constant source of criticism. These problems were accentuated in 1944 and 1945 by the necessity of conducting strike votes required under the Smith-Connally War Labor Disputes Act, a duty which finally interfered seriously with the major functions of the Board.[57] By summer of 1945 the backlog of pending cases had risen sharply.

The approach of the "Millis Board" to administrative questions was made clear when the Board sent a letter to all regional offices in January 1941, and a few months later called conferences of regional personnel, where "the major importance" of the regional offices in the work of the Board was emphasized. The Chairman expressed appreciation of the "tough jobs" in the field and promised to work for more help and decent pay for the field staff. He asked full and frank discussion from them in the effort to improve methods of operation. For some years less than half the staff had been in the field, but now there was increased emphasis on the field work. By 1946 nearly 60 per cent of the staff were in the regional offices.[58] Moreover, the policy of occasional area or general regional conferences of the field staff gave opportunity for very useful pooling of experience and discussion of methods. Such conferences bore good fruit in improving procedures and efficiency and in the training of new members as well as in the intangibles making for high morale in a hard-working staff.

The establishment of a Field Division, early in 1941, was of major importance. Before that a chief administrative examiner in the Secretary's office had been given the work of handling Washington relations with the field on cases. But now all such matters were separated from the Secretary's office and put in the hands of the Field Division, with a director and three assistant directors. They had the respon-

[55] *Eighth Annual Report,* p. 3. See n. 7, *supra,* for total expenditures.
[56] *Eighth Annual Report,* pp. 13–14.
[57] *Ibid.,* pp. 74–81; *Ninth Annual Report,* pp. 72–74; *Tenth,* pp. 76–77. See discussion below, p. 61, and ch. 8, 299.
[58] Cf. Bowman, *op. cit.,* p. 379; U.S. House of Represenatives, Subcommittee of the Committee on Appropriations, *Hearings, Department of Labor-Federal Security Agency Appropriation Bill for 1947,* 79th Cong., 2d Sess., Pt. 1, May 29, 1946, p. 749.

sibility of general supervision of the regional offices, handling all case work, and co-ordinating the work of the regions with that of the Board. All requests for advice, requests for authorization, appeals, questions as to compliance, and instructions were to be handled through the Field Division. The Legal Division continued to supervise the work of attorneys in the field. The assistant directors of the Field Division were to visit the regional offices and advise and assist the Regional Directors in improving their methods, but the Regional Directors were instructed that the Board expected them to stand on their own feet.[59]

The Attorney-General's Committee on Administrative Procedure had recommended that the Board delegate more authority and decentralize administrative functions. In line with this recommendation the Board delegated to the new Field Division complete responsibility for deciding requests for authorization to proceed in representation cases, unless advice was desired from the Legal Division, or if a new principle or matter of general policy was involved, in which case the problem would be referred directly to the Board. For complaint cases the Board set up an Authorization and Appeals Committee with power to act, except for cases which should be referred to the Board because of disagreement or a new question or policy matter.[60] The Board thus had no connection with any cases at this stage, unless on a matter of general policy. The new procedure provided for prompt and simplified handling of cases, with clear lines of responsibility.

Experienced Regional Directors had long been asking for more authority and autonomy, especially in issuing complaints and notices of hearing in representation cases. The Board had been unwilling to give them this authority as long as great differences in efficiency and methods continued in different regions. But this centralized control meant unnecessary paper work and delay, even after the increased efficiency of operations under the new Field Division organization. By the fall of 1942 the Board felt that the organization and personnel had been sufficiently strengthened, and policies were by then well enough established, for it to risk further decentralization. Accordingly in October, 1942, the Regional Directors were given authority to proceed without authorization from Washington in both complaint and representation cases. Only where there were issues of policy or novel questions of fact or law, or where the Regional Director and the Regional Attorney disagreed, was it necessary to request authorization from Washington. Regional Directors could then investigate cases, settle them by consent methods, permit their withdrawal, dismiss them subject to appeal to Washington, or proceed to hearing on their own authority. A year later the Board reported evidence of

[59] *Sixth Annual Report*, pp. 3–9; Field Division Letter No. 2, June 10, 1941. No discussion of the work of the Field Division can omit tribute to the work of Oscar S. Smith, first assistant director, and then director from September, 1942, until the complete reorganization of the work of the Board in August, 1947. His great administrative ability and understanding of labor relations were largely responsible for the successful building of organization, staff, and methods during these years.

[60] The Field Division handled requests for authorization first, then sent them to a Case Clearance Unit in the Legal Division. If both groups agreed, the Regional Director could proceed to issue complaint and notice of hearing. If they disagreed, the matter went to the Authorization Committee, consisting of the Director of the Field Division, the General Counsel, and the head of the Case Clearance Unit, whose decision was final unless any member wanted to refer a case to the Board. *Sixth Annual Report*, p. 8.

successful handling of the increased responsibilities by the field staff. About 70 per cent of the complaints and 86 per cent of the notices of hearing in representation cases had been issued by the Regional Directors without prior advice to Washington, and the later action by Board of Trial Examiner in these cases upheld the Regional Director in nine-tenths of the cases. The time from filing of cases to the opening of hearings also had been substantially reduced.[61] As time went on, more and more of the work was thus handled by the regional staff on their own responsibility, with much saving of time and an increase in effectiveness because of the addition to the prestige of the local staff when they could speak with authority. Separation of functions was a reality for a very large part of the work.

Before the Board could grant this degree of autonomy to regional offices it was necessary to standardize methods and policies, especially for the handling of the new great bulk of representation cases. Efforts along this line were made before 1940, as indicated above, and much more was done in the first year and a half of the Field Division. The great contribution of the Field Division continued to be the development of simplified and standardized procedures and forms. In 1941 a series of regional conferences studied various problems, among them public relations, representation procedures, compliance problems, and standardization of forms. Their reports were circulated to the regional offices for comments, and these and later studies resulted in the adoption of standard practices, which were revised on the basis of experience.[62] With the growing importance of representation cases and the necessity for efficient and speedy handling of hundreds of elections, much attention was given to improving methods, in order to be sure that there was every opportunity for free choice of representatives and that procedures were beyond possibility of complaint.[63]

It was more difficult to standardize procedures for handling charges of unfair labor practices, but here also progress was made in eliminating undesirable differences in the methods of different regions. The possibility of standard forms for written settlement agreements, and for notcies to be posted by employers in connection with compliance, had long been considered. The Board had adopted the policy that all such settlements should be put in writing, and in December, 1942, a set of standard agreement forms for the settlement of various kinds of charges and an accompanying set of standard notice forms were sent to the regional offices for trial. Finally, late in 1944, the Board decided to use a similar standard set of forms for notices to be posted by employers, to be attached to the Board's orders in formal cases.

The Field Division during this time was developing a field manual, which was sent out in April, 1943. It was not "designed as a straitjacket for field employees—to serve as a substitute for thinking, initiative, growing, or use of good judgment—but as a series of guide posts

[61] *Seventh Annual Report,* pp. 11–14; *Eighth,* pp. 12–14.

[62] By early 1942 forms had been accepted for consent election agreements and for reports on elections, and the best practice in election procedure had been codified, with appropriate forms. By October, 1942, forms were available for withdrawal and dismissal letters as well as notice of hearing. There was a standard form for recognition agreements for agreements for a check of union cards against company pay roll in lieu of elections, and for stipulations for consent elections to be followed by Board certification of a winning union.

[63] Cf. *Seventh Annual Report,* pp. 32–38; *Eighth,* pp. 15–16. Ch. 5, *infra,* pp. 129–31, describes an election.

to a better job." This manual, with suggestions on ways of handling different problems, as well as the standard procedures, was revised during the years and kept current, especially for the use of the new staff members. There was also a complete forms manual, kept up to date as revisions were made.[64]

Significant developments were made also in the handling of formal cases between the hearings and the issuance of Board orders. Earlier weaknesses in the Intermediate Reports had led the Board to put its chief reliance on the report of the attorney who reviewed the record. But now the Board determined to increase the importance of the Trial Examiner and of his report. After June, 1940, a cut in the budget necessitated turning most of the hearing of representation cases over to the field staff, and teh Trial Examiners were allowed to concentrate on their complaint cases. A staff of attorneys was assigned to assist them in various ways in preparation of their reports, by reviewing records, checking facts, and working on legal precedents. Although the Trial Examiners were supervised by the Chief Trial Examiner, the Board's policy was that nothing was to be "dictated" to the Examiner and that his report was to be his own.

Intermediate reports had in some instances been neglected by the attorneys of the Review Section. But now the Board voted that the attorneys should study the report of the Trial Examiner, along with briefs, exceptions, and records of oral argument, before beginning examination of the record of the hearing. The Intermediate Report was to be used as the basis for the Board's decision, and review attorneys were to indicate to the Board any points at which they found that report not supported by the record and correct in law and fact. Review attorneys, under careful supervision of a more experienced attorney, prepared a written memorandum for the Board on these points. The Board then had for its own study the Intermediate Report and its accompanying documents and the memorandum of the review attorney indicating any disagreements with the Intermediate Report. Each member of the Board had a legal assistant who aided in the member's analysis of the case. Memoranda were circulated among the Board members indicating their judgment as to the proper decision, before the Board meetings at which decisions were finally made. Sometimes the Trial Examiner was consulted on issues of the credibility of witnesses, often a difficult point on which he was in position to be of greater assistance. The Board sometimes discussed the evidence further with review attorneys and supervisors. The number of times that Trial Examiners were overruled on major or minor points was evidence of the independence of the Board when finally they made their decisions. Often from this time on the final decision of the Board was a fairly brief statement which incorporated the Intermediate Report, adopting its finding of facts and conclusions, except for any points of difference especially noted. By these changes in procedure more efficient use was made of the experienced Trial Examiners, and the Board felt itself in a better position to judge the evidence and decide the issues. Moreover, a substantial saving in

[64] The procedures as they had been developed by 1944 were described in some detail in the *Ninth Annual Report*, pp. 7–15. Cf. also Bowman, *op. cit.*, chs. 13–16.

time in the posthearing processes was achieved by eliminating some of the duplication of effort which had been present before.[65]

The handling of compliance activities had continued in an unsatisfactory state, with responsibility divided between Washington and the field, as has been indicated above. Early in 1943, however, the regional offices were given the primary responsibility of obtaining compliance with Intermediate Reports, Board orders, and court orders. They were to report periodically to the Feld Division. When they reported with full details that compliance on a case was complete, if Washington approved the case was closed and the employer was so notified. When the Regional Director reported that he could not obtain compliance, the case moved on for a decision in Washington as to the next step.[66] Except when cases were taken over by the Enforcement Section for legal action, the regional offices were given credit in their case load for the cases at the stage of compliance and were expected to give adequate attention to this part of the work.

A significant development during this time was the change of terminology, from the "settlement" phraseology, which implied bargaining and compromise, to that of "adjustment" in compliance with the law and "compliance" with orders of the Board or the courts. Compliance with the law was the aim in both the informal cases and those which reached formal stages. Sometimes the purposes of the law were achieved by accepting less than technically full compliance. But experience showed that in the earlier years lack of attention to compliance in the field and division of responsibility had resulted in long delays and too frequently in a failure to obtain the essence of compliance with the law. Such failures then militated against the possibility of securing compliance with the law by informal adjustments. The plan adopted at this time assumed clear allocation of responsibility to the regional offices except when the Enforcement Section took over for legal action, and complete co-operation between the various divisions in Washington and the regions in an effort to obtain full compliance. The regional offices could obtain technical aid from the Compliance Unit when compliance involved complicated problems, as of back pay due to large groups of employees. But the responsibility was that of the regions.

A study made for the Board in 1944 found that compliance handling had improved following the increase in regional office responsibility. Time necessary to secure compliance had been noticeably decreased, and there were fewer instances where the quality of compliance seemed doubtful. But there were still problems needing solution before prompt compliance could be obtained, especially in a small group of difficult cases. Many regional offices felt that there should be still further delegation of authority to them to determine when compliance had been achieved. They welcomed a decision of the Board late in 1944 to order the specific form of notice which must

[65] Cf. *Fifth Annual Report*, p. 123; *Sixth*, pp. 4–5, 9; Bowman, *op. cit.*, pp. 281–96. The first "short-form" decision was issued on November 4, 1942 (45 NLRB 355).

[66] In Washington the Field Division considered cases first and referred them to the Enforcement Section. A Compliance Committee, representing both groups, considered difficult cases and made recommendations to the Board for action. A Compliance Unit in the Enforcement Section had in 1940 replaced the old Settlement Section. But it worked only on cases especially assigned, with the Regional Director fully informed.

be posted by an employer as part of his compliance; that issue was no longer one to be bargained over.

In its effort to obtain compliance with its orders, the Board during these years, 1940–45, increased its litigation for the enforcement of orders and substantially improved its record of obtaining court approval. The Supreme Court in the five years enforced in full 22 Board orders, modified and enforced 6, set aside none, and remanded two for further action. The circuit courts, in deciding 461 cases, set aside only 10 per cent, in contrast to 20 per cent in the earlier period, and enforced Board orders in full in over 60 per cent, compared to 40 per cent in the first four years.[67] The procedures and policies of the Board thus had substantial support from the courts.

The ultimate sanction for obtaining compliance was through a petition to the circuit court to find an employer in contempt for failure to obey the order of the court enforcing the Board's order. The Board had been slow to use this technique, and the earlier results had not been encouraging. In 1938 and 1939 there were only four contempt cases, in three of which the petition was denied, and in only one was the employer found in contempt of court. But in 1940 ten petitions were filed, and in the next years more use was made of this device. By the end of 1945 a total of sixty-eight contempt petitions had been filed. The filing of the petition was enough to bring about compliance in twenty-two of the cases, and in thirty cases the company was found in contempt. There had been a substantial increase in the willingness of courts to stand behind their orders and require compliance.[68] No employer was punished for contempt, however, but they were permitted to purge themselves by bringing themselves into compliance, paying the back pay required, or otherwise complying with the order.

By 1945, then, the Board had achieved much in improving and standardizing its methods in the important work in the regional offices and increasing the efficiency of the work in Washington. It had delegated substantial responsibility to Regional Directors and to other officers in Washington, thus increasing the internal separation of functions. It had established a habit of studying its experience through staff committees and special studies by an operating analyst and continuing study of methods and policies in consultation with its field offices. In spite of large turnover during wartime, the key positions were filled by experienced and competent people, and the agency was operating at a creditable level of efficiency. And its record in the courts had continued to be good.

1945–47

The NLRB came into the postwar years, its last two years under the Wagner Act, with a firm basis in law and experience which had been tested by the courts and an efficient administrative organization which had been improved through the years as a result of criticism and appraisal by the public, governmental committees, and the Board itself. Administrative developments during these two years were only to carry further the trends toward greater internal separation of functions by delegation of authority and decentralization.

[67] From *Annual Reports*. See *infra*, ch. 3, Table 2.
[68] *Annual Reports*, esp. *Eighth*, pp. 62–63; *infra*, ch. 3, Table 3.

Change in the personnel of the Board itself were reflected more in certain changes in direction or emphasis in the decisions on cases, to be discussed later, than in administrative organization. Upon the retirement of Dr. Millis, on July 5, 1945, Paul H. Herzog, a lawyer who had been a member and later Chairman of the New York State Labor Relations Board from 1937 to 1944, became Chairman. When Mr. Reilly's term expired, he was replaced on August 27, 1946, by James J. Reynolds, whose experience had been in personnel work in industry and in labor relations work in the Navy.

The case load during these years rose to all-time highs. Labor shifts during reconversion, new organization drives by AFL, CIO, and independent union, with possibly some increase of resistance by industry after the end of the war, brought representation petitions to 10,690 and unfair labor practice cases to over 4,000 new cases in 1946–47. More than 5,500 elections for the choice of bargaining representatives were conducted during the first postwar year, and 6,900 during the second. In addition, for the first six months of this period the Board was still required to hold strike votes under the War Labor Disputes Act. During the year ending June 30, 1945, there had been 573 such elections, but in the months following the Board was swamped with a deluge of strike notices. In September, 307 were filed; in October, 666; in November, 587. By that time four of the regional offices were doing nothing but handling these cases. In six months 1,214 strike votes were conducted, including the polling of the employees of Ford, General Motors, and Chrysler. Finally by a rider to the Appropriations Act the Board was relieved of the duty of holding any further such elections, effective December 28, 1945.[69] But its regular work had been seriously set back during the time.

Congress had not permitted an increase in staff, and until December, 1945, the personnel was still under 800. A deficiency appropriation then permitted an increase in staff, which reached 990 by June, 1946. Nevertheless, the backlog of pending cases had risen by that time to 4,600. In spite of this, the antagonism to the Board, shown in the rising attempt to change the law, resulted in an appropriation which required the Board to drop more than 20 per cent of its staff, reducing it by April, 1947, to 720.[70] With unprecedented numbers of representation disputes needing to be determined, and a large number of charges of violations of the law, and in spite of continuing efforts to increase efficiency of operations, the Board was able to close only about two-thirds of the cases on its docket during these years, and by the end of the period over 5,000 cases were still pending. Delays in operations were very serious, to the disadvantage of both employers and unions. Cases which had to go to formal hearing and decision by the Board took six or seven months in representation cases, and eighteen to twenty months for complaint cases, the Chairman reported in early 1947.[71]

Instructions were sent to the field to make every effort to reduce the number of cases going to hearing by settling them at informal

[69] *Eleventh Annual Report*, pp. 68–69, 91; *NLRB Press Release*, November 12, 1945.
[70] *Eleventh Annual Report*, p. 6; Senate Appropriations Committee, *Hearings, 1948*, p. 870. See *supra*, n. 7.
[71] U.S. House of Representatives, Subcommittee of the Committee on Appropriations, *Hearings, Department of Labor-Federal Security Agency Appropriation Bill for 1948*, 80th Cong., 1st Sess., 1947, Pt. 1, p. 648.

stages whenever reasonably possible. Representation cases were to be given priority. The Board curtailed its taking of jurisdiction in marginal cases, where the company was small or shipped little out of the state, and dismissed many such cases "for budgetary reasons," as well as a feeling that it was unwise for the federal government to step in. It created several subregional offices, close to the source of cases, in order to reduce travel time and expense.[72] The Bureau of the Budget was asked to survey the Washington office in the interest of economies. Increased delegation of authority to regional offices also cut down time and unnecessary duplication of effort. The Board had earlier begun the practice of holding public hearings for the consideration of proposed changes in policies or procedures, as in regard to a change in the system of run-off elections, a proposed extenison of employers' right to petition, and the issue of supervisors' rights under the Act.[73] In 1945, also, the Board instituted a plan for an annual conference of union and management attorneys to consider problems and proposals for changes in methods.[74]

A very significant innovation during this time was the prehearing election, which Regional Directors had long wanted, and which was discussed at the attorneys' conference in October, 1945. The Board hoped to decrease the number of hearings and ordered elections, by providing that in simple cases involving only one union and with only minor issues in dispute, the Regional Director might hold an election without waiting for a hearing and Board order, but without prejudice to the right to a later hearing if desired by either party. It was of course desirable to have the co-operation of the employer to the extent of supplying a pay roll and observers for the election; but some elections were successfully conducted without his co-operation by taking affidavits from each worker as to his eligibility to vote. Either side could challenge the ballot of any person whose right to vote in the unit was in doubt, and such ballots were segregated. After the election, a hearing and decision by the Board could be asked for by either party. As was hoped, the great majority of cases were closed by agreement after the election, with recognition of unions which won, or an agreement for certification by the Board. The result was a great saving of time in resolution of disputes.[75] There were no substantial objections, and the method was being used with success even in some two-union cases.

As a result of this variety of pressures, restraints, and improvements in methods the Board succeeded during these two years in reducing the proportion of cases closed which required formal action to about 7 per cent of the complaint cases and 20 per cent of the representation cases. Of the latter in 1946–47 more than half of those closed were adjusted informally. Of the complaint cases, however, only 20 per cent were adjusted informally, and more than 70 per cent were

[72] *Ibid.*, p. 646.
[73] *Eighth Annual Report*, p. 14; *NLRB Press Releases*, January 24, 1944, and May 20, 1944.
[74] *Eleventh Annual Report*, p. 6.
[75] *Ibid.*, pp. 6–8. *Twelfth Annual Report*, pp. 3, 89. In the seven months ending June 30, 1946, of 118 cases closed after prehearing elections, only 16 had required a hearing and Board order after the election. In the next fiscal year, 1946–47, of 626 prehearing election cases closed, only 172 required subsequent hearings. During 1946–47 there were 644 such elections. The increase in the use of the prehearing election device also must have been an important factor in the decrease of Board-ordered elections from nearly 1,200 in the previous year to 876 for this year.

withdrawn or dismissed, an unprecedented proportion to be found not "good cases." [76] It was impossible to measure the extent to which budgetary limitations and "tougher standards" by the Board for finding unfair labor practices may have resulted in eliminating cases where there was, in reality, interference by employers with the right to organize. The trend, whether good policy or not, was toward a less complete protection of labor's rights under the Act.[77]

In 1946 after the passage of the Administrative Procedure Act,[78] the Board carefully reconsidered its organization and procedures to see what changes were made necessary. That law had followed many years of study, by the Attorney-General's Committee on Administrative Procedure and by congressional committees. It set up "standards of fair play" to guide all the administrative agencies, including the NLRB, which had had much consideration during these investigations. Since 1941 the Board, as we have seen above, had increased the separation of functions and delegation of powers within the agency. After careful study of the new law by a committee of personnel from its major divisions, the Board concluded that it was already meeting in all substantial respects the requirements of the law.[79] The Board rewrote its *Rules and Regulations*, however, making what changes were necessary, making the rules more explicit, and adding language of the new Act where pertinent. The new rules also incorporated some recommendations made at the area conferences of regional staffs during that year as well as the details of well-established practices. One major change made by the APA itself was to give the Trial Examiners independence and security of tenure, protected by the Civil Service Commission, independent of ratings by the agency itself.[80]

The autonomy of the regional offices further increased during these two years. As before, Regional Directors could issue complaints and notices of hearing in representation cases without prior authorization from Washington except in cases involving doubts as to jurisdiction, novel issues, or a few particularly difficult kinds of situations. The Appeals and Review Committee, representing the Field and Legal Divisions in Washington, handled requests for advice and could if

[76] *Twelfth Annual Report*, p. 71.

[77] An unpublished M.A. thesis at the University of Minnesota, by Frank Fager, former field examiner for the Board, on *Informal Procedures of the NLRB*, points out that withdrawals by the unions are often involuntary, and "if this be true, and it certainly seems to be, a large amount of worker unrest caused by real or imaginary violations of the Act is not remedied by the Board."

[78] Public Law 404, 79th Cong., 2d Sess., June 11, 1946. This Act was the culmination of a long study of the administrative agencies. Earlier bills such as the Walter-Logan Bill, which failed of passage, had attempted more drastic regulation of the independent administrative agencies.

[79] David Findling, "NLRB Procedures: Effects of the Administrative Procedure Act," *American Bar Association Journal*, 33 (1947), 14–17, 82; U.S. Senate, Committee on Labor and Public Welfare, *Hearings, Labor Relations Program*, 80th Cong., 1st Sess., 1947, Pt. 4, pp. 1925–31, 1896–1901. As required by the law, the Board published a detailed report on its organization and procedures in the *Federal Register*, Vol. 11 (September 11, 1946), No. 177, Pt. 2, Sec. 3, pp. 177A–602–23.

[80] The Board changed its terminology to call the field personnel who conducted hearings in representation cases hearing officers as distinct from the trial examiners. Their brief memoranda indicating the issues and their recommendations after hearings were to go directly to the Review Section with the record. For both representation cases and complaint cases rules were changed to permit intervention of interested parties at hearings with less formality. In complaint cases the Board made clear that, in addition to using the assistance of review attorneys, it consulted sometimes with Trial Examiners but not with any agents who participated in the prosecuting or investigation of the case. A new rule, required by the APA, provided that, when Regional Directors dismissed charges of petitions, the reasons were to be stated in writing. Previously there had usually been informal notification of the reason for such action, but now a more formal notice was to be given.

necessary take the question to the Board, but only rarely was this necessary. Appeals from the dismissal of petitions or charges were considered by this committee, which then gave their recommendation to the Board. Committee members might not after that advise the Board in regard to the decision of those or related cases. Cases which were closed by adjustment did not require approval from Washington, except where there was a stipulation for a Board order or court order, or if there was disagreement between the Regional Director and the Regional Attorney.

On the perennial problem of getting compliance with the formal orders, a regional conference committee in June, 1946, urged that more responsibility be given to the regional offices, even to the extent of initiating and handling contempt action. As a result, new instructions put complete responsibility for compliance upon them, and cases were closed on compliance when the Regional Director sent in his closing compliance report. He could ask for technical assistance or advice and could recommend further legal action, but those later steps would be taken only when the Enforcement Section agreed and began action. Often, however, attorneys in the field argued cases in the circuit courts. After a decree or contempt adjudication, it was again the full responsibility of the regional office to obtain compliance. Some sources of delay were thus eliminated.

As to representation cases, also, the Regional Director had a large degree of authority, initiating formal action in most instances without prior advice from Washington, holding prehearing elections, or dismissing cases subject to appeal to Washington as in complaint cases. Where he was able to obtain agreement for determination of representatives by consent election or consent cross-check of cards against pay roll, his rulings were held to be final, unless arbitrary or capricious.

Thus the Board, by delegating such authority to the Regional Directors, had largely decentralized the handling of the great bulk of its case work, informal and formal, in the investigating and prosecuting stages and the handling of representation elections. By delegating authority to the Committee on Appeals and Review, it kept clear of consideration of cases in the early administrative stages except for the rare case where a policy question was involved or where it had to consider an appeal from the Regional Directors' action. It was increasingly careful to segregate itself in its decisional activities from the Field Division or regional officers who had handled cases at the earlier stages. The Review Section functioned as a general pool of law clerks for the Board, with no connection in their handling of cases with the personnel who earlier investigated or prosecuted these cases. The Trial Examiners were assured independence in their conduct of hearings and in preparing their Intermediate Reports, and the Board consulted them in connection with the decision process only when their special experience with the case would help in the weighing of the evidence. But with all this degree of separation of functions and decentralization, a unified policy could be attained, since the Board was responsible in general for the determination of policy and for the administrative organization which carried out the policies.

In spite of the growing criticism of the Act and the Board in Congress and the public press during these two years, the Board continued

successfully to perform the important functions for which it was established, especially through the elections to determine representatives in nearly 7,000 cases. Through *informal* processes also it continued to dispose of the great bulk of the cases which came before it, in the spirit of the administrative process. It achieved compliance with the law in a substantial number of cases, either by informal adjustment or by compliance after formal orders. The courts, moreover, continued to uphold the Board's decisions in the great majority of cases.[51]

CONCLUSION—THE CRITICISM AND THE EVIDENCE

Criticisms of the NLRB that stemmed from dislike of the Act itself and its purposes, or opposition to certain practices over which the Board had no control under the Act, or criticisms of particular policies of the Board in its case decisions are not the issue at this point. But a number of criticisms of the *administration* of the Act continued to be repeated in various forms throughout the life of the Wagner Act. The chief of these charged: (1) that the Board, being its own "prosecutor, judge, and jury," had prejudged cases before they came up for decision and could not therefore make a fair decision; related was the charge that the actual decisions were often, in effect, made by subordinates; (2) that due process was denied also because bias and partiality prevented fair investigation, fair hearing, and impartial decision; (3) that the Board did not adequately weigh all the evidence and based decisions upon evidence which would not stand up in court, while the courts were prevented by the law from going behind the Board's findings of fact to make their own appraisal of the evidence. Such charges were made so frequently for so long a period that by sheer weight of repetition they received large credence. It is important to look at the record, however, to see whether they were justified.

The "prosecutor, judge, and jury" charge is a general attack upon the administrative agency system, not only on the NLRB. It is very significant that Congress itelf in passing the Administrative Procedure Act in 1946 continued the inclusion of all the functions of administration of certain laws within the agencies set up for the purpose, but with provisions to insure the internal separation of functions. The NLRB, as we have seen above, through the years increased its delegation of authority and its own separation, as the decision-making group, from the earlier functions of investigating and prosecuting cases, in the interest of meeting the public criticism on this score. There is no real evidence of abuse under the earlier system. Moreover, in the early stages of administering a new law it was essential that the Board keep a close check on the handling of cases while policy was being established. In the later years the separation had gone so far that many of the critical statements about the Board's administration bore little if any resemblance to what actually was being done. The Board had largely solved the problem of maintaining separation between the different parts of the agency: those which investigated, handled the great bulk of cases informally, administered the determination of representation questions in the field, and prosecuted the complaint cases requiring formal action; the Trial Examiners who heard such cases; and the Board itself which with the assistance of the review attorneys decided

[51] *Twelfth Annual Report*, p. 41. See *infra*, ch. 3, Table 2.

the formal cases. Yet it was able to maintain the unity of policy which resulted in its very successful record for informal settlements, what the Attorney-General's Committee called "numerically and otherwise, the life-blood of the administrative process—negotiations and informal settlements." [82] If there had been any basis in the early history for the charge that review attorneys exerted undue influence on decisions, this also was reduced as time went on. The Board improved its posthearing procedures by increasing the value and importance of the Trial Examiners' report and requiring that review attorneys use these documents and prepare written reports for the Board on their analysis of the record and the Intermediate Report. The machinery itself seemed to provide adequate safeguards for the integrity of the quasi-judicial process, subject only to the possibility of human error.[83]

The sweeping charges of bias and prejudice made against the Board and its staff must be viewed in the light of the fact that, as the Attorney-General's Committee pointed out, sincere belief in the policies and principles of the Act "cannot be called bias or prejudice, however distasteful such an attitude may be to parties or counsel who believe these policies and principles to be unwise or unfair." [84] In the early days of the Act, with an inexperienced and enthusiastic staff, operating in an atmosphere of great hostility, some of the criticism had a basis in fact. The Board did not entirely solve its problem of developing a competent staff, and especially in the first years the work in the field was very uneven. To some extent the unevenness continued. But, with experience and training, the development of methods of supervision and standards of procedure, and the elimination from the staff of people not suited to the job of thorough, impartial investigation, the Board had to a large degree solved this personnel problem, and this despite the tremendous turnover in staff incidental to the war. Moreover, the fact that in the first ten years about half of all charges of unfair labor practices were withdrawn or dismissed at the informal stages, and a still larger proportion in the last two years, gives no support to the claims of prolabor bias in case handling.[85] Mistakes there could still be, and undoubtedly were, but the question is whether the procedures were such as to protect all parties from the effects of individual shortcomings, if they existed.

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[82] Attorney-General's Committee, *Final Report*, pp. 58–59.

[83] Cf. U.S. House of Representatives, Committee on Education and Labor, *Labor-Management Relations Act, 1947, Minority Report*, Report No. 245, 80th Cong., 1st Sess., April 11, 1947, pp. 74–75. "No claim has been made that the NLRB has not fully complied with its provisions [in the Administrative Procedure Act]. . . . The hearings before the committee did not, in our opinion, disclose any abuses arising out of the present procedures of the . . . Board."

[84] Attorney-General's Committee, *Monograph*, p. 17.

[85] Cf. statement of Chairman Madden in a 1938 broadcast: "Here then are many hundreds of cases where the employer is exonerated on the merits. . . . Yet our critics go on parroting the statement that we always find that the employer is wrong. . . . Would they have us spend our time and that of the employer and his employees and the public's money going through the motions of a formal hearing in order to prove to ourselves what we already have learned from our investigation? . . . I ask our critics what they have to suggest as an improvement over our method of eliminating cases which are not well founded, and I ask them, in all decency, not again to mouth or write the falsehood, hundreds of times false, that we proceed against employers whenever unions request us to do so." Quoted in Joseph Rosenfarb, *The National Labor Policy and How It Works* (New York: Harper & Bros., 1940), pp. 486–87.

It must be admitted that there were widespread complaints by employers of bias and prejudice. By 1947 these charges seemed to be made more frequently in the areas where the purposes of the Act were less generally accepted and where "old-fashioned" unfair labor practices still were frequently found. The correlation appears more than accidental. Many employers who felt that there had been bias earlier had no complaints to make of recent years or complaints based on their own experience. Some of them acknowledged candidly that it was difficult to separate their feeling toward the Act, which at least at first was very "hard to take," and their appraisal of the Act's administration. The fear and insecurity aroused by the drastic changes in industrial policy which were forced by the Wagner Act were not conducive to approval of the actions of the administrative agency, however honest and objective it might be. The staff, moreover, did not achieve the superhuman feat of administering the Act so tactfully that those who came in conflict with it enjoyed the experience. To some extent it was a question of manners, of field examiners and trial attorneys who were young and lacking the polish of professional courtesy. Some of them let their enthusiasm for the purposes of the Act show when cold objectivity in the investigation of a particular set of facts was called for. But the facts were very human, emotionally charged facts in many cases, and complete objectivity was difficult to achieve. To some extent this resulted in overwriting in early decisions, when the facts would have spoken for themselves adequately in colder, less colorful language.[86] All these problems were much on the minds of the Board members, and, as administration improved, there can be no doubt that there was less basis for criticism than there may have been earlier. And always there were safeguards if abuses occurred, by appeal to Regional Directors against any improper action of the staff, and to the Board from actions of Regional Directors, and finally to the courts. No doubt some cases were adjusted simply because employers could not afford to fight cases through the courts. But study of the available evidence makes it seem very doubtful that much if any actual injustice was done to employers—and weighed against that is a considerable volume of violations of the Act which were never remedied by the Board.

It was charged also that the Board and staff were pro-CIO. This will be considered further in connection with discussion of the craft-unit issue.[87] The AFL with the rise of the CIO felt its interests endangered at a number of points, and it reacted with fear and anger when Board decisions failed to protect the claimed "vested rights" of older unions against the new rivals. Especially important were the issues as to craft units, as to setting aside of contracts made by minority unions or with illegal assistance by employers, the holding of elections in spite of contracts claimed to be a bar to the petition, and protection of individuals from discharge for advocating a shift to the

[86] Cf. the comment by the Second Circuit Court in enforcing the Remington Rand order, *infra*, ch. 4, n. 9.

[87] *Infra, ch.* 5, pp. 143–44.

CIO. All these will be discussed below. Study of the record shows that the Board in general impartially applied its carefully thought-out policies, however they fell. But on each of these issues it was most often older unions that were hurt, and newer groups who were aided, by these policies. The AFL Executive Council protested bitterly against "pro-CIO bias" and "abuse of power" by the Boards.[88] In a time of the rapid rise for the first time of a rival to the AFL, it would have taken more than a Solomon to protect the interests of a large group of new unionists without arousing the ire of the old-line craft union group. Undoubtedly the staff as a whole was sympathetic to the new expanding labor movement on an industrial basis and sometimes glad to see a challenge to particular old unions which had been intrenched without much democratic control or genuine concern for the interests of their members. This is not to say, however, that the staff was prejudiced in its handling of cases. Its job was to administer the Act, not to protect an old union against a new one if the employees desired a change. The charge of biased administration is not upheld by the record of handling AFL and CIO cases.

The issue of whether fair hearings were provided and requirements of due process met is crucial. Company counsel have often held that a hearing was unfair, and in a few cases the Board itself set a record aside and ordered a new hearing. The critics, however, always cited a small group of cases[89] in which courts criticized the conduct of hearings or the attitudes of Trial Examiners[90] and the four cases in which orders were set aside on the ground that there had not been a full and fair hearing.[91] They omitted to mention that these are only a handful of instances out of the more than seven hundred court decisions on enforcement of Board orders by 1947. And they suppressed the much longer list of court opinions in which there were comments on the fairness, courtesy, and impartiality with which hearings were conducted. The Supreme Court, in early cases, upheld the basic procedures as affording due process.[92] We have found also some twenty-four decisions by ten different courts, in which courts denied the charge that the hearing had been unfair or made specifically favor-

[88] Cf. American Federation of Labor, *Report of Executive Council to Annual Convention, 1938*, pp. 69–71, 75; *1939*, pp. 116–20; *1943*, pp. 36–37; *1944*, pp. 54–60; and others.

[89] Cf. T. R. Iserman, *Industrial Peace and the Wagner Act* (New York: McGraw-Hill Book Co., 1947), p. 62. See also *infra*, ch. 4, n. 1.

[90] Consolidated Edison Co. v. NLRB, 305 U.S. 197, 226 (1938); Cupples Co. Manufacturers v. NLRB, 106 F. 2d 100, 113 (C.C.A.8, 1939); NLRB v. Ford Motor Co., 114 F. 2d 905, 909 (C.C.A.6, 1940); NLRB v. Air Associates, Inc., 121 F. 2d 586, 589 (C.C.A.2, 1941).

Others which could be added are: NLRB v. Cleveland Cliffs Iron Co., 133 F. 2d 295, 302 (C.C.A.6, 1943); NLRB v. Western Cartridge Co., 138 F. 2d 551, 553 (C.C.A.2, 1943); NLRB v. McGough Bakeries Corp., 153 F. 2d 420, 421–22 (C.C.A.5, 1946); also in Donnelly Garment Co. v. NLRB, 151 F. 2d 854 (C.C.A.8, 1945), the case was remanded for the taking of evidence which had been excluded by the Trial Examiner, but the Supreme Court on review found no want of due process in the Board's proceedings. 330 U.S. 219 (1947).

[91] Montgomery Ward and Co. v. NLRB, 103 F. 2d 147, 156 (C.C.A.8, 1939); Inland Steel Co. v. NLRB, 109 F. 2d 9, 14–17 (C.C.A.7, 1940); NLRB v. Washington Dehydrated Food Co., 118 F. 2d 980, 986 (C.C.A.9, 1941); NLRB v. Henry K. Phelps Jr., 136 F. 2d 562, 566 (C.C.A.5, 1943).

[92] NLRB v. Jones and Laughlin Steel Corp. 301 U.S. 1, 47 (1937); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

able comments on the conduct of hearings.[93] The final proof of the fact that due process cannot have been denied extensively is seen in the fact that the Supreme Court set aside only two out of fifty-nine of the Board's orders which it reviewed through June, 1947, and the circuit courts set aside only 12.6 per cent in their 705 decisions on Board orders.[94]

Critics complained also that the Board based its decisions upon inadequate evidence and that the courts' power of review was too limited to insure proper protection of the rights of employers. The Act required the Board to base its decisions upon findings of fact from "all the testimony taken," and the rules of evidence prevailing in courts were not to be controlling. The power of the courts to review Board orders was limited by making the findings of the Board conclusive, if "supported by evidence." This arrangement was based on the usual theory of administrative law, that in a complex field "decisions based upon evidential facts under the particular statute [should be] made by experienced officials with an adequate appreciation of the complexities of the subject." [95] The Supreme Court early made clear, however, that "supported by evidence" means by "substantial evidence," and "substantial evidence is more than a mere

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[93] A few of the more recent might be quoted: "The record does not justify a finding that the Board's decision was reached as a result of bias and prejudice or that the manner in which the hearings were conducted denied the company due process of law. On the contrary we are left with strong impression that much of the conduct complained of was deliberately provoked by counsel for the Company, possibly to lay a basis for a defense to charges which otherwise could not be met." NLRB v. Weirton Steel Co., 135 F. 2d 494, 497 (C.C.A.3, 1943).

". . . without indicating an agreement with the Trial Examiner in all the rulings, we think his attitude was fair and impartial to both sides under conditions which it is understatement to describe as difficult." Berkshire Knitting Mills v. NLRB, 139 F. 2d 134, 138 (C.C.A.3, 1943).

"We have carefully read the entire record for the atmosphere and course of the proceedings. . . . The Trial Examiner properly manifested and exercised the courtesy, consideration, patience and restraint necessary on the part of a hearing officer. He accorder the parties liberal and equal scope in introducing evidence and cross-examining witnesses." NLRB v. May Department Stores, 154 F. 2d 533, 539 (C.C.A.8, 1946).

The entire list of such decisions found is as follows:

NLRB v. Mackay Radio and Telegraph Co., 304 U.S. 333, 350–51 (1938)
NLRB v. Remington Rand, Inc., 94 F. 2d 862, 873 (C.C.A.2, 1938)
Jefferson Electric Co. v. NLRB, 102 F. 2d 949, 954 (C.C.A.7, 1939)
Wilson and Co. v. NLRB, 103 F. 2d 243, 245 (C.C.A.8, 1939)
NLRB v. Stackpole Carbon Co., 105 F. 2d 167, 177 (C.C.A.3, 1939) (cert. den. 308 U.S. 605)
Kansas City Power and Light Co. v. NLRB 111 F. 2d 340, 357 (C.C.A.8, 1940)
Subin, *et al.* v. NLRB, 112 F. 2d 326, 332 (C.C.A.3, 1940)
Continental Box Co. v. NLRB 113 F. 2d 93, 96 (C.C.A.5, 1940)
Eagle-Picher Mining and Smelting Co. v. NLRB, 119 F. 2d 903, 906 (C.C.A.8, 1941)
Bethlehem Steel Co. v. NLRB, 120 F. 2d 641, 652 (C.A.D.C., 1941)
NLRB v. Luxuray, Inc., 123 F. 2d 106, 109 (C.C.A.2, 1941)
NLRB v. Newberry Lumber and Chemical Co., 123 F. 2d 831, 833 (C.C.A.6, 1941)
NLRB v. Baldwin Locomotive Works, 128 F. 2d 39, 47 (C.C.A.3, 1942)
NLRB v. Condenser Corp., 128 F. 2d 67, 79–80 (C.C.A.3, 1942)
NLRB v. Goodyear Tire and Rubber Co., 129 F. 2d 661, 663 (C.C.A.5, 1942)
NLRB v. Acme Evans Co., 130 F. 2d 477, 482–83 (C.C.A.7, 1942)
NLRB v. Gallup American Coal Co., 131 F. 2d 665, 668 (C.C.A.10, 1942)
NLRB v. Weirton Steel Co., 135 F. 2d 494, 497 (C.C.A.3, 1943)
Jacksonville Paper Co. v. NLRB, 137 F. 2d 148 (C.C.A.5, 1943)
Berkshire Knitting Mills v. NLRB, 139 F. 2d 134 (C.C.A. 3, 1943)
NLRB v. Thompson Products, Inc., 141 F. 2d 794, 799 (C.C.A.9, 1944)
NLRB v. Grieder Machine Tool and Die Co., 142 F. 2d 163, 166 (C.C.A.6, 1944)
NLRB v. May Department Stores, 154 F. 2d 533, 539 (C.C.A.8, 1946)
J and H Garfinkel v. NLRB, 162 F. 2d 256–57 (C.C.A.2, 1947)

[94] *Eleventh Annual Report*, p. 52; *Twelfth*, p. 41. Cf. *infra*, ch. 3, Table 2.

[95] Republic Aviation Corp. v. NLRB, 324 U.S. 793, 800 (1945).

scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [96] In two cases where the Supreme Court found the Board's decisions not supported by substantial evidence, it set them aside, although in both instances some of the Justices agreed with the Board.[97] Circuit courts, applying the same test, did not hesitate to set Board orders aside when they did not find them supported by substantial evidence, but, as we have seen, the denials of enforcement were relatively few among the cases which reached the courts.

Some of the sharply critical comments by courts which are often cited came in the early years when the Board, guided by the courts, was working out its standards as to evidence.[98] Occasionally courts accepted reluctantly their limited power to review the Board's findings, although they recognized that there was substantial evidence to support the Board's conclusions.[99] In other decisions, on the contrary, courts indicated that they recognized the case for giving to specialized expert agencies the original right to determine questions of fact and draw conclusions from them.[100] Several court decisions specifically denied charges that the Board had ignored evidence favorable to the employer.[101]

The Attorney-General's Committee in its report on the NLRB found that the Board had in the main followed the traditional rules of evidence with no major departure from established principles, although hearsay was admitted "if the evidence appears likely to open up a new line of inquiry previously undeveloped or if the parties are able, by virtue of their own knowledge, to explain or contradict the statement if it is inaccurate." [102] The Administrative Procedure Act, moreover, did not change the requirements as to substantial evidence or the limitation of the power of review by the courts of the agency's findings of fact.

The record therefore does not support the charges that there was inadequate protection of the rights of the accused through Board procedures and the right of appeal to the courts. Occasional mistakes, if they were made, or if the majority of the court believed that they had been made, were rectified by the setting-aside of the Board's orders. Only by a rejection of the basic theory of administrative law can a case be made against the Board's record as a whole on these issues. The criticisms stemmed in the main from dislike of the legislation itself. As one student of the subject has said: "Business men subject to these unpopular types of regulation would in general be glad indeed to have the broadest possible judicial review in the hope of watering down and delaying the effectiveness of the regulation." [103] The

[96] Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).
[97] NLRB v. Columbian Enameling and Stamping Corp., 306 U.S. 292 (1939); NLRB v. Sands Manufacturing Co., 306 U.S. 332 (1939).
[98] Cf. NLRB v. Union Pacific Stages, 99 F. 2d 153 (C.C.A.9, 1938); NLRB v. Thompson Products, 97 F. 2d 13 (C.C.A.6, 1938); Ballston-Stillwater Knitting Co. v. NLRB, 98 F. 2d 758 (C.C.A. 2, 1938); NLRB v. Empire Furniture Corporation, 107 F. 2d 92 (C.C.A.6, 1939); NLRB v. Reynolds International Pen Co., 162 F. 2d 680 (C.C.A.7, 1947).
[99] Cf. Wilson and Co., Inc., v. NLRB, 126 F. 2d 114 (C.C.A.7, 1942); NLRB v. Columbia Products Corp., 141 F. 2d 687 (C.C.A.2, 1944).
[100] Cf. NLRB v. Standard Oil Co., 138 F. 2d 885 (C.C.A.2, 1943); International Association of Machinists v. NLRB, 110 F. 2d 29 (C.A.D.C., 1939); Republic Aviation Corp., v. NLRB, 324 U.S. 793, 800 (1945).
[101] Cf. NLRB v. Sartorius and Co., 140 F. 2d 203 (C.C.A.2, 1944); NLRB v. Laister-Kauffman Aircraft Corp., 144 F. 2d 9 (C.C.A.8, 1944).
[102] Attorney-General's Committee, *Monograph*, pp. 19–20; cf. also its *Final Report*, pp. 70–71; and Gellhorn, *op. cit.* pp. 363–77.
[103] Robert E. Cushman, *The Independent Regulatory Commissions* (New York: Oxford University Press, 1941), p. 692.

propagandist technique of repeating falsehoods so often and with such assurance that they are believed almost had a parallel here. Certainly some employers in 1947 had no criticism to make from their own experience of the Board's hearings or use of evidence, although they reported hearing criticisms by others. Apparently actual criticism based on personal experience was much less widespread than was implied by the most vocal objectors. One employer, perhaps typical of some others, said: "Of course we have been well taught by Senator ———."

A different set of issues, not considered by the critics who won their case in 1947, was whether the Board at any time failed to enforce the law with the vigor needed for full effectuation of the purposes of the Act. Unions tended to this point of view in the later years. In so far as the issue refers to particular policies in decisions, it is outside the scope of this chapter. But the "ubiquitous Congressman" asking favors for his constituent,[104] fears of Appropriations Committee reprisals for vigorous prosecution of cases against politically important companies, and organized group pressures on behalf of particular unions or employers in certain cases were all difficult to withstand and might conceivably result in dropping or delaying cases or in "watering-down" decisions. Somewhat similar were the pressures, when any member of the Board showed signs of being "politically minded," which could and probably did occasionally result in a staff appointment less than the best available. There was a question, too, whether the Board, or Board members, should be available to confer with parties to a case or their supporters. The Board never thought it necessary to shut itself off from conferences which might help to achieve understanding and compliance with the Act. Yet there were dangers, especially if an individual member had private conferences—a practice definitely not approved by most of the Board members. And there was danger of the charge of yielding to pressure, if not the fact, when there were such conferences. Proof of whether this actually happened in any cases is difficult, but as former Chairman Millis once said, "There have been embarrassing attempts to see a Board member, rather than the Board itself, and assertions have been made that to do this was a matter of legal right. It might be that a member of the Board would badly wish to be free from such things and to protect himself against rumors, which, all will agree, are superabundant in Washington." The protection against such dangers lies of course in the integrity and courage of the members of the Board. Certainly most, if not all, of the members of the NLRB through the years were beyond the possibility of suspicion of yielding to such improper influence.[105] If at any point this Board, or any other administrative agency, failed to live up to the responsibility to decide cases honestly and courageously, this would be a matter of human error and of the men appointed to the Board. It should not be held the fault of the administrative procedures or of the law itself.

[104] Cf. discussion of inaction by administrative agencies as a result of such improper influence in Joseph P. Chamberlain, Noel T. Dowling, and Paul R. Hayes, *The Judicial Function in Federal Administrative Agencies* (New York: Commonwealth Fund, 1942), p. 90.

[105] Cf. another statement of former Chairman Millis: "Qualifications for membership on the Board consist of integrity, a sense of responsibility, impartiality and freedom from influence by any special group or organization, general sympathy with the Act to be administered, knowledge of men and relationships, and great industry. These present, other special qualifications may be important. One of these is an intimate knowledge of law, particularly industrial relations law. Another is an extensive knowledge of industrial relations, the variations in customs in industry, etc., and along with these, there must be a balanced mind and an ability to team with others who may have different views with regard to some matters."

A study of the record of the Board's administration leads inevitably to the conclusion that the Board on the whole had solved the major problems of efficient and fair administrative processes, except as limited by inadequate funds and staff. It had listened to the criticisms and had steadily improved its organization, staff, and methods of operation in order to insure equitable and impartial handling of cases in the informal stages and a judicial consideration of the merits of cases which required formal decision. While the Board might, and we think did sometimes, make mistakes or fail to act when action was needed, and there was room for difference of opinion among experts on matters of policy, the commonly accepted criticisms of its administrative processess largely disregarded the available evidence on its operations. It is significant that, during these years while administrative problems were being solved, the virulence of the attacks upon the Board increased, especially after V-J Day. And finally, in 1947, this structure was largely destroyed by the extensive revision of administration under the Labor Management Relations Act of 1947.

12. (Source: National Lawyers Committee of the American Liberty League, Pittsburgh, Pa., Smith Bros. Co., Inc., Law Printers [1935])

REPORT ON THE CONSTITUTIONALITY OF THE NATIONAL LABOR RELATIONS ACT

NATIONAL LAWYERS COMMITTEE

of the

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This Summary and Report on the Constitutionality of the National Labor Relations Act was initially prepared by the Subcommittee on Industrial Relations and Labor Legislation of the National Lawyers Committee. It was then submitted to all members of the National Lawyers Committee for their approval or criticism. Following this submission and as a result thereof, the report is now issued in its present form as the Report of the National Lawyers Committee.

RAOUL E. DESVERNINE,
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SUMMARY OF CONCLUSIONS AS TO THE CONSTITUTIONALITY OF THE NATIONAL LABOR RELATIONS ACT

The undersigned, members of the National Lawyers Committee of the American Liberty League, were appointed members of a subcommittee to investigate and report on recent developments in federal labor legislation.

Our Report was originally submitted to the entire membership of the National Lawyers Committee for their suggestions and approval and thereafter was revised as herewith submitted with the approval of the Committee.

It has been our task to consider such legislation from its constitutional aspects, with particular emphasis upon the relation of such legislation to our traditional and constitutional methods of dealing with industrial relations.

The National Labor Relations Act, which was approved by the President of the United States on July 5, 1935, represents the first attempt of the Federal Government to enact comprehensive labor legislation, designed to cover the entire field of industrial disputes. Consequently this new legislation provided the focal point of our investigation. In our report, which is submitted herewith, we have endeavored to present an analysis of the probable effects of the statute, followed by a consideration of its constitutionality, against the background of our political history. The scope of the subject required a somewhat extensive and detailed analysis of the Act. For that reason we are setting forth here a brief summary of our conclusions and are referring to the report itself for the supporting arguments and citation of decisions of the Courts.

The primary object of the statute is to define rules to govern collective dealings by employees with their employer. The Act expressly declares that representatives selected by a *majority* of employees in a

particular bargaining unit shall be the *exclusive* representatives of *all* the employees in that unit, to bargain with the employer on matters involving wages, hours of work and other conditions of employment. The Board is empowered to determine who are the representatives of the majority, which they may do by means of an election or such other method as the Board may select. The unit of representation, whether it be the employer unit, the plant unit, the craft unit, or some other unit, is likewise left to the discretion of the Board. Individual employees and minority groups have no right to negotiate with their employer as to wages, hours or conditions of employment, the only right reserved to them being to present individual "grievances" or complaints to the employer.

It is our belief that this provision of the statute constitutes an illegal interference with the individual freedom of employees, as guaranteed to them by the Fifth Amendment to the Constitution of the United States, which provides in substance that no person shall be deprived of life, liberty or property without due process of law. The freedom sanctioned by the Constitution includes the right of each man to follow any occupation and to sell his own labor on his own terms. The National Labor Relations Act constitutes a severe threat to that freedom in more ways than one. Highly competent workmen, who are accustomed to demand and obtain the best price for their labor, may find their wages fixed, to their detriment, by the agreements of the agents of the more numerous, but less capable, employees. The right of the individual employee or group of employees to make their own bargains is eliminated and the right of a minority to form its own associations, for bargaining purposes, is ignored. Finally, employees who refuse to participate in the selection of representatives are presumably bound by its results, even though they have not, even impliedly, consented to the selection of the chosen representatives.

These interferences with the individual's freedom of contract should be considered against a background of even more serious practical restraints which are sanctioned by the Act. Under its terms, national labor organizations may become the exclusive representatives of employees, despite the existence of a substantial group in opposition. It is expecting too much to suppose that unions will faithfully represent and bargain for non-members, who have not submitted themselves to the payment of dues and penalties and to numerous regulations of the association. As a consequence, dissenting employees are completely deprived of representation; their wages, hours of labor and conditions of employment will be determined, not by their desires, but by the will of the national organization. Otherwise, they may be compelled to join a union not of their own free choice.

A similar observation may be made with respect to the position of the employer. He will find himself required to bargain with the representatives certified by the Board, deprived of the right to negotiate with minority groups or individual employees. Yet our traditional interpretation of the Constitution has assured to every employer and every employee the right to make their own bargains, and has preserved to each freedom and equality of bargaining powers.

Discrimination in the matter of hiring and discharging or in the tenure and condition of employment against union members is pro-

scribed. The right of every disgruntled employee to call upon his employer for a public explanation of every promotion, transfer, or discharge, will seriously interfere with efficient management and discipline, places a heavy burden of responsibility upon employers and is a departure from our traditional policy of resting the sole authority in matters of this character in the employer. Similar provisions in earlier legislation, both State and Federal, have been invalidated because of their interference with the normal right of the employer to hire and fire in the best interests of his business.

So far as legal effect is concerned, the statute binds only the employer. It is a practical restraint upon his freedom of contract, because he is deprived of bargaining equality. The Board's decisions with respect to the representation of employees and its orders against unfair labor practices are final and binding upon the employer. He may be required to bargain with a particular group or enjoined from negotiating with another group. At the same time he may be punished for discharging or demoting an employee or required to continue in employment an employee whom he does not choose to employ. On the other hand, since the statute expressly reserves the right to strike, there is nothing to prevent individual employees or groups of employees from withdrawing from employment. Groups who are dissatisfied with the decision of the Board may strike, notwithstanding their agreements, and minority groups who are not satisfied with the bargains made by the representatives of a majority, may refuse to abide by them, through a walkout, although the employer is bound to observe their terms. Unlike English labor legislation, the Act makes no effort to regulate the activities of unions or to insure responsibility on their part.

There are other arbitrary interferences with the normal freedom of an employer. Refusal to negotiate or bargain with a particular group is made an offense against the statute, if the National Labor Relations Board certifies that group as the exclusive representative of his employees. Again, the employer is not permitted to render financial or other support to an organization of his employees, even though his employees may have requested or demanded that he extend such assistance to them. Jurisdiction is vested in the National Labor Relations Board to try and determine questions of private contract rights and its determination of factual matters is made final and conclusive; neither trial by jury nor the customary safeguards of judicial rules of evidence are preserved.

It is our belief that, in these respects, the statute unnecessarily and arbitrarily infringes upon the individual liberties of the employer and the employee, and is therefore invalid.

We have also considered the statute from the standpoint of the power of Congress to enact it. It is almost unnecessary to state the proposition that labor relations and industrial controversies are matters which are subject to the powers reserved by the Constitution to the several States. The Federal Government is one of defined and limited powers, without jurisdiction to intervene in matters of internal policy. It is not a complete sovereignty in the same sense as the individual States. Its powers with respect to Interstate Commerce are

limited to regulations which have some direct bearing upon the movement of persons or commodities in commerce among or between the several States. It has no authority to use this power as a pretext to interfere with matters which are subject to the jurisdiction of the several States. It is our opinion that the National Labor Relations Act, although it is called a regulation of commerce, is in substance a regulation of a matter which has no direct connection with commerce, that is, the relation between an employer and his employee. We have, therefore, reached the conclusion that the National Labor Relations Act, even if it were valid from the standpoint of due process, can have no application to industrial relations on a general scale.

Some industries may participate in interstate commerce, to a limited extent, because they use materials which are transported from States other than those in which their operations are located, or because they ship commodities in interstate commerce, but his limited participation does not bring their other activities within the field of interstate commerce or subject their industrial relations to the jurisdiction of Congress. It is our belief that the Labor Act can have no application to such businesses, because the relation between the employer and his employees is local in character and does not *directly* concern the movement in interstate commerce which precedes or follows their activities.

Production is not commerce. The processes and incidents of production, such as labor, are not commerce, even though the products of such activities subsequently find themselves in interstate movement. Although production may have some impact on interstate commerce, the effect on commerce of the labor expended in production is remote and indirect. Remote consequences cannot justify federal action, because federal power is limited to interstate commerce and cannot, by a pretext, intrude into local activities.

Another industrial group embraces businesses which do not receive materials in interstate commerce or ship articles across State lines. The contention may be made that the Act, nevertheless, applies because labor disputes in such industries may indirectly impede or hinder the movement of interstate commerce. We are, nevertheless, of the opinion that this *indirect* effect is not sufficient to justify the application of the statute to such concerns.

A business is by its very nature either intrastate or interstate in character and its essential character will prevail. We cannot change the nature of a business by legislative declaration or interpretation any more than we can, by legislative fiat, convert a regulation of labor into a regulation of interstate commerce.

Perhaps it may be contended that the Act can apply to businesses which are actually engaged in the movement of interstate commerce, such as interstate carriers, trucking agencies, and water transportation facilities. Railroads are not included, being subject to the Railway Labor Act. Since these enterprises are instrumentalities of interstate commerce, the regulatory power of Congress over their activities is broadly construed and Congress is permitted, because of the public interest in the continuity of interstate movement, to enact regulations which are designed to prevent interruptions to that movement. These

businesses occupy a very small part of the industrial field and constitute a relatively small portion of the businesses which the Act purports to and does embrace. Even in this territory, we believe that the Act cannot be effectively applied. As we have stated, its salient features are not consistent with the requirements of due process, and, eliminating the sections which we believe to be unconstitutional, nothing of substance remains to be applied to such businesses.

We feel that we should not close our discussion without some reference to the authority which will finally determine the constitutionality of the National Labor Relations Act and the extent of its application. The conclusions which we have set forth are based upon settled doctrines of the Supreme Court of the United States, the tribunal to which is entrusted the interpretation of the Constitution. These doctrines have not been invented by the Court; they are the express requirements of our political charter. The charter not only defines the line between the jurisdiction of the Federal Government and the jurisdiction of the several States, but it also imposes certain conditions which are designed to protect the freedom and property of individual citizens. The Constitution is a creation of the people, a body of limitations which they themselves have imposed upon their own governmental actions. The charter contains its own provisions for an amendment and while its provisions stand they must be accepted as the supreme law of the land, transcending not only the desires of any branch of government, but also the temporary beliefs and opinions of the people. It is the function of the Supreme Court to expound that document. The Supreme Court does not strike down legislation because it runs contrary to its opinions. It merely declares that, while the limitations of the Constitution stand they must be obeyed as the final mandate of the people and no legislature, whether it be Federal or State, can nullify them.

Times and our economy may have changed, but we have not changed our Constitution nor even deemed it advisable so to do. It is our task to expound our constitutional law as it is, apart from its economical or social consequences, and to point out how and in what respects this new legislation departs from our traditional constitutional concepts. It is almost unnecessary to add that it must not be assumed that the desired objects cannot be attained by means within the Constitution.

We have examined the Act with a view to expressing our opinion as to its constitutionality and whether or not it represents a departure from our established system of government. We have not expressed any opinion as to the advisability of any change in our system of government or the need or propriety of regulating all the industrial relations of the country through a central government. Considering the Act in the light of our history, the established form of government, and the

decisions of our highest Court, we have no hesitancy in concluding that it is unconstitutional and that it constitutes a complete departure from our constitutional and traditional theories of government.

Respectfully submitted,

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SEPTEMBER 5, 1935.

REPORT OF THE SUBCOMMITTEE ON INDUSTRIAL RELATIONS AND LABOR LEGISLATION

I. The Schechter Case

The decision in *A. L. A. Schechter Poultry Corporation, et al.*, v. *United States* [1] came after almost two years of speculation and argument as to the probable fate of the National Recovery Act. Its announcement blackened the headlines of countless newspapers throughout the country and exposed the Court to an avalanche of comment, criticism and praise. Arguments were heard that the Court should be abolished or its veto power greatly limited.[2] A few disgruntled critics, overlooking the unanimous character of the decision, demanded constitutional amendments requiring at least a two-thirds concurrence of the Court to invalidate Federal legislation, while others contented themselves with blasting the decision as a survival of "horse and buggy" conceptions of Government. On the other hand, the Court, although it stirred up a hornet's nest of controversy, has not lacked for supporters, who soberly point to the decision as another powerful demonstration of the Court's ability and readiness to protect the people from the consequences of caprice and tyranny in government.

Through all this fog and dust of controversy it is not hard to lose sight of the real importance of the decision. Does its importance lie in the fact that the Court has again resisted almost overwhelming pressure emerging from the executive and legislative chambers of the Government, or does it lie in the fact that the Court may have ignored the temporary desires of a large portion of the governing people? Neither hypothesis is correct. It was not a new experience for the Court. Created to protect the country not only against the arbitrary will of their chosen representatives, but also against the tyranny of a temporary majority, the Court has, on other occasions, braved the demands of current opinion by its insistence upon obedience to the man-

[1] 55 Sup. Ct. 837 (United States Supreme Court, 1935).

[2] The Court's action in limiting the constitutional application of a Federal statute was by no means a novel assertion of jurisdiction. It was merely the exercise of a power conferred upon the Court by the Constitution and employed almost without question since the first days of the Court. Whatever may be said of its exercise of jurisdiction over state legislation, its veto power over Federal law-making is too well settled and too well grounded to admit of discussion. *1 Warren, The Supreme Court in United States History*, pp. 79 to 84.

dates of the Constitution.[3] In other and similar crises, it has been savagely attacked for its resistance to what was represented to be the mandate of the people, but in the long run it has survived criticism and earned the recognition of the people that it had acted wisely and judiciously.

The real significance of the decision is far less superficial. It requires a careful exploration of the Court's traditional attitude towards the division between state and federal power to appreciate fully the importance of its pronouncement. In brief, and passing for a moment the historical basis of the decision, it must be accepted as an authoritative exposition of the limits of Congressional power—a restatement of the dividing line which lies between the states and Washington. As a result, any approach to current legislation, which seems to overstep the bounds of Congressional power, must be made with an understanding of the Schechter case. Its doctrines are not new—indeed, they are as old as the Constitution. The Court merely reaffirmed well established rules but it did so in terms which greatly enlightened past authorities.

In this, its most important aspect,[4] the decision dealt with the power of the Federal Government to regulate the incidents of interstate commerce. Every layman knows that our political system contemplates two distinct sovereigns. One is the State, a sovereign almost as independent as any world power, having full and complete jurisdiction over all matters within its territory, with certain well defined exceptions. The other is the central or Federal Government, a sovereign superior within its field over all the States, but limited in jurisdiction to the powers expressly conferred by or necessarily implied from the Constitution. Most of the powers granted to Congress, such as the jurisdiction over the currency and over bankruptcies and the war making power, seldom conflict with the exercise of the functions of the State, and therefore rarely occasion any difficulty. But another most important power is its jurisdiction over interstate commerce;[5]

[3] The decisions of the Supreme Court in cases involving the Bank of the United States in 1824 subjected it to a barrage of criticism, against which present attacks on the Court seem pale and colorless. Yet the Court's then precarious position stimulated one of the finest defenses of the Court, in the words of Senator William Harper of South Carolina: "The independence of the Judiciary is at the very basis of our institutions * * * It is in times of faction, when party spirit runs high, that dissatisfaction is most likely to be occasioned by the decisions of the Supreme Court. I do not believe that the Supreme Court, or the Constitution itself, will ever be able to stand against the decided current of public opinion. It is a very different thing from the temporary opinion of a majority: for a majority acting unjustly and unconstitutionally, under the influence of excitement, a majority though it be, is nothing more than a faction, and it was the object of our Constitution to control it. The Constitution has laid down the fundamental and immutable laws of justice for our Government: and the majority that constitutes the Government should not violate these. The Constitution is made to control the Government; it has no other object: and though the Supreme Court cannot resist public opinion, it may resist a temporary majority and may change that majority. However high the tempest may blow, individuals may hear the calm and steady voice of the Judiciary warning them of their danger. They will shrink away: they will leave that majority a minority, and that is the security the Constitution intended by the Judiciary." *2 Warren, the Supreme Court in United States History,* 131.

[4] One branch of the decision struck down the Codes because Congress had made an unjustifiable abdication of its legislative power to the executive. This principle was not a new one, although the Court did not find it necessary to invoke its application against an Act of Congress until the decision in *Panama Refining Company* v. *Ryan*, 293 U.S. 388 (1935). The Court has always sanctioned the legislative practice of delegating to administrative agencies the power to fill in the operative details of a statute, so long as Congress first prescribed an intelligible principle to guide administrative action. In the Panama Refining Company case, and later in the Schechter decision, the Court found, in substance, that Congress had not even defined this intelligible principle but had voluntarily delegated almost complete law-making power to the President. For some purposes, this aspect of the decision is important. However, it is not involved in the present discussion.

[5] The constitutional phrase is "The Congress shall have power * * * to regulate Commerce with Foreign nations and among the several States, and with the Indian Tribes * * * (Section 8 of Article I).

this power may at times conflict with the domestic jurisdiction of the States. These conflicts, whether real or apparent, occasion the confusion of jurisdiction which has been inherent in much of the recent federal legislation.

The draftsmen of the Constitution foresaw that if economic and political intercourse among the States was to be fostered, and the welfare of the nation protected, it would be necessary to curb the selfish interests of individual States where they might easily conflict with the interests of the federation as a whole. Therefore, jurisdiction over interstate commerce—a most fertile field for controversy between individual States—was granted to the Federal Government. Its jurisdiction involves the power to regulate, restrict and protect interstate commerce, *but it does not include* and was not designed to include the right to use such jurisdiction as a pretext to interfere with the local sovereignty of the States. If this one premise is carefully borne in mind, the apparent confusion which sometimes arises as to the limitations on the powers of each of the concurrent governments, will be to a large etxent removed.

On this problem of conflicting powers, the Schechter case is an emphatic restatement of ancient precedents. The line between the powers of the State and the power of Congress had become blurred, not by decisions of the Court, but by the arguments of advocates of the Recovery Act and similar congressional legislation. The position was taken in the executive and legislative departments of the government that the nation had come to a new conception of commerce; that business had outgrown the States and had become a matter of national concern, and that our purely internal political, economic and social life was so intimately connected with our national commerce, that it had been finally swallowed up in the latter's dominance. On this hypothesis, it was not difficult to argue that the wages of the newsboy on the corner, the prices of the baker, and the advertising policies of the local optometrist in some degree affect incomes and businesses. The impact might be slight, but in the end, it is contended, it either encourages or discourages commerce among the States.

Doctrines of the Court, which will be discussed later, were used to supply an apparent foundation for this argument, but, throughout its history, the Court, in the final analysis, has always insisted upon the divergency of State and Federal power. Finally, amid the tumult of argument in the Schechter case, it retraced the line which it had always drawn. Technically, it did not invalidate the Recovery Act because Congress had overstepped its bounds; it merely limited its application to matters which were a part of interstate commerce, warning away overenthusiastic administrators who had sought to apply the Act to matters which had no reasonable connection with commerce. No one can justly or reasonably criticize the Court for this position. Liberals may have quarreled with some of the Court's earlier conceptions of due process, but they can not, except out of ignorance, attack its conceptions of interstate commerce. Purely internal affairs do indirectly affect interstate commerce, just as interstate commerce indirectly bears upon internal affairs. This might be urged as a reason for changing our constitutional form of Government, but it is no excuse for attacking the Court for distinguishing between commerce and that which is not commerce, a distinction which the Constitution required it to obey.

The most liberal advocates of this novel conception of commerce could scarcely apply the label of "reactionary" to Justice Cardozo of the Supreme Court, or Justice Learned Hand of the Circuit Court of Appeals. While it is the philosophy of both these jurists to allow the utmost latitude to legislative and executive expression, nevertheless they saw the line which the Constitution required them to follow, and they did not hesitate to hew to it.

In finding the codes to be ineffectual in their attempts to regulate the wages of employees engaged in local activities, Justice Hand, in the Court below, declared:

> But the extent of the power of Congress to regulate interstate commerce is quite another matter and goes to the very root of any federal system at all. It might, or might not, be a good thing if Congress were supreme in all respects, and the states merely political divisions without more autonomy than it chose to accord them; but that is not the skeleton or basic framework of our system. To protect that framework there must be some tribunal which can authoritatively apportion the powers of government, and traditionally this is the duty of courts. It may indeed follow that the nation cannot as a unit meet any of the great crises of its existence except war, and that it must obtain the concurrence of the separate states; but that to some extent at any rate is implicit in any federation, and the resulting weaknesses have not hitherto been thought to outweigh the dangers of a completely centralized government. If the American people have come to believe otherwise, Congress is not the accredited organ to express their will to change.

In the Supreme Court, this utterance merited the approval of Justice Cardozo, who added his own belief that:

> There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours "is an elastic medium which transmits all tremors throughout its territory; the only question is of their size." Per Learned Hand, J., in the court below. The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions.

The line between the divergent jurisdictions is there. It is defined by our political charter, and the Supreme Court has again announced in unhesitating tones that it must be obeyed and that neither the States nor the Federal Government may crowd the other from its allotted territory by an appeal to a broader construction than the charter will bear.

The Federal Government may regulate and protect the streams of commerce and the beds through which they run. It may been exercise its jurisdiction to forestall or destroy direct barriers to these streams. But it may not say that all activities are commerce, or concern commerce, and thereby hope to intrude itself into matters which are primarily the concern of the separate States.

* * * * * * *

The collective bargaining provisions of Section 7(a), although not drawn in issue in the Schechter case, of course fell with the whole structure of the Recovery Act. To replace it, the so-called Wagner Bill, a far more comprehensive and drastic piece of legislation, was driven through to enactment as the National Labor Relations Act. Its final passage immediately stimulates the inquiry: "Has Congress so soon forgotten the lessons of the Schechter case and again overstepped the bounds of its jurisdiction in prescribing rules for collective bargaining between employers and employees?" To answer

this question a thorough examination of the Bill must first be made and the results surveyed against the background of our traditional political theories and our constitutional methods of handling industrial relations.

It is the primary object of this report to investigate the constitutional aspects of the National Labor Relations Act. For this reason we have dwelt perhaps overlong on the latest and most authoritative decision of the Supreme Court. We regret that another apparent digression is necessary but we believe that, although the question of constitutional validity is of primary importance to the lawyer, the first inquiry of the layman reaches out to learn the impact of the legislation on his particular interests. Therefore, before we consider the Act in its constitutional aspects, we shall again turn aside to attempt to estimate its effect.

II. Legislative Precedents of the National Labor Relations Act

In order to understand the breadth and the variety of the changes which have been introduced into the law by the National Labor Relations Act, it is necessary to make a brief survey of previous Congressional legislation in the field of labor disputes. This will be followed by a brief summary of the provisions of the Act itself, which will pave the way for a discussion of the constitutional aspects of the new legislation.

A. Early Railway Labor Legislation

Until the enactment of the National Recovery Act in 1933, Congress had made no attempt to inject itself into the field of collective bargaining, except in that narrow strip of territory occupied by the transportation industry. The first step was taken in the Railway Labor Disputes Act of 1888 which provided for the "arbitration and investigation" of labor disputes upon a voluntary basis. There was no effort to prescribe any principles of collective bargaining, except in so far as the statute provided for the selection by the employees of arbirators for the purpose of determining disputes. This statute, which was narrow in scope and comparatively ineffectual, was succeeded in 1898 by the Erdman Act, known as the Railroad Labor Disputes Act of July 1, 1898.

The Erdman Act provided for the voluntary adjustment and arbitration of disputes concerning wages, hours of labor, or conditions of employment, which seriously interfered, or threatened to interfere, with the business of carriers. One of the important and novel sections of the statute was section 10 which made it a criminal offense to require any employee to agree to refrain from membership in a labor organization or otherwise to discriminate against union members. This section was held invalid in *Adair* v. *U.S.*, 208 U.S. 16[1] (1908).[6]

The Erdman Act was subsequently replaced in 1913 by the Newlands Act. This Act provided for the creation of a Board of "Mediation and Conciliation" to take part in the amicable adjustment of controversies between carriers and their employees concerning wages, hours of labor, or conditions of employment. The Act provided that if voluntary settlements could not be reached, then the parties could voluntarily refer the controversy to special boards of arbitration, under

[6] This decision will be discussed under subsequent sections of this report.

limited supervision of the Board of Mediation and Conciliation. The Act expressly acknowledged the right of organizations to participate in the benefits of the statute and provided that employees who were not members of a union might select a committee of representatives for the purpose of arbitration. The Act prescribed in detail the provisions which should or might be embodied in the agreement of arbitration and declared that the awards of the arbitration should be final and enforceable. However, the Act was purely voluntary in that it did not require but merely recommended the adjustment of controversies and arbitration of disputes.

B. THE TRANSPORTATION ACT OF 1920 AND THE WAR LABOR BOARD

Later, in the fourth stage of Federal intervention, in 1920, the Newland Act was supplemented by the Transportation Act of 1920. An intervening development in the field of collective bargaining should first be mentioned. In the interim between these two Congressional efforts to provide for the adjustment of railway labor disputes, the war had seen the development of the War Labor Board, an instrument created by exectuive order to govern wartime industrial relations throughout the country. The War Labor Board did not operate under any fixed statutory definition, but it managed, through the use of board wartime executive powers, to settle many serious labor disputes. One of its functions was to draw up certain principles of collective bargaining. One of these principles provided for the "full recognition of the right of both employers and workers to organize in their trade unions and associations respectively and to bargain collectively through their chosen representatives." This right was not to be denied, abridged or interfered with by either side and all discrimination for legitimate activities with such organzations was frowned upon. In addition, workers were to refrain from the use of coercive measures either in causing persons to affiliate with their unions or in forcing employers to bargain. With the expiration of the War, this agency ceased to exist and the Federal Government returned to its policy of confining its intervention in labor disputes to the railroads.

The Transportation Act of 1920 provided for Adjustment Boards to be created by agreement between carriers and their employees or organizations of their employees, to facilitate the voluntary adjustment of labor disputes. While the act declared that it was the "duty of all carriers and their officers, employees and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any disputes between the carrier and employees," in substance, there were no definite obligations to participate. The Act also provided for the establishment of a Labor Board to take jurisdiction of disputes which could not be settled by the adjustment boards or which had not been referred to such boards. Disputes could be brought before the Labor Board either by the carrier or by the employees or upon the Board's own initiative. To this extent, the Act went beyond the previous legislation, in that reference to the Board was no longer voluntary. Nevertheless, the Board had no power to render legally enforceable decrees, its awards being enforced indirectly by the publicity given its decisions. The Transportation Act did not deal with collective bargaining, in general, nor did it define any method for the selection of representatives by either

party. The Board itself, however, announced certain principles, one of which in substance provided that employees, as a group, should be represented before it by an organization or other representatives selected by a majority of the group. The Board also assumed the right to determine the proper representatives of the employees and to that end, declared its right to order an election.

C. THE RAILWAY LABOR ACT OF 1926 AND AMENDMENTS

The Transportation Act and the Newlands Act were both repealed by the Railway Labor Act of 1926. This Act provided for boards of adjustment similar to those which could be designated by carriers and their employees under the earlier legislation, and, in addition, replaced the Labor Board by a Board of Mediation. The Board of Mediation was given power to adjust controversies and to appoint and supervise boards of arbitration. Again, however, there was no compulsion on either party to participate, except by virtue of a general declaration of duty to prevent interruption of service. The Act of 1926 contained elaborate provisions for arbitration agreements and proceedings, which will not be reviewed in detail, except to state that the awards of the boards of arbitration were made enforceable. There is no reference to general principles of collective bargaining, except so far as representation before the boards of adjustment and Board of Mediation was concerned. This Act, however, expressly sanctioned representation in its proceedings by organizations of employees and further provided that representatives should "be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion by either party over the self-organization or designation of representatives by the other."

The Act of 1926 was extensively amended by the Act of June 21, 1934, which replaced the adjustment boards by the "National Railroad Adjustment Board" and the Mediation Board by the "National Mediation Board." As amended, the Act retained provisions declaring that it was the duty of carriers and their employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions and to settle all disputes in order to avoid any interference with operation.

Subdivision Fourth of Section 2 of the Act, as amended, contains new provisions relating to the subject of collective bargaining. The right of employees to organize and bargain collectively is confirmed and the rule announced that "the majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class" for the purposes of the Act. Discrimination against union activity is prohibited, along with any interference with self-organization or the selection of bargaining agents. This Act also prohibits the use of the carrier's funds in assisting or contributing to labor organizations. Subdivision Fifth of the same section prohibits "yellow dog" contracts and Subdivision Ninth provides for the jurisdiction of the National Mediation Board to determine the identity of representatives of the employees. As we shall see, this Act is in many respects similar to the National Labor Relations Act.

D. MISCELLANEOUS FEDERAL LABOR LEGISLATION

During this period of development in railway labor legislation, there was no corresponding extension in the field of ordinary labor problems. The Anti-Injunction Act (Public Resolution No. 65, 72nd Congress, approved March 23, 1932) contained the declaration that it was the right of employees to organize and bargain collectively, but the Act was not designed to provide direct means for sanctioning such right. Its primary object was to outlaw the so-called "yellow dog" contract [7] and to restrict the jurisdiction of the United States Courts in awarding injunctions in labor disuptes. Discrimination against union membership was not directly prohibited, probably because of the decision in the Adair case, but it was declared to be the policy of the United States to deny judicial assistance to the enforcement of "yellow dog" contracts. The right to strike and picket was carefully defined and perhaps enlarged, while organization and sympathetic strikes were sanctioned. Drastic restrictions are placed upon the power of the courts to award injunctions, by requiring in substance that no injunction shall be awarded except after hearing the testimony of witnesses in open court and after finding that an injunction is necessary to prevent acts of violence which are likely to result in substantial and irreparable injury to the claimant's property. In an indirect sense, the statute has fostered the growth of organization, by restricting the power of the courts to prevent unlawful acts in connection with strikes and organization drives.

Other recent Federal legislation may be found in section 77 of the Bankruptcy Act, which was amended March 3, 1933, to provide for the reorganization of railroads. The amendment prohibits the use of any reorganization funds to foster so-called "company unions" and enjoins discrimination against union employees. Substantially the same provisions may be found in Section 77B of the Bankruptcy Act, as amended June 1934, to govern the reorganization of insolvent corporations. To a limited extent, both statutes are designed to sanction the use of labor organizations as instruments of collective bargaining, by preventing discrimination and hampering plant unions. They are unique in that they represent the first effort of Congress to reach beyond the transportation industry but they are, of course, of narrow application, in that they extend only to corporations in the process of reorganization in the bankruptcy courts.

As a result, it may be said that the first determined effort of Congress to establish widespread rules of collective bargaining is contained in section 7(a) of the National Recovery Act, approved June 16, 1933. This legislation deserves a more extensive discussion than that which we have given the railway labor statutes, because of the breadth of its operation and also because it is the immediate forerunner of the Wagner National Labor Relations Act. Therefore, it will be considered in the next subdivision of this report, concurrently with our analysis of the newer legislation.

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[7] That is, a contract requiring employees not to join or continue membership in labor organizations.

III. Analysis of the National Labor Relations Act

A. The background of the act

It is unfortunate that, in order to discuss the constitutional aspects of the National Labor Relations Act, we must indulge in a somewhat lengthy digression on the scope and effect of antecedent legislation. Until the Recovery Act, the National Government made no determined effort to inject itself into domestic problems involving labor relations, except in its own peculiar domain of interstate transportation. It is equally true that most of the States advocated a policy of noninterference in industrial relations, except in cases of police regulations dealing with such subjects as working conditions, hours of labor and the like. These facts are the necessary background to demonstrate the novel features of the new legislation.

The law has always accorded the utmost freedom to employees and employers in the adjustment of their mutual problems. Employees have been permitted to engage in activities of labor organizations or to refrain from membership in such organization as they see fit. Workingmen have been permitted to make their own bargains, whether collectively or individually, with respect to wages, hours of labor, and the like. On the other hand, employers have been allowed to hire at their own discretion and to be the sole judges of the advisability of discharging, demoting, or advancing employees. The law has intervened only where it was necessary to maintain order or to prevent injurious or fraudulent actions. It has protected the workingman against insanitary and unhealthy working conditions, as well as guarding him against hazardous work and excessive hours. It has not, however, attempted to interfere with the relations between employer and employees in so far as voluntary bargaining activities of either side are concerned.

The importance of the change brought about by legislative intervention into the field of industrial relations is more thoroughly appreciated, when it is realized that it involves a complete change in our theory of labor relations. Under traditional methods of approach, industrial relations were entrusted to the adjusting processes of economic laws. The new legislation transfers them to the field of politics and attempts to control and regulate them through the artificial processes of political machinery.

1. The National Recovery Act

As we have seen, section 7(a) of the National Recovery Act represented the first attempt of the National Government to promulgate a statutory requirement of collective bargaining on a scale that would cover all of the country's industries. Although, as we have seen, state legislation on the subject has been scarce, the law has recognized the propriety of the principle of collective bargaining. The Recovery Act simply attempted to translate this principle into Federal regulation. Section 7(a) did not contain a comprehensive labor program; it was no more than a Congressional effort to further the right of employees to bargain as a unit. The Recovery Act lent sanction to this principle by recognizing two constituent rights in employees. The first was the right "to organize." This was designed to give to the

employees of every employer the right to form their own organizations and, by the express command of the statute, the employer was enjoined with interference with their organization activities. This right was not necessarily related to the right of collective bargaining, although the Act recognized that employees might organize for the purpose of exercising the latter right. In its second aspect, the Act conferred upon employees the right to bargain collectively through "representatives" which they themselves had chosen. It should be observed that the statute, in that aspect, used the term "representatives"; it did not refer to "organizations" in connection with the instrumentalities of collective bargaining, although it did use the words "organize" and "self-organization" in describing the permissible activities which employees might undertake as a prelude to bargaining. To protect the employees in the exercise of their right to select agents to bargain for them, the statute also provided that the employees should not be interfered with in the process of selection.

The duties placed upon the employer by Section 7(a) simply corresponded to these rights of his employees. The Act merely required employers to acknowledge that the chosen representatives of the employees alone had the authority to bargain for the employees who had selected them. In short, if the employer undertook to carry on negotiations with his employees in groups or as a unit and undertook as a part of the bargaining, to ascertain their united will, he was required to do so with and through the representatives whom the employees had authorized to bargain for them and not with or through such agents as he might have preferred. Section 7(a) recognized that it was possible for the employer to ignore the chosen representatives and to deal with others as agents of his employees, by the indirect device of interfering with process of selection. To prevent this indirect means of refusing to acknowledge the real representatives of his employees, the statute forbade the employer to interfere with the employees in their designation of representatives.

Section 7 (a) was silent upon the subject of the method of selecting representatives. Until the National Labor Relations Board came into existence, the Act was commonly interpreted as an assurance of the right of collective bargaining to minority groups as well as to the majority. National unions were not mentioned and there was no reason to suspect that Congress had intended that they should become the exclusive and sole representatives of employees. The obligations of the employers were purely negative. Although the old National Labor Relations Board wrung a contrary construction out of the terms of Section 7 (a), the Act did not literally require an employer to enter into any contracts with employees, nor for that matter, to negotiate with anyone. He was simply commanded not to interfere with the process of selection and prohibited from dealing with representatives other than those freely chosen by his employees.

2. Public Resolution No. 44 (Labor Disputes Act)

Public Resolution No. 44, which followed the Recovery Act and which purported to provide a means of administration, did not alter the effect of the prior statute, except to provide a method of selecting representatives. The National Labor Relations Board created under the Resolution was given authority to investigate controversies arising

under Section 7 (a) and to inquire into violations, but its authority in this respect was purely administrative and not judicial.[8] Its quasi-judicial jurisdiction was limited to hearings for the purpose of determining whether or not it was in the public interest to order an election of representatives for collective bargaining purposes. The resolution did not purport to add to the obligations of the employers nor did it extend express sanction to national organizations as instrumentalities of collective bargaining. It did, perhaps, lay the basis for the majority rule which was subsequently brought into life by the National Labor Relations Board. Although it did not declare that representatives selected by a majority of the employees should be the representatives of all, nevertheless there may have been some justification for the belief that such was the implied intent.

B. THE COLLECTIVE BARGAINING FEATURES OF THE NATIONAL LABOR ACT

We have referred to Section 7(a) and Public Resolution No. 44 in some detail because it will enable us to contrast the provisions of the new legislation and thereby lead to a clearer understanding of its effect.

Section 7 of the Wagner National Labor Relations Act provides that:

> Employees shall have 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.

This declaration of principle is, of course, no broader than that provided in Section 7(a), although the right to form labor organizations is perhaps more clearly defined. Some observers had doubted the propriety of national unions as representatives for collective bargaining purposes under Section 7(a). Under the National Labor Relations Act, which defines "employee" without reference to the employees of any particular employer, there cannot be much question but that representation by national labor organizations is expressly sanctioned.

There are certain features inherent in a national labor union which may seriously affect their status as the exclusive representatives of employees. To a certain extent, it may be justly argued that the selection of a national labor union not only involves the designation of a bargaining agent but also to a certain extent the delegation of bargaining power. The officers of the national labor union are, for the most part, selected by employees of many different employers, frequently in different localities and working under entirely different conditions. The policies of the union are generally determined by its officers and committees without direct reference to the employee constituents, so that a particular employee in a particular plant, working for a particular employer, may find his own desires, and those of his fellow employees, submerged in the will of an entirely dissimilar group.

National labor unions, as most of them are now constituted, will not represent any employee unless he is a member in good standing. As a result, in order to obtain representation, the employee is required to submit himself to the constitution and bylaws of the organization, which may involve the payment of dues, submission to fines and penalties and subjection to innumerable rules and regulations governing

[8] The Board had no power to issue legally binding orders under this part of its jurisdiction. It did, however, secure some effectiveness to its degrees by recommending the removal of the Blue Eagle.

working conditions, union activities and the like. This is, of course, not objectionable, except in so far as a particular employee or group of employees may desire to remain outside. A fair percentage of the employees in this country are believers in labor organizations, but, on the other hand, there is a very substantial group in opposition. This state of affairs is the stage upon which the National Labor Relations Act is designed to operate.

After sanctioning the national labor union as an adequate representative of employees, Section 9(a) of the Act provides that—

> 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 and other conditions of employment: provided that any individual employee or group of employees shall have the right at any time to present grievances to their employer.

This adopts the so-called majority rule which was read into Public Resolution No. 44 and into Section 7(a) of the Recovery Act by the predecessor National Labor Relations Board. In one respect, it may go beyond the decisions of the earlier Board, which imposed no limitations upon the individual's right to bargain with his employer. Under Section 9(a) of the new Act, the single employee's right is limited to "*grievances*," while collective bargains, in respect of *wages*, *hours of employment*, *and other conditions of employment*, are confined to the representatives chosen by the majority. Although the language is not clear, it is the apparent intent of the Act to give binding effect to collective bargains negotiated by such representatives, even where such bargains would be clearly contrary to the desires of individual employees or minority groups. The latter are permitted to present grievances, that is, to make individual complaints, to their employer, but they cannot oppose the will of the dominant group.

If we combine this with our previous observations concerning national labor unions, it follows that a particular employee or group of employees, opposed to national labor unions, may find themselves without representation unless they submit themselves to membership. In the last analysis, their wages, their hours of employment and their conditions of employment will be governed, not by their particular demands, but by the desires of the union which represents a majority of their fellow employees. To this extent, the dissenter's freedom of contract is seriously abridged and his employment converted into a form of involuntary servitude. This unique result is entirely new in our law.

Our existing system attempted a policy of "hands off" toward labor unions. Their activities have come to be recognized as lawful and their objects considered socially and economically proper. The law has told them that they may represent their members, wherever situated, and may carry on their organization and bargaining activities, without obstruction. Section 7(a) did not, in actual fact, enlarge the situation which existed at common law, except to the extent that it assumed jurisdiction on the part of Congress to further common law principles through Federal action. On the other hand, the National Labor Relations Act is a complete reversal of policy. It does not, of course, provide that national labor unions shall be the only adequate representatives or that they shall be the representatives in every case; it still

admits of the selection of individuals or of the plant unions or organizations. But once representatives are selected, the Act crystallizes the situation and determines that these representatives shall be the *exclusive agents of all the employees, for all purposes of collective bargaining*. It has declared, in practical effect, that whenever there are national labor organizations supported by a majority of the employees, then the minority must either yield or be deprived of representation.

Whether this is a result which is socially desirable is not for us to say. There are substantial groups of employees who thoroughly disapprove of the activities of national labor unions. The Act, in its desire to place collective bargaining on a nationwide scale, absolutely overrides the desire of these groups. It is a drastic step and, whatever its merits, it should not be taken without a thorough investigation of its propriety.

It may be suggested that the Act simply applies the ordinary political device of majority representation to labor relations. Obviously there are practical distinctions as well as theoretical. We have always recognized the principle that in government, the minority should be bound by the desires of the majority, within constitutional limits. On the other hand the right of the individual to form his own associations and to make his own contracts with respect to his livelihood has not been questioned. Similarly, if he feels that his interests lie with a particular group and chooses to align himself with that group for the purpose of protecting them, we have always considered it desirable to protect his right so to do. No one can question the right of an employee to join with his fellows in concerted action, even where it involves submerging his own individual desires in favor of the common wish. It is a far different thing, however, to force him to participate in such an association and to impose upon him representation which he has not chosen.

At the same time, the right of individual employees, and groups of employees, to select the unit of representation is taken away and vested in the National Labor Relations Board. The Board may select the employer unit, the craft unit, the plant unit, or such other subdivision, as it may consider appropriate. The contention may be made that it is thereby empowered to go beyond the employees of a single employer and select a craft or class which runs throughout a number of plants throughout the country. If such a construction should be accepted (which seems improbable), then the individual employee or dissenting group might be seriously affected by reason of the greater voting strength of other employees, working for different employers, under entirely different circumstances.

C. UNFAIR LABOR PRACTICES

From the standpoint of the employee, the most important feature in the Act is the provision establishing the majority rule, which we have just discussed. From the standpoint of the employer the most important feature is section 8 which establishes five so-called unfair labor practices, which are made subject to investigation and punishment by the Board.

Section 8 provides as follows:

It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) 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: Provided, That nothing in this Act, * * * or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

1. Interference, Restraint and Coercion

The prohibitions against interference, restraint or coercion are not new to this Act. As we have seen, smiliar langauge appeared in Section 7 (a) and in the Railway Labor Act of 1926. Under the Railway Labor Act, a similar provision received final construction by the Supreme Court in the case of *Texas and New Orleans Railway Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548 (1930). The Railway Labor Act had used the language "interference, influence or coercion" instead of the phrase "interference, restraint or coercion." The terms "interference" and "coercion" implied illegal activities on the part of the employer constituting legal duress. "Influence," on the other hand, was a much broader term and could be construed to prohibit the most peaceful acts of persuasion. Nevertheless the Supreme Court, guided by the context, placed the following construction upon the word:

* * * The meaning of the word "influence" in this clause may be gathered from the context. * * * The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. "Influence" in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls "self-organization." The phrase covers the abuse of relations or opportunity so as to corrupt or override the will, * * *.

No one can quarrel with the propriety of interdicting acts of violence, fraud or duress on the part of an employer nor can we criticize a principle prohibiting an employer from using his authority to bring undue pressure upon his employees. On the other hand, the belief is widespread that friendly communication and intercourse should not be restricted.[9] If it is proper for an employe to use every peaceful argument at his disposal to convince his employer of the desirability of labor unions as representatives of employees, then it should be that similar friendly arguments by the employer should not be denied, so long as there is no undue use of authority.

[9] Under the Anti-Injunction Act, protection against illegal picketing and coercive tactics by unionists has been largely reduced. The National Labor Relations Act similarly prohibits coercive tactics on the part of employers alone.

The managements of most industrial enterprises now recognize clearly that industry cannot afford to maintain antagonistic relations with its employees. High standards of efficiency require not only that employees shall be physically and mentally capable of their work but also that they shall be contented and satisfied with their conditions of employment. Far-sighted employers have endeavored to operate their businesses as ventures in which both they and their employees are equally interested; to that end they have sought to maintain a feeling of mutual trust and harmony. Employees likewise have found that friendly intercommunication between themselves and their employers furnishes a satisfactory method of adjusting disputes and grievances and of improving their social and economic position. It has not been the policy of the law to interfere with a relationship of this character for the law has rather proceeded on the theory that it is socially and economically desirable.[10]

The Supreme Court, in interpreting the provisions of the Railway Labor Act of 1926, apparently believed that these reasons of policy required a construction which would permit the continuation of friendly counsel and advice on the part of the employer. The old National Labor Relations Board, however, assumed a decidedly hostile attitude towards the employer. It broadened the construction of the provisions of Section 7(a) and proceeded on the assumption that the position of the employer made advice and moral suasion from him the equivalent of a command. If a similar construction is to be given to the National Labor Relations Act, then the employer will find that absolute silence on his part is the only safe course of conduct. Moreover, he will find himself faced, in many instances, with the almost impossible task of preventing subordinate officials, superintendents and foremen from discussing labor activities and organizations with the men with whom they work. Under the Recovery Act, employers, who were anxious to obey the requirements of the law, frequently found themselves embarrassed by the conversations of foremen and straw bosses, which, because of the intimate personal contact between the workmen and their foremen, could not be prevented and, in fact, were in most cases unknown to the employer. Under the new legislative act, if the construction adopted by the predecessor board is established, they will find their responsibilities in this respect greatly increased.

2. Restrictions on Employee Representation Plans

The second unfair labor practice, that is, the prohibition against "contributing financial or other support to a labor organization," is likewise based upon a belief that harmonious relations between employer and employee are unlikely. In so far as it is designed to prevent bribery or corruption, it is above criticism. Nor can objection be made to its prohibition of interference with the formation of any organization which employees may desire, providing the term interference

[10] In *United States* v. *Weirton Steel Company*, 10 F. Supp. 55 (D. C. Del. 1935), we find the following passage: "Production in quantity and quality with consequent wages, salaries and dividends, depends upon a sympathetic cooperation of management and workmen. A relation acceptable and satisfactory to both workmen and management is an essential feature of the enterprise. If satisfactory the court will not disturb it. It is said this relation involves the problem of the economic balance of the power of Labor against the power of Capital. The theory of a balance of power or of balancing opposing powers is based upon the assumption of an inevitable and necessary diversity of interest. This is the traditional Old World theory. It is not the Twentieth Century American theory of that relation as dependent upon mutual interest, understanding and good will."

receives a construction similar to that placed upon it by the Supreme Court in the case referred to above. However, when the prohibition is extended to the contribution of "financial or other support," then serious doubts may be held as to the advisability of the enactment.

It has been the policy of our law, as we have stated, to promote the harmonious adjustment of labor disputes by means of friendly intercourse between employers and employees. The law has assumed the position that it would not interfere with such relations, except to prevent the commission of violent or unlawful acts. The provision of the new legislation, like its counterpart in the 1934 amendment to the Railway Labor Act, is a step in the other direction and hearkens back to a period when a spirit of antagonism was the general rule in industrial relations.

The object of the provision is to defeat the so-called "company union." The company union, or employee representation plan, as it is usually designated, is, in substance, with minor variations, a constitutiton or plan adopted by employees, by which they may select representatives to bargain with the management on their behalf and by which they may fix the procedure to be followed by their representatives in bargaining activities. Participation by the employee is purely voluntary and concurrent membership in any organization is expressly permitted, not discouraged.[11] Participation by the employer is generally limited to an agreement, either express or implied, on his part, to cooperate with the representatives selected and to meet with them for the purpose of adjusting disputes and negotiating the demands of his employees. Many employers feel that such a plan contributes to the content of their employees by eliminating the misunderstandings which might otherwise arise, and have, therefore, as a rule, felt it their duty to co-operate with the employees and, in many instances, to pay the expenses of operating the plan. Over two million employees in the United States have given sanction to a plan of this character and have indicated their belief in its efficacy as a means of collective bargaining. Although such plans are scarcely more than a quarter of a century old in this country, they seem to have functioned with at least a measure of success.

Such plans proceed entirely on the assumption that all industry is a cooperative venture and that friendly relations are essential to the satisfaction of both employer and employees. They visualize a stage on which the employer and his employees, the latter through representatives, may meet for the purpose of considering wages, working conditions, hours of labor and other matters of mutual interest. Perhaps we have not had sufficient time to measure their actual efficacy, but it seems safe at least to say that they are founded upon a proper principle and that they are entitled to a period of fair trial.

Nevertheless, it is the object of the National Labor Relations Act to abolish these industrial enterprises at a single blow. Financial contributions to the expenses of a plan of representation or employees organization are prohibited and the burden of payment is thrown upon those who are, in all probability, least able to bear it. This, however, is not the worst feature of this provision. The phrase "other support"

[11] The legality of such a plan under the Railway Labor Act of 1926 was sustained in *Brotherhood of Sleeping Car Porters* v. *The Pullman Company* (D.S.N.D., Ill. 1934, reported in 2 Commerce Clearing House, Federal Trade Regulation Service, p. 5306) and under Section 7 (a) of the Recovery Act in *United States* v. *Weirton Steel Co.*, 10 F. Supp. 55 (D.C. Del. 1935).

supplies the key to a far more drastic device. If an employer is anxious to cooperate with his employees and yields to their demands in good grace, then he lays himself open to the charge that he contributed support to the bargaining agent of his employees. It is difficult to estimate the number of normal—even benevolent—practices of many years' standing which may now involve the employer in accusations that he has offended against the Act. An employer who has allowed representatives of his employees to use his property for meetings or elections, or who furnishes ballots or clerical or mechanical assistance may be charged with attempted domination of his employees' organizations. Contributions to picnics, payments to employees' relief and insurance funds and similar enterprises, which are customarily supervised by employee representatives, might be placed in the same class as bribery or corruption by a broad construction of this prohibition against "financial or other support." Employers who have for many years supplied recreational facilities to their employees, through the latter's representatives, may find themselves brought before the Board and charged with unlawful acts. Suppose too that employees, as they have frequently done in the past, demand that their employer contribute to the payment of part of the expenses of their association; must he refuse their demands in order to comply with the law? These are not speculative possibilities; the decisions of the previous Board and the frequently demonstrated attitude of the Government toward Section 7(a) of the Recovery Act, make them highly probable results of the new legislation.

3. Discrimination Against Unions

The third unfair labor practice to be proscribed, includes "discrimination in regard to hire or tenure, or term or condition of employment, to encourage or discourage memberships in any labor organization." This is, in substance, the provision which has been held invalid by the Supreme Court of the United States in *Adair* v. *United States*, 208 U.S. 161 (1908), involving federal legislation, and in *Coppage* v. *Kansas*, 236 U.S. 1 (1914), as to state legislation. It is also somewhat similar to a provision of the National Recovery Act, requiring the Codes to provide that "no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing." It will be observed, however, that the new legislation is far more drastic in that it may easily be construed as prohibiting discrimination not only in the matter of hiring and firing but also with respect to promotions, demotions, wages, hours and in fact any term or condition of employment.

Although the Recovery Act forbade only discrimination in the matter of employment and discharge, the old National Labor Relations Board arrogated to itself jurisdiction to characterize many other acts as constituting discrimination against union activity. In addition, although it was dealing with a statute of the most doubtful constitutionality, the predecessor Board seems at times to have proceeded on the assumption that membership in a labor union conferred a status similar to that of a civil service upon union employees, so that the employer, in discharging workmen, took upon himself the burden of

proving that their discharge was justified.[12] This attitude in many instances seriously impaired plant morale by greatly weakening the authority of the employer to impose disciplinary measures. On the other hand, employees, who were active union members, thought themselves immune from discipline and developed an arrogant attitude which seriously impaired their own efficiency and that of their fellow employees.

It has been the uniform policy of the law to accord the utmost latitude to the employer in the management of personnel, just as the employee has been assured the right to choose his own employment or to refrain from continuing in a particular employment at his discretion. Promotions, transfers and demotions have rested entirely within the discretion of the employer, the law recognizing that the utmost efficiency in management requires strong authority. The National Labor Relations Act, especially if it be administered in the same manner as the Recovery Act, will require a complete departure from traditional policies. While the right of the employee to quit, either singly or in company with his fellows, is expressly preserved by the Act, the employer will find that he risks a violation every time he discharges an employee who may be affiliated with a union. Requests to work overtime, transfers from one part of an establishment to another, reprimands, lay-offs, promotions and demotions will all involve potential complaints under the Act. The employer will be forced to maintain elaborate records of seniority, efficiency and the like in order to justify his management.

The peculiar nature of relations between employer and employees have thus far caused the law to hesitate to interfere, because of the immeasurable personal equations which may be involved. Employees are frequently employed, discharged or transferred because of recommendations of subordinate officials, whose judgment may be based, to some extent, and properly so, upon purely personal reactions. The comparative efficiency and personal adaptability of the worker, as well as his ability to handle men and devise new methods of approach, are personal factors which are extremely difficult to appraise. These elements, which render it most difficult for anyone to judge an employer's motives and conduct, have induced the law to consider that ultimately the employer should be the sole authority. The change worked by the new legislation reaches out in a different direction, and considerations of efficiency, adaptability and discipline are submerged beneath an artificial status which has no bearing upon the character of the employee.

The new legislation may be prejudicial, from the employer's viewpoint, in other respects. For example, an employer frequently finds it necessary to discharge or discipline employees, to eliminate internal disturbances or because of theft, sabotage or the like. If, to protect himself against the charge or union discrimination, he must openly avow his reason for taking such action, he may find himself exposed to possible legal liability or at least loss of good will. Examples of this

[12] In *H. B. Rosenthal-Ettlinger Co.* v. *Schlossberg*, 266 N.Y. Supp. 762 (Sup. Ct. N.Y. 1933), the Court declared: "If that (Section 7 (a)) means that an employer may not discharge an employee for any reason, or for no reason, and in the case of any man discharged, must be prepared to show good cause for the discharge, other than the union affiliations of the man discharged, all employees who are union members have been transferred to a status equivalent to that of civil service, a result which could not have been intended. Whatever the rule of the unions may be, that is not the law of the land."

could be multiplied but it is sufficient for present purposes to say that an honest and reasonable mistake may place the employer under countless difficulties, ranging all the way from a potential libel action to a public reputation for injustice to employees, if, to avoid liability under the Act, he must be prepared to give a public accounting of every exercise of discretion.

It is significant that after prohibiting discrimination against labor organizations, the statute expressly sanctions a "closed shop" contract with any labor organization (other than those assisted or supported by employers). The employer cannot say to an employee that he must not join a labor organization, but he can bind himself to require his employees to join such organizations. Until this Act, it was the policy of the law to permit the employer the utmost discretion in employing and discharging employees; by the same token the law sanctioned the right of every employee to join any organization which he might desire or to remain aloof. In the enactment of the Wagner Act, this conception has somehow fallen by the wayside. Employees may be forced to join labor organizations, to submit themselves to their rules and regulations and to contribute to their funds, if their employer so directs. This provision is a handy supplement to the majority rule announced by the statute; when an organization becomes the exclusive representative of all the employees, it will find itself in a strong position to compel the minority to come within its fold or be deprived of employment. There are economists who argue that the closed shop is a desirable institution in labor relations but the law has always thought that the restriction it imposes upon the freedom of employees is too great to warrant attaching to it the sanction of the law.

4. Discrimination Because of Testimony Under the Act

The fourth unfair labor practice prohibits discrimination against an employee because he has filed charges or given testimony under the Act. This, of course, provides another restriction upon the employer's authority over his personnel. However, the motive which lies behind it is entirely proper; the only undesirable feature is that it may be administered in a careless way. Under the reign of the preceding labor board, it sometimes happened that employees who had given testimony returned to their work, secure in the belief that they were thenceforth immune from discharge irrespective of their conduct and qualifications. There were malcontents who took advantage of their participation in hearings before the labor boards to defy their employers and, unfortunately, many of the Regional Boards supported them.

5. Compelling the Employer to Bargain

The fifth unfair labor practice is almost staggering in its novelty. It is made an offense against the Act for an employer "to refuse to bargain collectively with the representatives of his employees." This is not only new in the field of labor relations but it is a provision whose counterpart cannot be found in any branch of law. The right of employers and of employees to make their own terms has hitherto been sanctioned. Section 7 (a) did not alter this age-old policy; while it attempted to insure to the employees the right to unite in bargaining, it placed no obligation upon the employer to enter into any negotiations

or to make any contracts. Nevertheless the old Labor Board, in a series of decisions, held that the employer was required to enter into negotiations with his employees. While it did not go so far as to require that a contract must ensue in every case, the Board found that the failure of the employer to enter into a definitive contract was evidence of bad faith in negotiation. Illustrations of the length to which this provision may be pressed are sufficient to reveal its hazardous character. Suppose that a group of employees demands a 50% increase in wages, in response to which, the employer, at the outset of negotiations, announces that under existing conditions, any increase is impossible. If he continues to adhere to his position and refuses to make any concessions, then it might be justly argued that he had refused to bargain, for the idea of bargaining generally involves a certain amount of yielding on both sides. Similarly, if the employer should voluntarily accede to a 20% increase, without commiting himself to maintain it, it might be found that in failing to enter into a definitive agreement, he had not fulfilled his obligations to bargain. These unusual results were at least implied by some of the decisions of the predecessor Board and, under the positive enactment contained in the National Labor Relations Act, they have become probable rules. Of course, we do not infer that the Act requires the employer to yield to every demand of the bargaining agents, however unreasonable; but, on the other hand, it is clear that there is an *affirmative obligation* placed upon the employer, which has not hitherto existed in our law.

Where this new conception will lead, it is difficult to say. If the closed shop contract, which is sanctioned by the Act, is demanded and the employer steadfastly refuses to sign such a pact, may it not be said that he is not bargaining with his employees? If he feels that his business will not stand increased wages or decreased hours, and announces flatly that he cannot yield to collective demands, may it not be charged that he is offending against the statute? If he wants to call a group of his employees together and talk to them about working conditions and the like, may he not be haled before the Board for ignoring the chosen representatives?

It may be observed from the foregoing that the Act is primarily directed against the employer. There has been no attempt to proscribe unfair practices, such as unlawful picketing, sabotage, misrepresentation or intimidation, on the part of labor organizations or employees. The pattern provided by English labor legislation and by the principles announced by the War Labor Board, which worked both ways, has been neglected and the burden of responsibility placed upon the employer alone. It is interesting to observe that the Anti-Injunction Act, which has been in operation for but a few years, is an expression of a similar policy, in its restrictions on the power of courts to prevent unlawful picketing and similar activities. Again, in a larger sense, the new legislation binds only the employer, for the right of the employee to strike and set at naught the rulings of the Board and the contracts of his representatives, is expressly preserved.

IV. The Power of Congress To Enact the National Labor Relations Act

A. CONSTITUTIONAL CONSTRUCTION

Any investigation of the power of Congress to promulgate particular legislation relating to interstate commerce is inevitably beset, at the outset, by a confusion of two distinct, but, nevertheless, intimately connected issues.[13] To a layman, the distinction may at times be most elusive of comprehension. Nevertheless, we believe that it is necessary to attempt definitions of these two inquiries and to enlighten them with illustrations drawn from the decisions of the Supreme Court. The two inquiries may perhaps be described as follows:

1. Has Congress, in enacting the particular statute, so exceeded its limitations that the statute is inherently invalid?

2. Assuming that the statute is not wholly and inherently invalid, to what subjects and to what extent may it be constitutionally applied?

The *Schechter* case provides an interesting illustration of the distinction between the two issues. The code making power of the President, under the National Recovery Act, was not in terms confined to industries or businesses engaged in interstate commerce, nor were the subjects of the codes themselves required to be limited to regulations of the movement of commerce. Nevertheless, in defining the punishment to be meted out for code violations, the Recovery Act declared:

> Any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor * * *.

The *Schechter* case involved an attempted application of code provisions to the purely local activities of a New York poultry dealer. Although the Code provisions were, in terms, broad enough to apply to such activities, the Court found that the Constitution would not allow their application to subjects which were not a part of interstate commerce. The Court did *not* decide, as some would have us believe, that the Recovery Act was, on its face, invalid as a Congressional usurpation of jurisdiction over subjects not in interstate commerce; it simply tempered the construction to be given the scope of the Recovery Act by referring to constitutional requirements.

We may contrast with the ruling in the *Schechter* case an earlier decision of the Supreme Court in the *Trademark Cases*, 100 U.S. 82 (1879). The Trademark Law was analyzed by the Supreme Court and found to apply, in terms, to purely local business; this, the Court considered, was an unwarranted use of Congressional power. The opinion declares:

> If its main purpose be to establish a regulation applicable to all trade, or to commerce at all points, especially if it be apparent that it is designed to govern commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided in Congress.

This duality of problems may easily impair the clarity of our treatment of the National Labor Relations Act. Accordingly, and to hold confusion to a minimum, we have considered it advisable to stress the question of the constitutional application of the Act, rather than that

[13] The next section of this report will consider the statute from the standpoint of compliance with the requirements of the due process clause of the Fifth Amendment.

of its inherent validity or invalidity.[14] This, we believe, will satisfy readers who are primarily concerned with the scope and effect of the statute in its immediate application to their own particular interests. Others who have a more academic interest in the results of our investigation will bear the distinction in mind throughout and will realize that, in practical effect, our conclusions may be applied with equal facility to both issues.

B. SCOPE OF THE ACT

It should be noted at the outset that the Act endeavors to stay within the restraints of the commerce clause in terminology, and yet, at the same time, struggles to cover a large expense of territory. Its operations are not confined to transactions in interstate commerce, but literally reach to all matters "*affecting commerce*," by using this somewhat novel conception of constitutional law, which has been given currency by similar expressions in the National Recovery Act.

To appreciate the scope which Congress has attempted to give the statute and the meaning which it seeks to apply to this phrase, "*affecting commerce*," we must begin with the Declarations of Policy contained in Section 1 of the Act, and entitled, "Findings and Policy." It is noteworthy that almost every item of recent legislation which purports to cover territory hitherto considered not subject to occupation by Congress, begins on a similar note. It is hard to resist the opinion that such declarations have a slight taste of intellectual dishonesty about them, as though Congress, conscious of its limitations, had sought to secure constitutional validity by proclamations that there is grave need of action on its part.

This Declaration of Policy is, in substance, a somewhat extended syllogism, neatly unraveling itself to a final conclusion that Congressional action is necessary in labor controversies, to insure protection to the movements of commerce.

The first proposition is advanced that employers and employees are at unequal levels with respect to bargaining powers. To place them on equal footing, the remedy is suggested that employees be permitted to organize and exercise their bargaining power through organizations, a form of economic concentration already available to employers. The next step in the syllogism is that, if employers do not recognize this right to organize, and if they do not bargain with employees on a collective basis, then strikes and industrial controversies are inevitable. At the same time, employees are handicapped in their efforts to secure an adequate return for their labor and are seriously impeded in demanding and negotiating improvements in working conditions.

The third premise declares that these conditions, if permitted to continue, will materially impair the movement of commerce among the several States by leading to strikes, lockouts, and decreased purchasing power. Finally, from these fateful antecedents, the conclusion is

[14] The Act provides in Section 15: "If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act or the application of such provision to persons or circumstances, other than those as to which it is held invalid, shall not be affected thereby." This may be sufficient to relieve the Act of the taint of invalidity, for it intentionally invites a construction which would apply it only to subjects which it can legally reach. Normally, however, the only effect of such a clause is to remove the presumption of legislative intent, which would otherwise obtain, that if part of the Act or its application be deemed illegal, the balance should likewise fall. It will not save the legislation if the unconstitutional portions are essential to achieve the object of the Act. *Williams* v. *Standard Oil Co.*, 278 U.S. 235 (1929).

drawn that it is the policy of the United States to remove obstructions to commerce by assuring to employees the right to organize and bargain collectively.

The statute then puts its argument to work by defining the term, "affecting commerce," as—

> In commerce, or burdening or obstructing commerce, or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce, or the free flow of commerce.[15]

In our analysis of the Act itself, we have pointed out that while the Act literally applies to almost all employers and employees, its enforcement is, nevertheless, confined to transactions "*affecting commerce*." The right to organize and bargain collectively is confirmed in the most general terms, and all employers are instructed, without limitation, to refrain from interference and from certain defined unfair trade practices. Despite this generality, the Act is administered exclusively through the National Labor Relations Board, and the administrative agency cannot take action unless the controversy or question "*affects*" commerce.

Where does this novel conception of commerce lead us? As a simple illustration of its potentialities, we may take the case of a business which cannot, under any circumstances, be classified as engaging directly in commerce among the several States.

A grocer in a small city in the State of New York purchases his stock in trade from a jobber in the same location and delivers the merchandise at retail to customers within a radius of a few miles. The goods are not shipped to his place of business in interstate commerce, nor does he sell or deliver across State lines. We will say that he employs three drivers, who join a truckdrivers' union. Their representative approaches the grocer and demands an increase in wages, to which the grocer replies that he would prefer to deal with his own employees, whom he has known intimately for many years. The union calls a strike, which lasts for one week. As a consequence, the grocer loses a week's sales and buys less from the jobber, whose purchases from a wholesale fruit dealer in the State of California, are correspondingly reduced. Interstate commerce, as a result, has been slightly affected: at least, the current will shift to a different grocer and perhaps a different jobber. Or we may look at the problem from another angle.

The drivers lose a week's wages and buy less supplies from a department store which imports its merchandise from the State of New Jersey. Again there has been an effect, or to use Justice Cardozo's words, a "distant repercussion," on interstate business. Looking at the example again from another aspect, we may suppose that the drivers refuse to go on strike and resign from the union. Although no controversy has been realized, there was a situation which *might* have led to a labor dispute, which *might* have led to a strike, which *might* have led to a loss of wages, which *might* have led to a decrease of purchasing power, which *might* have resulted in a decrease of sales, and, therefore, of importation. This monotonous succession of "mights"

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[15] The definition of "commerce" itself is the usual one: it is defined to include "trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any territory of the United States, and any State or other territory, or between any foreign country and any State, territory or the District of Columbia, or within the District of Columbia or any territory, or between the points in the same State, but through any other State or any territory, or the District of Columbia or any foreign country."

indicates the extent to which the conception may be driven. If the drivers had destroyed the property of the grocer, we would have expected the law of the State of New York to deal with them. Similarly, if the grocer had assaulted his employees, he would have been held responsible to the local authorities. But, apparently, when the employees merely argue with their employer, the situation calls for the intervention of Congress.

If the conception is driven to its logical extremes, it becomes difficult to discover any act or transaction which cannot be said to have some effect on interstate commerce. An illustration of its flexibility is supplied by the argument of the Government in *United States v. Mills*,[16] a case arising under the National Recovery Act. The case had its origin in criminal proceedings against a retail gasoline dealer in Hagerstown, Md., for violations of the Code of Fair Competition for the petroleum industry. The offense charged was that the defendant had disobeyed code prohibitions against giving premiums with sales of gasoline at retail. The Government's case was based upon a series of speculative possibilities, which may be summarized as follows:

1. Defendant's practice tended to destroy the stability of gasoline prices in Hagerstown, Md.;

2. A price war in Hagerstown might extend beyond the particular locality;

3. If it did reach beyond Hagerstown, it might, by lowering retail prices, in turn lower the refinery price, which in turn would react unfavorably on producers' prices; and

4. It might ultimately result in lowering prices to such extent that "stripper" or lean wells in certain States would be unprofitable to operate, thereby shifting the bulk production to the "flush" wells of Texas, Oklahoma, and California.

This succession of possibilities was deemed insufficient to supply the groundwork for Congressional regulation. The Court declared, in substance, that the line between Congressional and State legislation, although flexible to a limited extent, could not be moved across broad territories by an imaginative version of the facts.

This is the new and novel conception of interstate commerce, we are told, that everything bears upon commerce and, therefore, affects it. Yet there is no magic in the term "*affecting commerce*," and surely its occasional appearance in judicial utterances cannot override the direct holdings of a steady growth of constitutional decisions. Its origin is traced, in the opinion in the *Mills* case, to the use of the phrase "concerning commerce," by Chief Justice Marshall in *Gibbons* v. *Ogden* (9. Wheat. 1), and to certain language of the present Chief Justice in the *Minnesota Rate Cases* (230 U.S. 352) where the latter remarked:

> The words "among the several States" distinguish between the commerce which concerns more States than one, and that commerce which is confined within one State, and does not affect other States.

Of this origin of the phrase, Judge Chesnut said in the *Mills* case:

> It is, however, an unsound rule of construction, which imports a meaning into a particular phrase in a judicial opinion, divorced from its context, and we must remember that *Gibbons* v. *Ogden* and *Minnesota Rate Cases*, in which the particular wording appears, were essentially cases dealing with physical interstate movement by ship and by rail.

[16] 7 F. Supp. 547 (D.C. Md. 1934).

The use of a word or phrase, however dramatic or effective, cannot alter settled conceptions of commerce, as the Constitution and the Supreme Court have fixed them; nor is it intellectually helpful to speak of modern conceptions or of "horse and buggy" ideas in approaching the problem of Congressional powers. However sensitive to local activities interestate commerce may have become, that cannot alter the provinces of the State or Federal Governments one whit, nor change that which is not interstate commerce into that which is.[17]

C. BUSINESSES TO WHICH THE ACT MAY APPLY

Because of the apparent scope of the statute as we have outlined it, a comprehensive discussion of its constitutional application demands consideration of a variety of factual situations to which the Act might, in terms, apply. Of course, the possible factual cases are so numerous that it would be impossible to consider each one; some rough classification is essential. Perhaps five suppositious cases will cover the subject with substantial, if not theoretical, accuracy. We may suggest the following:

I. Businesses[18] engaged in or connected with the transportation of articles or communications in interstate commerce, such as carriers, express agencies, transport and shipping companies, telegraph and telephone corporations and similar agencies.

II. Businesses engaged in mining, manufacturing, producing, processing, or selling commodities which are thereafter transported, by independent agencies, in interstate commerce.

III. Businesses engaged in manufacturing, processing or selling materials which are received in a finished or unfinished condition from other states.

IV. Businesses simultaneously engaged in both of the activities described in Groups II and III; that is, importing materials and selling finished articles in interstate commerce, either with or without subjecting them to processing or manufacturing.

V. Businesses which neither import materials or commodities nor export them, but which are engaged in local activities, which exert some indirect influence or effect on interstate commerce, whether such businesses involve purchasing, manufacturing or selling commodities, or supplying other and more intangible services. This group will be found to embrace the bulk of the retail trade, together with a large portion of the processing industries and enterprises supplying intangible services.

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[17] The use of this conception in the Recovery Act was perhaps aided by the emergency character of the legislation. The argument was made that, because of the business depression, interstate commerce was in a disorganized state; that wholesale pricecutting, wage decreases and other unwholesome trade practices had seriously impeded the movement of the trade. The conclusion was then advanced that Congress could, with propriety, protect the movement of commerce by removing local evils which tended to impede it. This is, of course, irrelevant to the Labor Act, which is designed as permanent legislation. Even so, it may be desirable to note that Federal Power is strictly defined by the Constitution and there is no reason to believe it can be enlarged by an abnormal factual situation. *A. L. A. Schechter Poultry Corporation* v. *United States*, 55 Sup. Ct. 837 (1935).

[18] With the exception of Group I, the industries defined will be found to be businesses in which *the bulk* of the employees are engaged in local activities, which have nothing to do with the interstate movement of persons or things. Of course, even in such cases, some of the employees may actually participate in the movement. For example, in a large manufacturing plant, some of the workmen may be engaged in loading articles for shipment to other states. This incident of their employment should not alter the fact that their relations with their employer are primarily local in character. In addition, it would be futile to attempt to apply the Act in piecemeal fashion; either it must apply generally to the relations between an employer and all his employees, or it will be entirely ineffective.

These classifications are obviously not exhaustive. Group V is, on its face, subject to further subdivision into almost an infinite variety of specific cases. However, the nature of our argument will reveal that for purposes of applying the doctrines of constitutional law, the grouping is fairly satisfactory.

D. INTERSTATE TRANSPORTATION

It may be observed that the groupings which we suggest are so arranged that the probabilities of successful Congressional regulation diminish with each step, as the activities sought to be regulated lose proximity to the actual subject of congressional power, that is, interstate commerce. The first classification, which comprises the instrumentalities of interstate commerce, seems to supply the most fertile field for valid Congressional regulation; nevertheless, even here there are obstacles to valid action.

Inasmuch as the most important factor in the first group, that is, the railroad industry, is not subject to the National Labor Relations Act, but rather to the Railway Labor Act of 1926, it will not receive the same extended consideration which will be given to the other groups. However, since the problem here differs only in degree from the problems arising under the later groups, it cannot be completely neglected.

The transportation of persons and commodities between states is, of course, the very essence of interstate commerce. As a consequence, Congressional regulation of rates, transportation facilities, equipment, personnel and related matters, has been uniformly sustained. It would be, indeed, difficult to find a more comprehensive and thorough body of legislation than that developed in the halls of Congress to govern the operations of carriers and communication systems.[19] Nevertheless, even in this broad field of federal activity, the Supreme Court has declared that there are frontiers. Practically unlimited regulation of matters which are actually and directly connected with commerce, the Court has declared, is admissible; but regulation of disconnected activities, even of businesses admittedly engaged in interstate commerce, is still not a proper Congressional function.

The Employers Liability Cases (*Howard v. Illinois Central Railroad Co.; Brooks v. Southern Pacific Company*, 207 U.S. 463 [1908], were decided at a time when Congress had undertaken a policy of comprehensive regulation of interstate carriers. Nevertheless, the decisions came as a warning in unmistakable terms that the power to supervise interstate commerce did not imply the power to speak on every related subject, however tenuous the connection might be. The statute drawn in question was the Federal Employers Liability Act of July 11, 1906, which provided for the liability of common carriers engaged in interstate commerce, for accidental injuries or deaths of their employees. Actions were brought under the Act to recover damages for the deaths of employees actually engaged in the movement of interstate commerce at the time of the accidents. The Supreme Court, nevertheless, after an analysis of the statute, determined that its application

[19] The breadth of railway legislation is, of course, partially attributable to another cause. Railroads are classed as public service corporations, which, by virtue of their public obligations, are required to continue operations, if the government shall direct it. This power to compel operations carries with it wide latitude to enact all manner of regulations to prevent interruptions and to increase the probabilities of continuous service. Compare *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522 (1923).

was in terms extended to injuries sustained by employees of interstate carriers while engaged in activities not involving the movement of interstate commerce. As a result, the Court held that although the Act embraced subjects within the authority of Congress, it also applied to matters not within its constitutional powers, and that the two applications of the statute were so intermingled that they were not capable of separation. The statute, as a whole, was, therefore, declared invalid.

Proponents of the statute argued vigorously that, by engaging in interstate commerce, the carriers had subjected themselves to all manner of Congressional regulation. Most significant, for present purposes, was the Court's reply, for in answer to this argument it stated:

> To state the proposition is to refute it. It assumes because one engages in interstate commerce, he thereby, endows Congress with powers not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely state concern. * * * It is apparent that if the contention were well-founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures.

At the same term of Court, provisions of the Erdman Act of 1898 were summoned before the Supreme Court in *Adair v. United States*, 208 U.S. 161 (1908). It will be recalled from our preceding summary of this railway legislation that one of its principal features was its punishment of discrimination in the matter of employment against union members and its proscription of so-called "yellow dog" contracts. The Court not only found that the section was an illegal interference with the freedom of contractual relations between employer and employee,[20] but also declared that it was not a proper subject for congressional action. Even although it applied to carriers and employees engaged in the interstate transportation of goods and passengers, the Court declared that the regulation itself was not a regulation of commerce, but constituted an effort on the part of Congress to affix its legislation to a purely local thing, that is, the relation between the employer and employee. In this connection, the Court stated:

> But what possible legal or logical connection is there between an employees' membership in a labor organization and the carrying on of interstate commerce. Such relation to a labor organization cannot have, in itself and in the eye of the law, any bearing upon the commerce with which the employee is connected by his labor and services.

So far as we can ascertain, this part of the Supreme Court's ruling has never been overruled. Some advocates of labor legislation have believed that the Court revealed a reversal of philosophy in later deci-

[20] This problem will be referred to in the last section of the Report.

sions involving railway labor legislation. Certainly the decisions under the Transportation Act of 1920 had no such effect.[21]

Critics of the *Adair* case place great reliance on *Texas and New Orleans Railroad Company v. Brotherhood of Railway and Steamship Clerks, et al*, 281 U.S. 548 (1930). This case arose under the Railroad Labor Act of 1926, which, as we have already indicated, set up machinery for the voluntary adjustment and arbitration of labor disputes before boards of adjustment and boards of arbitration. The plaintiff union had a controversy with the Railroad before a board of adjustment and, pending the decision, the defendant Railroad fostered the formation of a rival union by indulging in alleged coercive and oppressive tactics. The union then brought injunction proceedings under the section of the statute which declared that "representatives, for the purposes of this Act, shall be designated by the respective parties * * * without interference, influence or coercion, exercise by either party over the self-organization or designation of representatives by the other." The lower court granted an injunction and expressly held that the statute was constitutional, questioning the *Adair* case. The Supreme Court of the United States, in referring to the measure as a regulation of commerce, declared, "* * * Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation." It held, in substance, that the only compulsion put upon the carriers by the Act was to refrain from interfering with the designation of representatives by employees. The Court noted that the Act did not compel the carrier to deal with the union, nor to employ union members. In so holding, the Court stated:

> 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

[21] The labor provisions of this Act came before the Court in two cases. *Pennsylvania Railroad Co.* v. *U.S. Railroad Labor Board*, 261 U.S. 72, 43 S. Ct. 278 (1923) involved an attack by a carrier upon the labor provisions of the Transportation Act of 1920, a statute which we have summarized in the preceding section of this report. The Act did not directly define principles of collective bargaining, but simply provided for methods of adjusting controversies between carriers and their employees. The Labor Board, created under the Act, was empowered to take jurisdiction over disputes under certain circumstances. The Board, in the exercise of its rule-making powers, promulgated certain principles of representation, one of which ordained that an organization chosen by a majority of employees should represent the entire group. The Board also announced the principle that the choice of representatives should be made without interference from the carriers. The Pennsylvania Railroad contested the right of a union to represent its employees and the Labor Board, after taking jurisdiction of the dispute, decided the case adversely to the Railroad, which then, in injunction proceedings, contested the validity of the legislation on the ground that it required the Railroad to recognize a labor organization. The Supreme Court upheld the statute, but it did not pass upon its constitutionality from the standpoint of congressional power over interstate commerce. The Court simply took the position, which it later affirmed in *Pennsylvania Railroad System, etc.*, v. *Pennsylvania Railroad Co.*, 267 U.S. 203, 45 S. Ct. 307 (1925), that the legislation had not affected any legal rights of the carrier. The basis for this conclusion was that the Board had no statutory power to enforce its orders, Congress having provided that the only machinery for enforcement should be by means of publicity given to the decision. In the later decision the Union attempted to enjoin a conspiracy on the part of the Railroad and its officers to defeat the provisions of the Transportation Act by interfering with the rights of employees to select the plaintiff as their representatives. The Court again held that the Act did not affect any legal rights of the Railroad, and therefore, did not find it necessary to pass upon its constitutionality.

is not aimed at this right of the employers, but at the interference with 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 employees in making their selection, they cannot complain of the statute on constitutional grounds.

The foregoing indicates that in no case has the Supreme Court receded from the position which it took in the *Adair* case. The Railway Labor Act of 1926, which was involved in the *Texas and New Orleans Railroad Company* case, was not nearly so drastic as the National Labor Relations Act. It merely provided ways and means by which employers and employees could adjust and arbitrate disputes, without directly compelling either side to bargain with the other or to take any steps in the direction of arbitration. The only obligation imposed by the statute was that which required both sides to refrain from interfering with the election of representatives by the other. The Court disclaimed its intention to overrule the *Adair* case, at least on the point of due process, because it pointed out that there was no question of interference with the normal right of the carrier to employ or discharge as it saw fit.

It is still correct to say that whatever the effect of the Texas & New Orleans Railroad decision may be, it is confined solely to interstate carriers. In the interval between the Adair case and the more recent decision, labor relations between carriers and their employees were undergoing drastic changes. Frequent disputes over wages and hours of labor had greatly increased the dangers of strikes and of the cessation of operations. Because carriers are the chief instruments of interstate commerce, and because their continued operations are absolutely essential for the well-being of the public, Congress has always been accorded wide power to compel the continuance of operations.

The liberal treatment shown by the Supreme Court to the Adamson Act [22] a statute fixing the hours and wages of employees of interstate carriers, is an illustration that the situation which led to the decision of the Supreme Court in the Texas and New Orleans Railroad Company case was a factual change in the status of the railroads. Passage of time since the Adair case witnessed an increase of the power exercised by Congress over carriers and, at the same time, emphasized the need of continued operation. This power of Congress to force carriers to maintain their functions is peculiar to the field of transportation.

In *United States* v. *Chicago, Milwaukee & St. Paul R.R. Co.*, 282 U.S. 311 (1931), we find the Court again reiterating the distinction between regulations which bear a reasonable relation to interstate commerce and those which do not, in the following language:

* * * neither the Commission nor Congress itself may take any action which lies outside the realm of interstate commerce. (Citing *Hammer* v. *Dagenhart*, the

[22] In the fact of a threatened general strike, Congress passed the Adamson law, which established the 8-hour day and provided for a commission to observe its operations and to report to the President not later than nine months after its creation. To protect the employees during the preparation of the commission's report, Congress declared that wages should not be reduced below the pre-existing standard, despite the reduction in the number of hours. The Court, in *Wilson* v. *New*, 243 U.S. 332 (1917), recognized the emergency character of this legislation and upheld it on the ground that it was necessary to prevent a complete interruption of interstate commerce. In so holding, the Court stated:

"If it be conceded that the power to enact the statute was in effect the exercise of the right to fix wages where, by reason of the dispute, there had been a failure to fix by agreement, it would simply serve to show the nature and character of the regulation *essential to protect the public right and safeguard the movement of interstate commerce, not involving any denial of the authority to adopt it.*" (Italics supplied)

Child Labor Case, infra). It follows that if the condition in question relates not to such commerce, or to the rights and duties of the carrier engaged in such commerce, but exclusively to extrinsic matters, it is imposed without authority of law.

This same distinction has been repeated in the last year in the Railway Pension Case, *Railroad Retirement Board* v. *the Alton Railroad Company, et al.*, 55 Sup. Ct. 758 (1935), which held invalid congressional legislation providing a compulsory pension system for railroad employees. The Court stated, through Mr. Justice Roberts, that—

> The question at once presents itself whether the fostering of a contented mind on the part of an employee by legislation of this type is in any just sense a regulation of interstate transportation. If that question be answered in the affirmative, obviously there is no limit to the field of so-called regulation. The catalogue of means and actions which might be imposed upon an employer in any business, tending to the satisfaction and comfort of his employees, seems endless.
>
> * * * * * * *
>
> We think the answer is plain. These matters obviously lie outside the orbit of congressional power.

Of the *Texas and New Orleans Railroad* decision, the Court declared:

> The railway labor act was upheld by this court upon the express ground that to facilitate the amicable settlement of disputes which threatened the service of the necessary agencies of interstate transportation tended to prevent interruptions of service and was therefore within the delegated power of regulation. *It was pointed out that the act did not interfere with the normal right of the carrier to select its employees or discharge them. Texas & New Orleans R. Co. v. Brotherhood of Railway & S. S. Clerks*, 281 U.S. 548, 570, 571, 50 S. Ct. 427, 74 L. Ed 1034." (Italics supplied)

It is correct to say that the decisions of the Supreme Court, allowing congressional regulation of employer-employee relations, must be confined to interstate carriers and that, even in that field, congressional action will be allowed only to the extent necessary to secure uninterrupted service. The Pension decision has shown that the power over instrumentalities of interstate commerce must be limited to subjects which have some reasonable connection with commerce.

E. BUSINESSES PRECEDED OR FOLLOWED BY THE MOVEMENT OF ARTICLES IN INTERSTATE COMMERCE

The next subject of injuiry naturally includes the second and third factual situations, which we have described, that is, cases involving local activities which are preceded by or succeeded by the movement of articles in interstate commerce. The same problem as that involved in the class just discussed is repeated here but emphasis is shifted from the interstate movement to the local activities. The primary function of an interstate carrier is the transportation of goods and passengers in interstate commerce, while in the second and third classes, the most extensive functions are the local activities of manufacture, production and the like, the interstate sale and delivery or purchase and delivery being more or less essential incidents. Where a business enterprise either ships its products in interstate commerce or purchases materials from other states or abroad, it is, unquestionably, in that aspect of its business, engaged in interstate commerce. Therefore, the tenor of our inquiry must be: "Does this participation in

interstate commerce subject the complete business activities of an employer to congressional regulation?" A subsidiary inquiry, which will be considered later, is: "Assuming that an employer may be subjected to a certain amount of regulation because of his participation in interstate commerce, is the employer—employee relationship a reasonable subject of such regulation, or is it a matter which involves the domestic policies of the state?"

1. The Dividing Line Between Commerce and Local Activities

The function of Congressional jurisdiction over interstate commerce is well expressed by Madison, describing the purposes of the Commerce Clause to the Virginia convention, during the debates upon the question of the adoption of the Federal Constitution (3 Elliot's Debates, pages 259–260):

> The powers of the general government relate to external objects, and are but few. But the powers in the states relate to those great objects which immediately concern the prosperity of the people. Let us observe, also, that the powers in the general government are those which will be exercised mostly in time of war, while those of the state governments will be in time of peace. But I hope the time of war will be little, compared to that of peace. * * *
>
> All agree that the general government ought to have power for the regulation of commerce. I will venture to say that very great improvements, and very economical regulations, will be made. It will be a principal object to guard against smuggling, and such other attacks on the revenue as other nations are subject to. We are now obliged to defend against those lawless attempts; but, from the interfering regulations of different states, with little success. There are regulations in different states which are unfavorable to the inhabitants of other states, and which militate against the revenue. New York levies money from New Jersey by her imposts. In New Jersey, instead of co-operating with New York, the legislature favors violations of her regulations. This will not be the case when uniform regulations will be made.

It seems to have been the purpose of the draftsmen of the Constitution to recognize the independent sovereignty of the states and, at the same time to remove a most fertile source of jealousy and confusion among the states, by entrusting the guardianship of interstate business to the Central Government. In *Gibbons v. Ogden*, 9 Wheat. 1 (1824), Chief Justice Marshall, a strong federalist, had his first opportunity to expound his views of the congressional power over commerce and, despite his leanings towards a strong central government, he did not lose sight of the primary object of the division of power. His language was:

> It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states.

The same jurist, in *McCulloch v. Maryland*, 4 Wheat. 316 (1818), expressed the opinion that the United States was designed to be a government of "enumerated powers."

In the opening pages of this report, we referred briefly to the principle which underlies the whole problem of conflicting state and federal sovereignties. It may clarify subsequent discussion to reiterate that principle, which is that the power of Congress over interstate commerce is designed *to allow Congress to protect that commerce and to provide a uniform system of regulation, not to suffer the jurisdiction of the states over domestic affairs to be whittled away by an extension*

of federal action. If the arguments of those who demand an enlargement of federal power over interstate commerce are analyzed, it will be found that they are, beneath the surface, an attack upon our dual system of government. Dissatisfaction with our constitutional forms, whether founded or unfounded, should not be an excuse for advocating the obliteration of our political lines by the device of broad construction.

The earlier decisions of the Supreme Court under the interstate commerce clause will not reveal many instances where congressional regulation has been invalidated; until recent years, Congress made no effort to enact the far flung legislation which has characterized its later attitude toward matters of domestic policy. Consequently, almost all of the decisions are concerned with the power of the states to tax or regulate local subjects, in situations where such taxes or regulations have at least an indirect impact on interstate commerce. Nevertheless, if these decisions are subjected to scrutiny, it will be learned that there are two well settled, parallel lines of authority establishing the rule that local activities are not drawn into the current of interstate commerce merely because they are preceded or succeeded by an interstate movement. While these decisions are not directly controlling, inasmuch as they deal with state taxes or police regulations, and not congressional measures, they indicate the dividing line between interstate commerce and local transactions.

One of the earliest decisions is *Coe v. Errol*, 116 U.S. 517 (1886). The Town of Errol, New Hampshire, had imposed a general property tax upon certain logs which had been cut down in New Hampshire and were at the time being floated down the river to Lewiston, Maine, being temporarily detained in the Town of Errol on tax day by low water. The question before the Supreme Court was whether or not the New Hampshire logs, although intended for export and partially prepared for that purpose, were subject to tax in the same manner as other property in the state. The court held that the commerce clause did not relieve the logs from taxation and declared:

> Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such place why may they not be regarded as still remaining a part of the general mass of property in the State?

Just prior to the above decision, the Supreme Court in *Brown v. Houston*, 114 U.S. 622 (1885) had declared that where articles had been shipped into a state and had arrived at their destination, their interstate movement ceased, and they were no longer entitled to the protection of the commerce clause against local taxation. Many years later in *General Oil Co. v. Crain*, 209 U.S. 211 (1908) the principles of these decisions were reiterated and combined in the following statement of the Supreme Court:

> The beginning and the ending of the transit which constitutes interstate commerce are easy to mark. The first is defined in *Coe v. Errol*, 116 U.S. 517, to be the point of time that an article is committed to a carrier for transportation to the State of its destination, or started on is ultimate passage. The later is defined to be in *Brown v. Houston*, 114 U.S. 622, the point of time at which it arrives at its destination.

The lines drawn by these decisions have been continuously observed by the Supreme Court in a series of decisions extending to the present time.[23] Inasmuch as these cases have reached substantially the same conclusions, based upon substantially identical arguments, it is unnecessary to subject them to close analysis. However, for the sake of emphasis, it may be desirable to single out a few unusual decisions defining the beginning of the interstate movement and its termination.

Arkadelphia Milling Co. v. St. Louis Southwestern Railways Co., 249 U.S. 134 (1918) arose out of actions by certain shippers and railway companies to enjoin the enforcement of intrastate railway rates fixed by a State railway commission. The facts indicated, in one of the cases, that the shipper was engaged in transporting logs from its lumber operation in the state to its mills, where the logs were processed and manufactured into staves and other products and held in storage, to be sold and shipped in accordance with the demands of the market. Almost 95% of the finished articles were eventually delivered to points outside of the state. The court found that the interstate movement did not begin until the sale and delivery of the finished products, declaring:

> It is not merely that there was no continuous movement from the forest to the points without the State, but that when the rough material left the woods it was not intended that it should be transported out of the State, or elsewhere beyond the mill, until it had been subjected to a manufacturing process that materially changed its character, utility, and value.

In one of the latest decisions, *Chassaniol v. City of Greenwood*, 291 U.S. 584 (1934), the Court declared, through Mr. Justice Brandeis:

> Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each like the growing of it, steps in preparation for the sale and shipment in interstate commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a *transaction in intrastate commerce.* (Italics supplied).

Similarly in *Oliver Iron Co. v. Lord*, 263 U.S. 172 (1923), after declaring that mining "like manufacturing, is a local business", the Court added:

> Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce.[24]

The reverse situation may be seen in *Industrial Association v. United States*, 268 U.S. (1925). The defendant, an association of builders and contractors in San Francisco, in order to force the open shop on building workers in that city, devised a plan for dealing in building supplies located in or produced in California, which

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[23] See, for example:—*Bacon* v. *Illinois*, 227 U.S. 504 (1913); *Susquehanna Coal Co.* v. *South Amboy*, 228 U.S. 665 (1913); *Packer Corporation* v. *Utah*, 285 U.S. 105 (1932); *Nashville, etc., Ry. Co.* v. *Wallace*, 288 U.S. 249 (1933); *Edelman* v. *Boeing Air Transport, Inc.*, 289 U.S. 249 (1933); *Minnesota* v. *Blasius*, 290 U.S. 1 (1933), and *Federal Compress, etc., Co.* v. *McLean*, 291 U.S. 17 (1934)—all defining the end of the interstate movement; and *Cornell* v *Coyne*, 192 U.S. 418 (1904); *Crescent Cotton Oil Co.* v. *Mississippi*, 257 U.S. 129 (1921); *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922); *Oliver Iron Co.* v. *Lord*, 262 U.S. 172 (1923); and *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210 (1932)—fixing its beginning.

[24] Another decision may be briefly noted because of its unusual facts. In *Utah Light & Power Co.* v. *Pfost*, 286 U.S. 165 (1932), an action was brought to enjoin collection of a tax levied by the State of Utah on the manufacture, generation or production of electric current in the state. The Complainant transmitted current to points in other states and maintained the tax was a burden on the interstate movement. The court sustained the tax as a tax on local activity, although the production of current and its transmission are substantially instantaneous. Here the connection was most intimate between manufacture and movement but the Court did not hesitate to differentiate them.

required the sale of such supplies only to members of the association who held a permit. As a part of the plan, permits were denied to members, unless they employed one or more non-union employees on each job. All of the materials restricted by the plan were local in origin except plaster; the permit system was accordingly applied only to imported plaster which had come to rest in salesrooms and warehouses and therefore had become a part of the general property of the State. The court held that the combination was not in restraint of interstate commerce because it applied only to goods which were local in origin or which had come to rest within the State. In reaffirming the dividing line between local activities and interstate movement, the court declared:

> It is true, however, that plaster, in large measure produced in other states and shipped into California, was on the list; but the evidence is that the permit requirement was confined to such plaster as previously had been brought into the state and commingled with the common mass of local property, and in respect of which, therefore, the interstate movement and the interstate commercial status had ended.

These two parallel groups of decisions naturally converge into a third line of authority, establishing the principle that local activities such as mining, manufacturing, warehousing, processing and the like are not withdrawn from the jurisdiction of the states because of subsequent or precedent movements in interstate commerce. The first of these decisions is *Kidd v. Pearson*, 128 U.S. 1 (1888), which upheld a statute of the State of Iowa, prohibiting the manufacture of intoxicating liquors, although the prohibition applied to liquor intended for transportation in interstate commerce. The argument was advanced that the state had trangressed beyond its proper jurisdiction, because the statute restricted the movement of interstate commerce. In pointing out the fundamental distinction between local activities and commerce, the court declared:

> No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different.

Subsequently in *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895),[25] the Supreme Court reaffirmed the distinction in language which has come to be recognized as a fundamental statement of the principle: "*Commerce succeeds to manufacture and is not a part of it.*"

It is unnecessary to review later decisions which have accepted the doctrine of *Kidd v. Pearson*,[26] the rule of these cases offers powerful resistance to any extension of the interstate commerce jurisdiction of Congress under the guise of the "modern conception" of commerce to which we have adverted. Commerce has greatly expanded but there has been no real shift in emphasis from the local activities to the importation or exportation which precedes or follows them. All are essential parts of trade and business and it is both futile and absurd to

[25] While this case has been questioned in later decisions such as *Standard Oil* v. *United States*, 221 U.S. 1 (1910), the ground of attack has been that the facts did show that the object of the combination was directed against interstate commerce. The principle set forth above has, however, been cited with approval on many occasions since the Knight case. See, e.g., *United States* v. *Chicago, M. & St. P.R.R. Co.*, 282 U.S. 311 (1931).

[26] A few of them are: *United Mine Workers* v. *Coronado Coal Company et al*, 259 U.S. 344 (1922); *United Leather Workers* v. *Herkert & Meisel Trunk Co.*, 265 U.S. 457 (1924); *Delaware, Lackawanna & Western Railroad Co.* v. *Yurkonis*, 238 U.S. 439 (1915). A late case is *Champlin Refining Co.* v. *Corporation Commission, etc.*, 286 U.S. 210 (1932), which upheld the Oklahoma Oil Curtailment Act, over the contention that restriction of production impeded the movement of interstate commerce.

speak of one as dominating the other. The only fair conclusion that we can reach is that the allocation of power required by the constitution must be pursued while the constitution requires it. Where either state or federal jurisdiction attempts to use its power as a pretext to interfere with matters which are subject to the other, then the effort must be stricken down. For this reason, a state cannot use its taxing powers or its police powers to discriminate against interstate commerce, and by the same token, Congress cannot use its power over commerce to intrude into local policies.

The decisions, which we have described, are, for the most part, concerned with state police and taxing measures, but that may be attributed to the fact that Congress has not until recently attempted to interfere in matters which do not concern it. Even so, these decisions are controlling because they in terms acknowledge the exclusive sovereignty of the states. For example, in *Kidd* v. *Pearson*, the court, while it dealt only with a state police regulation, rested its opinion upon the belief that, if the state law were stricken down, then the jurisdiction of Congress would be greatly enlarged at the expense of the state. Thus, we find the court stating:

> If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. *The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry.*" * * * The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are and must be local in all the details of their successful management. (Italics supplied).

This same argument was repeated by the Supreme Court in *Heisler v. Thomas Colliery Co., et al.*, 260 U.S. 245 (1922), upholding a state taxing measure, where the court declared:

> The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty of exportation of a product or article from a State determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. *It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth*, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production. (Italics supplied).

It was this danger of the destruction of the powers of the States which evoked the following statement of the Court in the *Schechter* case:

> But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control.

2. The Child Labor Cases

The decision of the Supreme Court in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), must be given careful consideration, in fixing the jurisdiction of the central government. It involved an attack upon the validity of an act of Congress which prohibited the transportation in interstate commerce of articles produced in manufacturing establishments in which, within thirty days prior to the interstate shipment, children under the ages of fourteen to sixteen had been permitted to work. However worthy the motives of Congress may have been, the statute was a flagrant attempt to use its jurisdiction over interstate commerce to force a police measure upon the States. This was fatal to the legislation; the Court declared:

> The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.
>
> In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. *Lane County v. Oregon*, 7 Wall. 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government.

In summarizing its conclusions, the Court stated (p. 276):

> Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.

This case is sometimes popularly referred to as a five to four decision and its authority questioned upon that ground. It is proper to point out that the soundness of the decision is questioned chiefly by partisans, who, in their desire to accomplish the laudable purpose of abolition of child labor, are impatient of a decision which runs counter to their ends. However, even this criticism is inapplicable here because it may be justly said that, on the point of Congressional powers, the decision is the *unanimous decision* of the Supreme Court. Critics of the prevailing opinion usualy rely upon the dissenting opinion of Mr. Justice Holmes, which was approved by Justices McKenna, Brandeis and Clark. The dissenting opinion was not based upon the proposition that the Federal Government had the right to control labor conditions in the States but upon the notion that Congress, in the exercise of its power to regulate commerce, could prohibit the movement across state lines of any goods, for any reason, good or bad, or for no reason at all. Justice Holmes declared:

> The objection urged against the power is that the States have exclusive control over their methods of production and that Congress cannot meddle with them, *and, taking the proposition in the sense of direct intermedling, I agree to it and suppose that no one denies it.*

Whether or not we agree with Justice Holmes' belief that Congress can prohibit the movement of commodities for any reason, it is correct

to say that all the justices were in substantial agreement in condemning Congressional intermeddling in the domestic policies of the State. The decision has been bitterly attacked but it is difficult to understand why and honest critic should disagree with the conclusion of the Court. If the Court had denied validity to child labor regulations on the basis of the due process clause, there would have been reason to attack the decision as an unnecessary interference with legislative discretion, but the Court, in the Child Labor case, did not concern itself with the philosophical or economic basis of the statute and perhaps had no right to do so. The decision was required by our political charter and the Court simply refused to be blinded by a legislative pretext. This is indicated by a later decision of the Supreme Court in *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), where the Court was again forced to strike down an attempt by Congress to regulate child labor within the States through the device of a prohibitory tax. Again the Court penetrated the disguise of the taxing measure and found that it was in substance a police regulation which Congress had no authority to enact.

3. Employer-Employee Relations

The distinction which we have emphasized between the local activities of a business and its subsequent or precedent participation in interstate commerce has been maintained in the field of labor relations. It was because of this that the first Federal Employers Liability Act was invalidated in *Howard v. Illinois Central Railway Co.*, 207 U.S. 463 (1908). The Act, as we have pointed out before, literally applied to employees who were not actually engaged in interstate commerce; therefore the Supreme Court found that Congress had exceeded its powers.

The distinction drawn in that case has been frequently re-affirmed by the Supreme Court in decisions under the second Federal Employers Liability Act, which was, in terms, limited to employees engaged in interstate commerce at the time of the accident leading to their death or injury. The second Act, although upheld by the Supreme Court, has been consistently confined in its application to employees engaged in interstate commerce. Thus, in *Delaware, Lackawanna, Western Railway Co. v. Yurkonis*, 283 U.S. 439 (1915), the Act was held inapplicable to an injury sustained by an employee who was at the time working in mines owned by the Railroad Company, producing coal which was to be used in locomotives in interstate commerce. The Court declared

> The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce after the same was mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce.

Subsequently, in *Shanks v. Delaware, Lackawanna & Western Railroad Co.*, 239 U.S. 556 (1916) an employee who was injured in erecting a shop fixture in a machine shop of an interstate carrier was referred for redress to the state compensation laws. Still later in *Industrial Accident Commission v. Davis*, 259 U.S. 182 (1922), the same principle was reaffirmed in its application to injuries sustained by an employee while working in the general repair shops of a railroad company upon a locomotive which had been and would be employed in interstate commerce.

These decisions, although they involve the construction of a statute, nevertheless establish that the distinction which has been emphasized will be applied to differentiate employees who are engaged in interstate commerce and those who are not.

There is still another factor which prevents interference in the field of labor controversies. Even assuming that participation by an employer in interstate commerce might subject certain of his activities to congressional regulation, nevertheless the relationship between the employer and his employees is purely a local matter. Although an employee may be employed in assisting the movement of interstate commerce, his relationship to his employer is not a part of commerce. It is a status existing wholly within the State, whose incidents, such as wages, hours or labor and the like are purely domestic in character. The National Labor Relations Act, although it speaks in terms of interstate commerce, is in actuality, a regulation of industrial relations. It is one thing for Congress to enact wage regulations to insure continuity of interstate movement, as it has done in the case of interstate carriers, and an enirely different thing to use the interstate movement as a pretext to intrude in the field of the States. The Supreme Court has upheld congressional regulation of the local incidents of employment in the railway cases, where it has found the true object of Congress to be the protection of interstate commerce. But we do not believe it will permit such interference where the real purpose of the regulation is deliberately to interfere in matters which are not the concern of the Federal Government. If the proposition should be accepted that the most insignificant participation in interstate commerce subject all of the activities and all of the relationships of an employer to congressional measures, then there would be nothing to prevent congressional entry into the field of fire and building regulations, safety requirements, and a thousand similar measures, local in character. Yet no one would argue that regulations governing the erection and operation of factories, the hours and wages of employees, and the conditions of safe employment should be functions of the central government.

The decisions of the Supreme Court on this point are few because for the most part, Congress has realized its own limitations. The case of *Adair v. United States*, which we have already discussed, however, did establish the rule that the organization or union affiliations of employees of interstate carriers bear no reasonable relation to the interstate activities of such carriers.[28]

If the railway labor legislation is broadened out into general definitions of the right of collective bargaining to govern all industries and if Congress reaches beyond businesses in which it has a right to dictate continuity of operations, then the connection between commerce and industrial relations becomes very tenuous. The fate of the Railway Pension Act has been a warning that, even in its own territory, Congress cannot enact measures which have no reasonable relation to interstate commerce. It is a justifiable conclusion that it is under a similar disability when it attempts to gather all businesses into its fold.

[28] See the discussion of this decision and similar cases, *supra*, pages 57 to 64.

F. BUSINESS IN THE STREAM OF COMMERCE (GROUP IV)

The principles governing the fourth group of factual situations which we have outlined flow naturally from those already stated. If importation and exportation in interstate commerce do not singly transfer purely local activities into the field of congressional regulation, it should follow that their combination would not alter the legal situation. It is difficult to find Supreme Court decisions relating to this unusual factual situation, but lower court decisions are plentiful. One of them, *Federal Trade Commission v. Claire Furnace Co., et al.*,[29] 285 Fed. 936 (1923) involved an action by several companies engaged in manufacturing and mining to restrain the enforcement of an order of the Federal Trade Commission requiring the submission of comprehensive reports of the complainants' operations. A number of the complainants were engaged not only in manufacturing and selling steel products, but in mining coal and iron ore which was shipped across state lines to their manufacturing plants. The Court of Appeals of the District of Columbia analyzed the business operations of the complainants and found them not subject to the requirements of the Federal Trade Commission, declaring:

> Three separate and distinct operations are involved: First, the shipment of raw materials to the plants. If from outside of the state, the materials are in the nature of freight in interstate commerce from the time they are delivered to the carrier until they are delivered by the carrier at the plant. Second, the processes of manufacture by which the raw materials are converted into finished products, during which time the complainants are not engaged in commerce. Third, the sale and delivery of the finished product.
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> * * * * * * *
>
> It therefore does not appear that complainants are common carriers or engaged in the operation of any of the instrumentalities of commerce. They are mere shippers, and as such are engaged in commerce only from the time their products, whether it be raw material or the finished product, are delivered to the carrier and in turn by the carrier delivered to them or to their consignees.

However, during the tenure of the National Recovery Act, Government attorneys attempted to extend its application to businesses involving local activities preceded and succeeded by an interstate movement, on the ground that the local activities were merely incidents of a stream or current of commerce which was subject to Federal legislation. This conception can, of course, be imaginatively applied to both groups II and III. For example, the manufacturer who produces finished articles from raw materials purchased in the state and then ships the finished products to other states can be said to participate in the stream of commerce, from the beginning of his manufacturing operations. Similarly, the manufacturer who imports raw materials and processes them for local consumption can be pictured as taking part in the stream of commerce at its termination. Nevertheless, we prefer to consider this conception in connection with businesses engaged in both importation and exportation, because it was most frequently invoked in this field during the reign of the Recovery Act.

The origin of the conception of a stream of commerce may be traced to the case of *Swift & Co. v. United States*, 196 U.S. 475 (1905) which involved an action by the United States under the Sherman Act to restrain a conspiracy in restraint of trade. It appeared that a conspiracy existed among six large meat packing houses and was accomplished

[29] Reversed on another point in 274 U.S. 160 (1927).

through a combination among dealers and commission men in the stockyards to refrain from bidding against each other. The defendants argued strenuously that all of their activities took place within the confines of a single state. The court nevertheless took a broader view of the facts and concluded that the object of the conspiracy was to monopolize and impede the movement of interstate commerce from the stock farms in the West to the ultimate consumer in various states. There was no need to refer to any other factor than that defendants had deliberately designed to obstruct the movement of commerce, but the court nevertheless made the statement that:

> When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce.

Subsequently in two decisions, *Stafford v. Wallace*, 258 U.S. 495 (1922) and *Chicago Board of Trade v. Olsen*, 262 U.S. 1 (1923), the court used the same conception to sustain Congressional regulation of certain local activities. The *Stafford* case involved the Stockyards and Packers Act. Congress, after a series of elaborate investigations, had found that the large packing houses had taken advantage of their control over the stockyards and connected facilities to control the prices of cattle. The stockyards were, of course, centers located in the larger cities where cattle in transit from western states were temporarily detained, watered and fed and sometimes slaughtered. Most of the sales from producers to dealers and packers took place while the cattle were in the yards, being handled through commission agents. The statute enacted by Congress provided comprehensive regulation of the yards, connected facilities, the fees and activities of commission men and dealers and similar subjects. Although the act literally regulated local activities, the court found that these activities were so closely connected with the general current of commerce that they were subject to Congressional regulation.

The *Olsen* case involved the Grain Futures Act, which provided for direct regulation of the practices of grain exchanges and their members, the primary object being to control dealings in grain futures. Similar Congressional regulation in the Future Trading Act, through the device of a prohibitory tax, had been invalidated by the Supreme Court in *Hill v. Wallace*, 259 U.S. 44 (1922). The second attempt of Congres to regulate future trading followed after a series of investigations into abuses in future trading had led to the conclusion that such trading, unless subjected to regulation, could have disastrous effects upon commerce in grains. In the *Olsen* case, the Supreme Court upheld the Grain Futures Act, although the activities of grain exchanges and their members were purely local in character, because these activities, unless regulated, constituted a very serious threat to the current of interstate commerce in grains.

It might seem at the outset that if Congress can regulate local activities, because they concern or affect the stream of commerce, then there is no objection to its regulation of industrial relations which precede or are preceded by a movement in interstate commerce. Nevertheless the implication of these unusual cases is not as broad as one might think. In the *Swift* case, the Court was dealing with a conspiracy

effectuated by local activities, *whose direct object was the manipulation of the current of interstate commerce.* The novelty of the decision was the Court's conception that the Sherman Act applied to restraints of commerce *on a broad or general scale* as well as to restraints of a particular movement of interstate commerce. Subsequently, in *Stafford v. Wallace*, the Supreme Court quite naturally concluded that if Congress could punish a conspiracy to restrain interstate trade, it was a necessary consequence that it could provide means for preventing such conspiracies from the outset.

Advocates of the legality of the National Recovery Act attributed more force to this conception of a stream of commerce than the decisions establishing it will warrant. It was useful in conspiracy cases because it obviates the necessity of proving a direct restraint upon an actual train of interstate commerce. In the *Olsen* and *Stafford* cases, it served a somewhat different purpose. Both cases dealt with peculiar situations; they involved focal points, through which the stream of commerce swept on its way from producer to the ultimate consumer. A stockyard is simply an institution which assembles live stock from various portions of the country, arranges for its temporary storage and then sends it on its way, after the shift of ownership has been made from the producer to the packer or dealer. The grain exchange which was involved in the *Olsen* case, performs a similar function for grains. Grains are, for the most part, warehoused in transit, where the grain exchange is located, and the exchange serves as a market place for shifting title and arranging the final destination of the produce. In other words, both stockyards and exchanges are instrumentalities of commerce, in much the same way as the actual carriers of commodities. This factor was emphasized in both the *Olsen* case and the *Stafford* case. Thus, in the *Stafford* case, we find the Court stating:

> The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one state to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character.

Similar language appears in the *Olsen case*, where the Court declared:

> The sales on the Chicago Board of Trade are just as indispensable to the continuity of the flow of wheat from the West to the mills and distributing points of the East and Europe, as are the Chicago sales of cattle to the flow of stock toward the feeding places and slaughter and packing houses of the East.

Both decisions took a practical view of commerce and avowed that the power of Congress was not to be defeated by the fact that its subjects were merely local incidents of interstate commerce. Nevertheless, it would be impossible to extend the language of the decisions beyond their immediate facts, without entirely obliterating the distinction between that which is interstate and that which is not. From a speculative viewpoint, almost every business participates, to a limited extent, at least, in the general current of commerce. This participation is merely magnified in those industries which import and export materials before and after their manufacturing or other operations. But such industries are not instrumentalities of commerce in the same sense as stockyards or grain exchanges and to hold that they are would be to over-emphasize the current of commerce at the expense of local authority. It is, therefore, reasonable to believe, from a careful consideration of both the *Olsen* and *Stafford* decisions and from a realiza-

tion of the lengths to which the conception would otherwise be driven, that the doctrine is to be confined to instrumentalities of the broad movement of interstate commerce and not to be tortured into application to local activities which have merely a remote bearing on interstate trade. Consequently, we find that the decision in *Arkadelphia Milling Co. v. St. Louis Southwestern Railways Co.*, 249 U.S. 134 (1918), which came long after the Swift case, expressly declared that the conception of a "stream of commerce" did not change the character of local manufacturing operations.

There is another distinguishing factor involved in the cases which we have just seen. Not only are the stockyards and grain exchanges, in practical effect, instrumentalities of interstate commerce, but in both instances, Congress had enacted comprehensive regulations to prevent the continuance of constantly recurring practices which had and were designed to have direct and immediate effects on interstate commerce. The distinction which we have emphasized throughout comes to the fore again, to set these exceptional decisions apart in their true light. The Supreme Court perceived the intimate connection between the local activities involved and the broad movement of interstate commerce and it recognized that the primary object of Congress was to protect the interstate movement of grains and cattle against direct restraints and interferences. But that is no precedent for believing that the Court will sustain Congressional regulation of remote local activities where the true object of the statute is to regulate such activities and not to assist the movement of commerce.

G. INDIRECT EFFECTS ON INTERSTATE COMMERCE (GROUP V)

The second distinguishing factor in the *Olsen* and *Stafford* cases leads naturally to another constitutional doctrine which is best illustrated by showing its application to the fifth group of factual situations which we have defined. The only possible justification for Congressional regulation of the fifth group must rest upon the need of preventing obstructions to interstate commerce, whether local or national in their origin. There are several decisions of the Supreme Court which uphold, to a limited extent, the right of the Federal Government to prevent and forestall direct impediments to interstate commerce. The discussion of these cases will of course apply to Groups II, III, and IV as well as Group V, because, as we have pointed out, it is impossible to justify the application of the National Labor Relations Act to these cases as a direct regulation of interstate commerce. The position may be taken, however, in support of the Act, that Congress can apply its laws to the factual situations described in order to prevent impediments to commerce and that, of course, is the thought which lies behind the declaration of policy with which the Act is prefaced. This theory of Congressional power is very flexible and it takes but little argument to extend it to the fifth group, as we have already pointed out.

In both the *Stafford* and *Olsen* cases, the Supreme Court stressed the fact that Congress had found that constantly recurring local practices had had a direct effect upon the current of interstate commerce, with the consequence that federal action was needed to remedy the situation. This doctrine is based in part upon other decisions of the court concerning railroad regulations. Thus, in *United States* v. *Ferger*,

250 U.S., 199, the Supreme Court held a Federal statute making it a criminal offense to issue forged bills of lading although, since the bills were forged, there was no movement of articles in interstate commerce. The basis of the decision was that Congress, under its power over interstate commerce, could punish practices which had directly impeded the movement of commerce. Again in the so-called Shreveport Rate Case [30] the Supreme Court upheld Federal regulation of intrastate rates of interstate carriers, in order to prevent possible discrimination against interstate traffic arising out of low intra-state rates.

Somewhat later, in *Railroad Commission of Wisconsin* v. *Chicago, Burlington and Quincy Railroad Co.*, 257 U.S. 563 (1922), the Court upheld the action of the Interstate Commerce Commission in requiring an increase of intra-state rates for the purpose of apportioning the burden of increased expenses and to prevent discrimination against interstate traffic by compelling it to pay more than its share of the expenses of operation.

A third situation, in which the Court has sustained the power of Congress to prevent obstructions to commerce, is presented by the conspiracy cases. These cases have permitted the application of the Sherman Act to restraints of interstate commerce accomplished through purely local conspiracies or combinations, as in the *Swift* case. In a very recent decision, *Local 167 etc.* v. *United States*, 291 U.S. 293 (1934), the Court upheld an action under the Sherman Act against a conspiracy among the poultry market men, drivers and shochtim (slaughterers) in the New York area, to injure the business of other dealers in the locality. The Court declared that the conspiracy directly impeded the importation of live poultry into New York and that it was accordingly subject to punishment as a restraint upon interstate commerce, even though the combination was effectuated through purely local activities. Earlier decisions of the Supreme Court had reached the same results.[31]

From an analysis of the foregoing cases, we find that the power of Congress to regulate local activities having a direct effect on interstate commerce has been upheld in three types of cases:

1. Cases involving the regulation of grain exchanges and stockyards.
2. Cases involving the regulations of railroads.
3. Cases involving prosecutions for conspiracies under the Anti-Trust Laws.

To what extent, then, may this doctrine be carried? The cases declare that, while Congress can use its power to prevent direct obstructions to interstate commerce, it may not attempt to prohibit or regulate local activities merely because they have an indirect bearing upon the movement of commodities. The distinction is at times very difficult to grasp, because it is, in the last analysis, a question of degree. Nevertheless, there are decisions of the Supreme Court which enable us to distinguish between those effects which are direct and those which are too remote to warrant Congressional interference. For example, in the *Schechter* case, the Government sought to apply a Code of Fair Competition under the Recovery Act, to the business of poultry

[30] *Houston East and West Texas Railway Co.* v. *United States*, 234 U.S. 342 (1913).
[31] See, for example, *Swift & Co.* v. *United States*, 196 U.S. 375 (1905) and *United States* v. *Patten*, 226 U.S. 525 (1912).

dealers in New York City, upon the hypothesis that certain unfair trade practices, although local in character, constituted a direct threat to the movement of poultry into the State of New York. The Government's position in that case was fortunate, because the Supreme Court had already found [32] that a conspiracy among New York poultry dealers wrought such a direct influence upon interstate trade as to be punishable under the Anti-Trust Laws. The Court, nevertheless, refused to push the conspiracy doctrine to this point and held code regulations relating to hours, wages and unfair trade practices inapplicable to the local activities of poultry dealers. The language of the Court, in distinguishing the earlier decisions is as follows:

> This is not a prosecution for a conspiracy to restrain or monopolize interstate commerce in violation of the Anti-Trust Act. Defendants have been convicted, not upon direct charges of injury to interstate commerce or of interference with persons engaged in that commerce, but of violations of certain provisions of the Live Poultry Code and of conspiracy to commit these violations. Interstate commerce is brought in only upon the charge that violations of these provisions—as to hours and wages of employees and local sales—'affected' interstate commerce.
>
> In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects.

It is proper to conclude from the *Schechter* case that at least those businesses which are not preceded or succeeded by an interstate movement are not subject to the provisions of the National Labor Relations Act. This, however, does not entirely answer the argument with respect to Groups II, III and IV, in which the proximity to interstate commerce may be easier to see. However, there are other decisions of the Supreme Court which seem to warrant the conclusion that local activities before and after interstate commerce, are not subject to regulation, except under unusual circumstances.

The case of *United Mine Workers v. Coronado Coal Co., et al.*, 259 U.S. 344 (1922) [33] involved an action by mine owners to enjoin the United Mine Workers and certain local unions and their officers from continuing conspiracies to restrain and monopolize interstate commerce in violation of the Anti-Trust Laws.

The mines in question had been closed and reopened upon an open shop basis, whereupon union miners, through a series of unlawful acts, deliberately attempted to prevent mining operations. The plaintiff charged that there was a conspiracy between union coal operators and the defendants to restrain interstate commerce and that the unlawful activities of the local unions at plaintiff's mines were a part of the conspiracy. The Court nevertheless, found that the efforts of the local unions to prevent operations did not constitute a direct interference with interstate commerce, declaring:

> Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. In *Hammer v. Dagenhart*, 247 U.S. 251, 272, we said: 'The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U.S. 439.' Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce.

[32] In *Local 167 etc.* v. *United States*, discussed *supra*.

[33] Although these decisions are primarily interpretations of the Anti-Trust Laws, as the Court stated in the *Schechter* case: "The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act."

Subsequently, the case reappeared in the Supreme Court in 268 U.S. 295 (1925), after the evidence had been offered to prove that it was the direct object of the conspirators to prevent the movement of coal in interstate commerce. Because of this additional element of international interference, the Court upheld the application of the Sherman Act to the conspirators. At about the same time, in *United Leather Workers v. Herkert and Meisel Trunk Co.*, 265 U.S. 457 (1924), there came before the Court an action to enjoin union workers from illegal picketing which, it was contended, prevented the continued manufacture of goods by the complainant, thereby constituting a conspiracy in restraint of commerce under the Anti-Trust Laws. The evidence showed that the strike prevented the complainant from continuing to manufacture the goods needed to fill orders which it had received from customers in other states. Although the strike seriously impaired the complainant's operations and thereby diminished its purchases of raw materials from other states and its shipments of finished articles across the state lines, nevertheless, there was no evidence that the conspirators had directly interfered with or intended to interfere with interstate movements in either raw materials or finished products. The Supreme Court therefore held that the effect of the strikers' activities on interstate commerce was too remote to warrant punishment under the Sherman Act.[34] It is unnecessary to review other decisions of the Supreme Court which have also held that interruptions to manufacturing and other local activities do not constitute direct impediments to interstate commerce.

Where, then, does the distinction lie between our situation and the three types of cases which we have already reviewed. In the *Olsen* and *Stafford* cases, involving regulation of grain exchanges and stockyards, Congress was dealing, as we have said, with instrumentalities of interstate commerce, and was acting to prevent local activities which were designed to and did have an immediate effect upon interstate commerce. This line was drawn in *Industrial Association v. United States*, 268 U.S., 64 (1925), where the Court declared:

> The same is true of *Stafford v. Wallace*, 258 U.S. 495, 516, 42 S. Ct. 397, 66 L. Ed. 735, 23 A. L. R. 229, which likewise dealt with the interstate shipment and sale of livestock. The stockyards, to which such live stock was consigned and delivered, are there described, not as a place of rest or final destination, but as "a throat through which the current flows," and the sale as only an incident which does not stop the flow but merely changes the private interest in the subject of the current without interfering with its continuity.

The second class of cases involving the regulation of intrastate rates of interstate carriers is equally distinguishable, because there, Congress was dealing with interstate carriers, which are peculiarly subject to its control, and which must be regulated in a uniform manner in order to prevent discrimination against interstate commerce. The key to this distinction is supplied by the language of the Supreme Court in *Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy Railroad*, *supra*, where the Court declared:

[34] An excellent statement of the rule appears in *Industrial Association* v. *United States*, 268 U.S. 64 (1925), where the Court said: "The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation—for building is as essentially local as mining, manufacturing or growing crops—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances that was a fortuitous consequence so remote and direct as plainly to cause it to fall outside the reach of the Sherman Act (Comp. St. 8820 et seq.)"
This language is referred to with approval in the *Schechter* case.

Commerce is a unit and does not regard state lines, and while under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of the state authority or a violation of the proviso.

Similarly, the conspiracy cases are no authority for the general regulation of local activities which have some bearing on interstate commerce, because all of them have involved a direct intent on the part of the conspirators to restrain and impede the movement of articles in commerce. This is well stated in the *Schechter* case:

Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. *Coronado Coal Co.* v. *United Mine Workers*, 268 U.S. 295, 310, 45 S. Ct. 551, 69 L. Ed. 963. But, where that intent is absent, and the objectives are limited to intrastate activities, *the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute*, notwithstanding its broad provisions. This principle has frequently been applied in litigation growing out of labor disputes."

* * * * * * *

While these decisions related to the application of the federal statute, and not to its constitutional validity, *the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system.* Otherwise, as we have said, there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government. We must consider the provisions here in question in the light of this distinction. (Italics supplied).

We submit that the exceptional cases, falling in the groups outlined above, cannot be used to justify the National Labor Relations Act. It is true that relations between employers and employees, whether peaceful or hostile, may have some bearing upon interstate commerce, but the bearing is too remote to permit of regulation. A succession of speculative possibilities cannot substitute for the direct relation that the cases discussed require.

The involved trail of reasoning which Congress has followed in order to link labor disputes to interstate commerce in the declaration of policy which prefaces the Act is an apt illustration of the remoteness of the connection. Its long extended syllogism indicates that Congress has recognized that the bearing is indeed remote and that it has hoped to draw it closer by an elaborate outline of its premises. A similar declaration of policy was made in the Grain Futures Act, which was upheld in the *Olsen* case, but the connection there was much closer. Congress had undertaken elaborate investigations and had found that the movement of grain was so sensitive to dealings in grain futures that it was a comparatively simple matter, through such dealings, to control supply and demand and therefore prices. There was only one step in that argument. Future trading had been used to produce shortages and abundances of grain, the object being to profit by manipulated prices. Because of the long study which Congress had devoted to the problem, the Supreme Court accepted its findings of an intimate connection and upheld the statute upon that ground. But even there, as a careful study of the opinion will reveal, the Supreme Court reviewed in great detail the evidence which was placed before Congress and concurred in the findings that Congress had made.

The case is not an authority for the proposition that a declaration by Congress of the need of regulation will automatically justify its action. This is well illustrated by a succession of decisions involving rent-fixing laws of the District of Columbia. In *Block* v. *Hirsh*, 256 U.S. 135 (1921) the Court had upheld the emergency rent laws. But subsequently, the emergency rent act was extended and came before the Court in *Chastleton Corp.* v. *Sinclair*, 264 U.S. 543 (1924). The Court did not accept the Congressional statement without question but remanded the case to the lower Court to determine whether or not the emergency still existed, declaring:

> * * * a Court is not at liberty to shut its eyes to an obviously mistake, when the validity of the law depends upon the truth of what is declared.

Of course a finding of Congress is entitled to some weight but it is difficult to believe that the Supreme Court will accept it as controlling, if it runs counter to its many decisions that local activities are not commerce, although succeeded or preceded by a movement in commerce, and that industrial relations have no such connection with interstate commerce as would bestow upon Congress the power to govern them. The *Olsen* and *Stafford* cases involved *legitimate regulations of interstate commerce*, but even the most cursory examination of the Declaration of Policy which prefaces the Labor Act must reveal (as does its very title) that, despite its extended syllogism, *the Act is an attempt to regulate labor and not interstate commerce.*

Before closing our discussion of this branch of the question, it is proper to observe that there is grave danger in the conception that transactions "affecting commerce" are subject to Congressional authority. It may be conceded, as we have pointed out, that the Supreme Court has, on occasion, justified federal regulations dealing with subjects which "directly" obstruct or hinder the movement of interstate commerce, but there is a broad difference between this conception and the conception which underlies the language of the National Labor Relations Act.[35]

It is easy to trace the cause of the misuse of this conception. Congress undoubtedly has the right to protect the current of interstate commerce and to that end it may regulate or eliminate practices or activities which are a part of or intimately connected with the movement of commerce. It is a far different thing, however, to attempt to govern practices which exist in manufacturing and other local activities, simply because they incidentally effect the movement of commerce. The distinction is made entirely clear if an attempt is made to appraise the probable results of failing to observe it. Professor Willoughby, in his treatise on the United States Constitution, has already phrased the argument so well, that we could not do more than repeat his language:

> That interstate commerce is greatly affected by the conditions under which manufacturing is carried on, is, of course, true: and that the States, by the regulation of manufacturing within their limits, whether by foreign or domestic corporations, may indirectly encourage or discourage the production of the commodities which are to furnish the articles of interstate commerce, is equally true. But this furnishes no argument for the doctrine that Congress may, for the

[35] The use of the phrase "affecting commerce" was perhaps entitled to greater weight in the National Recovery Act, because it was legislation designed to operate for a short time to correct certain temporary conditions which had disorganized the movement of interstate commerce. But even there the conception was overworked, for an emergency could hardly broaden the defined and limited powers of Congress.

promotion of interstate commerce, undertake the control of manufacturing within the States. For in truth, it would not be difficult to show that interstate commerce is substantially affected by almost every element of the social, economic and industrial life of the people—by the men who mine the coal which is used by interstate railways and steamships, by the persons who produce the material of which the cars and locomotives and ships are built, by the bankers and brokers who deal in the stocks and bonds of interstate carrier companies, and, in fact, by the operation of all who in any way deal with or handle the commodities which ultimately are transported outside the State. That commodities are manufactured with the intent that they are to be exported, in part or in whole, is absolutely immaterial, as determining the exclusiveness of State authority over their production.

We believe we may justifiably conclude that the Supreme Court will recognize that Congress cannot use the conception as a pretext to interfere into matters which are not a part of interstate commerce, even though they precede or follow; that they will confine the doctrine of the Olsen and Stafford cases to transactions which are intimately connected with the movement of commerce, or directly obstruct and impede it; and that will not justify, as a regulation of commerce, a statute which piles speculation upon speculation to attain its ends. There is no better way to demonstrate our conclusions than by a reference to the opinion of Chief Justice Hughes in the *Schechter* case:

> The argument of the government proves too much. If the federal government may determine the wages and hours of employees in the internal commerce of a state, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also effecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power.

V. The Fifth Amendment

Recent appraisals of the constitutional aspects of the National Labor Relations Act seem, for the most part, to have overlooked considerations of due process as they may affect the legislation. Yet just prior to the passage of the Act, the Supreme Court, in a decision almost as portentous as the *Schechter* case, restated its position that Congressional action is as much bound by the limitations of the Fifth Amendment [36] to the Constitution as the states are by the due process clause of the Fourteenth.

This has been the law since the occasion first arose to evoke the due process clause against Congressional action. That it has not often been stated is due to the fact that, in general, Congress has not attempted, so often as the forty-eight States, to evade the requirements of due process. To a certain extent, this fact is significant to our discussion under the preceding section of this report; police regulations by Congress have been rare because it has been so widely accepted that Congress has no clearly defined police power.[37]

Adair v. United States, 208 U.S. 161 (1908) clearly declared that Congress, in the exercise of its regulatory power over interstate commerce, must obey the dictates of due process. In recent years, there has

[36] Which provides, in substance: "Nor shall any person be deprived of life, liberty or property without due process of law."

[37] Technically, Congress has no police power. However, it may, in exercising its defined powers, to a certain extent, enact police regulations. See *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146 (1919).

been a tendency to overlook the requirements of the Fifth Amendment and to sanction any legislation produced in the halls of Congress if some express power of Congress can be found to support it. Perhaps some justification for this attitude can be traced to the increasing tendency of the Supreme Court to give both state and federal legislation the benefit of the doubt in matters of due process. But even here there is some limit, the Court has announced. First, in the Railway Pension case, (*Railroad Retirement Board v. The Alton Railroad Co. et al.*, 55 Sup. Ct. 758 [1935]), and then in a decision invalidating the Frazier-Lemke Farm Relief Act, (*Louisville Joint Stock Land Bank v. Radford*, 55 Sup. Ct. 854 [1935]), the Court has found Congressional legislation vulnerable because of its unwarranted infringement of the properties and liberties of the people. In the latter decision, speaking through Mr. Justice Brandeis, the Court declared: "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." In the former decision, the Court declared, in substance, as in the Adair case, that the Railway Pension Act not only was an excessive exercise of power over interstate commerce, but also was in plain disregard of due process requirements.

The Supreme Court's consistent treatment of due process requirements as a restraint on the legislative powers of the Congress and the states, has been the focal point of most attacks on the veto power of the Court. The principal complaint seems to be that, in striking down legislation on this ground, the Court has frequently assumed to set itself up against the will of the people, as evidenced by the action of their chosen delegates, the legislators. This palpably ignores the principle which underlies our Constitution as a political charter. We are not a pure democracy, but a constitutional democracy. We have, ourselves, deliberately created limitations on our powers as a people, not merely to restrain our governors, but also to restrain our own temporary beliefs and enthusiasms. Settled opinions of the people, in the long run, will and do make use of the machinery which the Constitution itself provides for its amendment, but in brief periods of temporary frenzy, the Constitution and the Supreme Court justly hold us to the limits that we, ourselves, have established.

So, with our conceptions of due process. They are not fixed and rigid, frozen in place once and for all by the language of our political charter. On the contrary, they yield to our experience and to our settled desires, once we have finally determined what we want. But they do not give ground to thoughtless expedients, nor to the will of those who have temporary power to thrust new and untried principles on the nation. Justice Roberts, who wrote the opinion in *Nebbia v. New York*,[38] 291 U.S. 502 (1934), sanctioning the milk control law of the State of New York, places emphasis on this function of the Constitution in the Railway Pension case, where he says:

> The federal government is one of enumerated powers; those not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states or to the people. *The Constitution is not a statute, but the supreme law of the land to which all statutes must conform*, and the powers conferred upon the federal government are to be reasonably and fairly construed, with a view to effectuating their purposes. But recognition of this principle can-

[38] A reading of this liberal opinion should convince any critic that the Supreme Court is fully aware of the practical needs of government. There may be an implication in it that, in recognizing the wide scope of state police power, the Supreme Court has indicated that police regulations are the proper concern of the States, not the federal government.

not justify attempted exercise of a power clearly beyond the true purpose of the grant. (Italics supplied.)

Settled doctrines of constitutional law are therefore not to be lightly treated in approaching recent legislative materials. Times and our economy may have changed, but we have not changed our Constitution, nor even deemed it advisable so to do.

Our somewhat extended outline of the National Labor Relations Act was designed primarily as an introduction to the topic of due process. Several features of the Act, we saw, were startling departures from our traditional method of treating labor and industrial relations. More than that, they constituted serious threats to our freedom of action, whether we stand as employers or as employees.

A. FREEDOM OF CONTRACT

One of the foremost rights protected by the Constitution is the right to follow a common calling or occupation. It is a necessary corollary that the law must also respect the individual's freedom to contract concerning the normal incidents of his employment. Similarly, the employer enjoys a corresponding right to conduct his business in an orderly fashion, free from unjustifiable restraints and regimentation. Although these rights were first thoroughly delineated in the concurring opinion of Mr. Justice Bradley, in *Butchers Union Slaughterhouse Co. v. Crescent City Live-Stock Co.*, 111 U.S. 746 (1884), the classic statements of the principle appears in the language of the Court in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), where it was said:

> The "liberty" mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

These rights have not been enforced in derogation of the Government's power to enact police measures for the protection of the health, safety and well-being of the citizens. Consequently, State laws regulating hours of labor, working conditions and the payment of wages have been upheld, to protect the physical well-being of employees and to prevent fraud and oppression by employer. But once the Government has gone beyond police measures and deliberately interfered with freedom of contract, to force its temporary economic conceptions upon its citizens, the Court has scrutinized its legislative efforts with the greatest of care. The present statute comes within the second category, for the most part. Its provisions relating to collective bargaining and to unfair labor practices, are not designed to protect the property of employers or the well-being of employees, but are rather intended to force a novel economic policy into their relationship. Therefore, it is proper to consider whether or not they infringe upon the freedom of the parties to such an extent as to render them subject to attack.

It will be recalled that the statute is divided into two broad categories, the first confirming and protecting the right of collective bargaining, and the second denouncing certain unfair labor practices on the part of employers. The first must therefore be considered mainly

from the standpoint of the individual employee and the second from the standpoint of the employer.

B. INTERFERENCE WITH THE FREEDOM OF EMPLOYEES

So far as the statute is declaratory of the right of employees to organize and to bargain as a unit, it cannot be said to infringe upon any rights of the employee or employer. On the contrary, it is a confirmation of the employees' freedom to unite with others for their common good. If individual employees or groups of employees may unite or refrain from uniting, as they see fit, their individual liberties are fully protected. Since the decision of the Supreme Court in *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks, et al.*, 281 U.S. 548 (1930), there can be no question but that a simple declaration of this principle neither interferes with the rights of employees nor the rights of employers. Employees are permitted to gather together and select agents in the same manner as any other group of individuals; the employer is simply enjoined from interference with process of organization and selection.

But the collective bargaining provisions of the National Labor Relations Act reach far beyond the simple declaration of principle which was involved in the *Texas & New Orleans Railroad Company* case. The Act, as we have seen, is a decided change from preexisting legislation, in that it declares that representatives selected by a majority of employees shall be the *exclusive agents* of all for the purposes of bargaining with respect to wages, hours of labor, conditions of employment and the like. This provision, on its face, is an implied prohibition against individual contracts by individual employees or minority groups of employees. It might be urged that the statute should not be so broadly construed; that the Act does no more than interpret the natural effect of an election and that the majority rule is not designed to interfere with the rights of individual employees or minority groups to make their own bargains. The Act, however, prohibits any construction which would narrow its effect, for it declares that the selection of representatives by a majority shall not interfere with the right of individual employees to present *grievances* to their employer, thereby excluding their right to negotiate with their employer with respect to *wages, hours of labor and other conditions of employment.* In other words, while the right to make individual complaints is preserved, collective agreements relating to wage scales and other matters of general interest are given binding force, even where they are entirely unsatisfactory to minority groups or individual employees.

The majority rule is coupled with two other elements. In the first place, national labor unions are sanctioned as representatives. Secondly, the statute expressly permits a closed shop agreement with a labor organization. Looking at this combination from its practical consequences, it is obvious that there is a serious threat to the freedom of individual employees and minority groups. It is common knowledge that national unions will not, as a general rule, represent non-members; consequently non-members and minority groups will be forced to submit themselves to the membership requirements of a union which acts as exclusive representative of the employees, in order to participate in collective bargaining. At the same time the statute favors such a result, by sanctioning the use of closed shop contracts.

This practical interference with the freedom of individuals and dissenting groups may not be a legal interference with the freedom of employees to contract concerning their employment, but it supplies the background of other consequences of the statute which do constitute direct interferences with such freedom. In the first place, employees who refuse to participate in an election of representatives are presumably bound by its results, even though they did not, even impliedly, consent to the selection of the chosen representative.[39] In the second place, the right of individual employees to make their own bargains with their employer is completely eliminated. And thirdly, the right of minority groups to associate or organize and to bargain as a unit, is likewise cast aside.

A concrete example may serve to illustrate the effects of the majority rule. We may suppose that most of the employees in a particular establishment are affiliated with a certain union, while the electricians, who form a small but distinct minority, are either connected with another union or are not members of any organization. The National Labor Relations Board may determine to establish the entire plant as the bargaining unit, and, pursuant to its authority under the statute, certify the prevailing union as the exclusive agent of all the employees. The electricians, whose problems may be distinct from those of the other employees, may find themselves inadequately represented or without representation at all. Their own union affiliations, if they have any, are rendered useless for all practical purposes, and if they have no such affiliations and are opposed to unionization, they will find themselves compelled to join the prevailing union to secure representation. Their wages, their hours and their working conditions will be determined, not by their own contracts and desires, but by the will of an entirely dissimilar group. In other words, their entire status is completely changed by pure accident, that is, by the fact that a majority of their fellow employees have subscribed to the tenets of a particular union.

The opinion of the Court in *Allgeyer v. Louisiana*, which we have quoted above, insures to everyone the right to make contracts with respect to his occupation. This right has not been diminished by any decision of the Supreme Court, but has been reaffirmed on many occasions. Thus, in *Adair v. United States*, 208 U.S. 161 (1908), the Court declared:

> The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.
>
> In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.

More important, perhaps, for present purposes, is the decision in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). In that case, Congress had provided for the creation of an administrative board to fix minimum wages for women and children employed within the District of Columbia. The Board conducted investigations and, after hearings, issued orders fixing wages in particular occupations. The statute was held invalid by the Supreme Court on the express ground that it was

[39] The Act does not simply provide machinery whereby groups of employees may join forces to hold an election, each taking his chance on the outcome. It allows the Board to *determine*, by an election or otherwise, the representatives selected by a majority of the employees in a *unit designated by the Board*, and *compels* the dissenters to abide by the outcome.

an unwarranted interference with freedom of contract, the Court declaring:

> It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect to the price for which one shall render services to the other in a purely private employment, where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee.
>
> To sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good, but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.

The decision in the *Adkins* case has been criticised on many occasions, principally on the ground that the Court failed to give due consideration to the fact that starvation wages do have an important bearing upon the health and physical condition of employees. It may be true that the Court did not accord liberal treatment to the statute as a proper police measure, in view of the fact that its object was to protect the health and safety of the citizens. But even if that criticism be well founded, the principle of the case remains, and has not been questioned, that the Government cannot interfere with freedom of contract, except where it is necessary to provide for the health and safety of its citizens.

This decision, which was later approved in *Murphy v. Sardell*, 269 U.S. 530 (1925), and which receives analogous support from decisions barring price-fixing legislation,[40] is controlling on the present Act. The restrictions upon the individual's freedom to contract, which we have set forth above, bear no relation to the health or safety of employees, but are designed for the sole purpose of thrusting temporary conceptions of economic policy upon the relations between employer and employee. Whether or not the economic policy has merit, is difficult to judge. In any case, there are millions of employees who are not members of labor organizations and who would be forced to join such organizations, in particular cases, in order to bargain with their employers. Similarly, there are surely many employees who will oppose bargains made on their behalf by agents whom they have not selected to act for them. This is the vice of the Act, that it does not acknowledge their freedom and that it casts it aside to enact a dubious experiment.

C. INTERFERENCE WITH THE FREEDOM OF EMPLOYERS

For the most part, the restrictions placed on employers are contained in those sections of the statute which proscribe unfair labor practices. Before we advert to those, however, we should know that in restricting the right of individual employees to bargain with their employers, the statute, at the same time, removes from employers the right to make individual agreements with their employees. In this respect, the statute might be considered a violation of the Fifth Amendment, for the reasons which we have outlined under the preceding subdivision of this report. However, a discussion of this effect of the statute will be deferred for the present.

The unfair labor practices prohibited have already been discussed in some detail and will not be again reviewed. The first, which prohibits employers from oppressing or coercing their employees in the

[40] See e.g. *Ribnik* v. *McBride*, 277 U.S. 350 (1928); *Tyson & Bro.* v. *Banton*, 273 U.S. 418 (1927); *Williams* v. *Standard Oil Co.*, 278 U.S. 235 (1929).

latter's organization and collective bargaining activities, seems entirely proper. It should not place the employer under any obligation other than the negative one of refraining from injurious or oppressive tactics towards his employees. As the Court said in the *Texas & New Orleans Railroad Company* case:

> The statute in this respect does not interfere with the normal exercise of the right of the (employer) to select its employees or to discharge them. The statute is not aimed at this right of the employers, but at the interference with the right of employees to have representatives of their own choosing.

The fourth unfair labor practice which prohibits discrimination against employees who have given testimony under the Act might also be upheld as a justifiable rule of policy designed to secure the efficient administration of the Act.

The remaining restrictions on employers are, however, of the most doubtful validity. The second unfair labor practice, as we have seen, forbids, in general terms, any discrimination by an employer against employees, because of their union membership. If this was limited to fraudulent or injurious tactics on the part of the employer, it might be upheld as a justifiable police measure. But as it now stands, there can be no question but that it runs contrary to two decisions of the Supreme Court, which expressly invalidated legislation of that character.

In *Adair v. United States*, 208 U.S. 161 (1908), the Supreme Court invalidated similar legislation of Congress, punishing as criminal offenses, discrimination by an employer against union members and the use of the "yellow dog" contract. Subsequently, in *Coppage v. Kansas*, 236 U.S. 1 (1914), involving similar legislation of the State of Kansas, making it unlawful to demand of employees an agreement not to join or continue membership in a labor union, the Supreme Court reexamined the question involved in the *Adair* case. Again the conclusion was reached that the statute constituted an unjustifiable interference with the freedom of contract, the Court declaring:

> Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense.
>
> * * * * * * *
>
> And can there be one rule of liberty for the labor organization and its members, and a different and more restrictive rule for employers. We think not; and since the relation of employer and employee is a voluntary relation, as clearly as is that between members of a labor organization, the employer has the same inherent right to prescribe the terms upon which he will consent to the relationship, and to have them fairly understood and expressed in advance.

The *Adair* case was questioned by the lower Court in the *Texas & New Orleans Railroad Company* case, above referred to, but the Supreme Court did not repudiate its former holding, pointing out that the Railway Labor Act of 1926, then before the Court, did not interfere with the right of the carrier to select its employees or to discharge them, a distinction reiterated this year in the *Railway Pension* case.

The fifth unfair labor practice is, as we have pointed out before, a novel institution in our law. It is phrased in the negative, in that it proscribes, as an unfair practice, the refusal of an employer to bargain with the exclusive representatives of his employees, but its object is of course affirmative, to require the employer to participate in such bargaining.

This portion of the statute has two consequences. If we combine this with Section 9, adopting the so-called "majority rule", it is apparent that it not only requires the employer to bargain with the exclusive representatives, but it at the same time prohibits him from entering into bargains as to wages, hours of labor and the like, with individual employees and minority groups, for bargaining with individuals or minority groups, as to such matters could reasonbaly be construed as a refusal to bargain with the exclusive agents.

Our discussion of the constitutional freedom of employees to make their own contracts with their employer is equally relevant on this point, for the employer is entitled to similar freedom under the Constitution. As the Court said, in the *Adair* case,

> The right of a person to sell his labor upon such terms as he deems proper, is in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.

Compulsory collective bargaining is almost a contradiction in terms; as the Supreme Court has stated on one occasion, "whatever may be the advantages of collective bargaining, it is not bargaining at all, in any just sense, unless it is voluntary on both sides."[41] If these principles are sound, then this double-edged effect of the statute, which requires the employer to bargain with one group and denies him the right to bargain with another, is an obvious interference with his freedom of contract. As one Federal Court has said, "It is a constitutional right of an employer to refuse to have business relations with any persons or with any labor organization, and it is immaterial what his reasons are, whether good or bad, well or ill-founded, or entirely trivial and whimsical."[42]

Other decisions of more recent origin than the *Adair* and *Coppage* cases, are equally significant. In *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923), the Supreme Court had before it a Kansas statute creating an Industrial Court with power to hear disputes between employer and employees over wages and other terms of employment, and to make enforceable awards, based upon its findings. The statute was confined in operation to employers engaged in the business of manufacturing food and certain other more or less essential industries, the determination of the public character of the employer's business being vested in the Court. The defendant refused to comply with an order of the Court requiring, among other things, an increase in wages and, on appeal to the Supreme Court of the United States, the statute was declared to be invalid, as an interference with the contractual rights of the employer and his employees. In this connection, the Court stated:

> These qualifications do not change the essence of the act. It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 43 Sup. Ct. 625, 67 L. Ed.—, decided June 4, 1922. While there is no such thing as absolute freedom of contract, and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception.

An argument in support of the statute was made, that it applied only to businesses affected with a public interest, and reference was

[41] *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U.S. 229 (1917).
[42] *Goldfield Consolidated Mines Co.* v. *Goldfield Miners' Union*, 159 Fed. 500 (C.C.D. Nev. 1908).

made to the case of *Wilson v. New*, which upheld the Adamson Act, an Act of Congress fixing the wages of railroad employees. The Court pointed out that the distinction lay in the fact that Congress had power to compel the continued operation of the railroads, and therefore to pass regulations which would insure such continuity of operations. This element, the Court declared, was lacking in ordinary businesses, irrespective of their size and importance.

Subsequently, the Supreme Court of the State of Kansas awarded a writ of mandamus against the defendant to compel his obedience to the order of the Industrial Court, after first eliminating the requirements relating to wages and overtime payments. The defendant again appealed to the Supreme Court, which declared invalid not only the provisions authorizing the Board to fix wages, but also the provisions of the statute requiring compulsory settlement of labor disputes before the Industrial Court. In setting aside the legislation, the Court declared:

> The system of compulsory arbitration which the act establishes is intended to compel, and if sustained will compel, the owner and employes to continue the business on terms which are not of their making. It will constrain them, not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms. True, the terms have some qualifications, but as shown in the prior decision the qualifications are rather illusory and do not subtract much from the duty imposed. Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteen Amendment.[43]

This language of the decision seems conclusive as to the fate of the National Labor Relations Act. Although it is not an arbitration statute, it does in effect require the compulsory settlement of labor disputes by punishing the employer for his refusal to bargain with the exclusive representatives of his employees. Continued resistance of the employer to the demands of his employees and a persistent refusal to enter into agreements respecting wages or the settlement of other controversies, may easily be construed as a refusal to bargain collectively. Consequently, there can be no doubt but that the statute is designed to effect the compulsory settlement of disputes, and the language which we have quoted from the Supreme Court is fatal to legislation of that character.

Some of the administrative features of the Act may raise a question as to the legality of the procedure prescribed for the National Labor Relations Board, but it would unduly extend this report to devote thorough consideration to them. The Board may not only investigate controversies arising under the Act, but it may also hear and determine complaints against employers of unfair labor practices. The investigatory powers of the Board are broad in character and are supplemented by unrestrained authority to compel the production of documents and other evidence. Its *quasi*-judicial powers are equally extensive. It is expressly provided that the rules of evidence prevailing in courts of law or equity will not be controlling and the findings of the Board as to questions of fact are final and conclusive, if supported by evidence. In its *quasi*-judicial functions the Board is empowered to issue orders requiring employers "to cease and desist" from unfair labor practices and "to take such affirmative action, including reinstatement of employees, with or without back pay, as will effectuate the policies" of the Act. Although the Board is thereby empowered

[43] *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 267 U.S. 552 (1925).

to render affirmative decrees, including decrees for the payment of substantial sums of money, the party litigants are not assured of a jury trial. Customary safeguards accorded by rules of evidence, including the right to cross examine opposing witnesses, may be dispensed with in the discretion of the Board.

Reference might be made to other provisions of the Act which place almost unprecedented discretion in the hands of the Board. It is, however, the primary function of this report to consider the substantive features of the Act and we cannot, therefore, give to the administrative provisions of the legislation the extended discussion which a careful study of them would require.

There may be other provisions of the legislation, both substantive and administrative, which are subject to the taint of illegality, but we will content ourselves with the review which we have presented of its more important features. It may be that some provisions do not offend against due process, but its salient features, that is the establishment of the majority rule, the provisions against union discrimination and the requirement that employers bargain with the exclusive agents of their employees, are objectionable. The Act expressly provides that if any of its provisions are found to be invalid, such invalidity shall not affect the remainder. Such a provision simply rebuts the presumption of legislative intent, which would otherwise prevail, that if part of the Act is illegal, the whole should fall. It is our position that with the invalid portions removed, the little that remains is ineffectual, for the object of the legislation, from beginning to end, is to compel the adjustment of labor controveries by a form of compulsory collective bargaining through majority representation and such an object cannot be achieved through the provisions which might be sustained.

Respectfully submitted.

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SEPTEMBER 5, 1935.

SUBJECT INDEX

13. (Source: Walter Gellhorn and Seymour L. Linfield, Columbia University School of Law, in *Columbia Law Review*, Vol. 39, No. 3 [March 1939])

POLITICS AND LABOR RELATIONS: AN APPRAISAL OF CRITICISMS OF NLRB PROCEDURE

Employers ought to refuse to have anything to do with the National Labor Relations Board. They ought to fight it out, and fight it out even if they have to go to jail. Fight it out as one of the fundamental principles of American liberty. Lewiston (Me.) Sun, editorial, February 4, 1938.

The history of the National Labor Relations Act is familiar. The tale has been well and frequently told,[1] so that further recounting of the circumstances of its birth is unnecessary. The chronicle of disappointingly unsuccessful efforts to combat anti-unionism by official pressures is itself a long one; not until the appearance of the Wagner Act had there been perfected a useful governmental instrument to prevent intimidatory employer tactics aimed at interfering with the free organization of employees.

The National Labor Relations Act was passed in the teeth of a tenacious belief of employers that employees should not be permitted to bargain collectively through representatives of their own choice.[2] On the very day following the National Labor Relations Board's first session fifty-eight legal luminaries, acting under the aegis of the American Liberty League, declared the Act to be unconstitutional,[3] their pronouncements served as a model brief for the scores of injunction suits which practically brought to a standstill the Board's work during its

[1] See, *e.g.*, BERLE, AMERICA'S RECOVERY PROGRAM (1934) 89–103; DAUGHERTY, LABOR UNDER THE NRA (1934); LORWIN AND WUBNIG, LABOR RELATIONS BOARDS (1935); MACDONALD, and others, LABOR AND THE NRA (1934) 1–26; MACDONALD AND STEIN, THE WORKER AND GOVERNMENT (1935); TWENTIETH CENTURY FUND, LABOR AND THE GOVERNMENT (1935); U.S. Congress, House, COMPILATION OF LAWS RELATING TO MEDIATION, CONCILIATION, AND ARBITRATION BETWEEN EMPLOYERS AND EMPLOYEES (1937); *Hearings Before the Senate Committee on Education and Labor on S. 1958*, 74th Cong., 1st Sess. (1935) 1–32; Garrison, *The National Labor Boards* (1936) 184 ANN. AM. ACAD. 138; MacDonald, *The National Labor Relations Act* (1936) 26 AM. ECON. REV. 412; Saposs, *American Labor Movement Since the War* (1935) 49 Q. J. ECON. 236; Slichter, *Government and Collective Bargaining* (1935) 178 ANN. AM. ACAD. 107.

[2] The roster of witnesses who opposed the passage of the Act in hearings before the Senate Committee on Education comprises a Who's Who of American industry, including representatives of the United States Chamber of Commerce, American Iron and Steel Institute, American Mining Congress, American Newspaper Publishers Association, Institute of American Packers, Cotton Textile Institute, and Automobile Manufacturers Association, to name but a few. See *Hearings Before Senate Committee on Education and Labor on S. 1958*, 74th Cong., 1st Sess. (1934).

[3] American Liberty League, National Lawyers Committee, *Report on the Constitutionality of the National Labor Relations Act* (1935); *cf.* T. R. Powell, *Fifty-Eight Lawyers Report* (1935) 85 NEW REPUBLIC 119.

first two years.[4] While the bitterness of the opposition to the Act has somewhat abated, and while the principle of collective bargaining has been at least verbally accepted by many who formerly denounced it, a determined, if covert, resistance continues.[5] Detractors of the NLRB, aided and abetted by many of the leading newspapers and publicists, have branded it as a "kangaroo court" [6] and "drum-head court martial" [7] charged that "an employer has as much chance before that board as an aristocrat had before the French tribunes of the Terror",[8] and suggested that the Act should more appropriately be designated as the "Strained-Relations Act" [9] or even "An Act to Increase Troubles, to Spread Unemployment, and to Disrupt Industry." [10]

The recalcitrants today, however, only infrequently launch direct attacks upon the acknowledged objectives of the Act—which the recently concluded studies of labor relations in Great Britain and Sweden, made by a representative commission of high standing, have emphasized once more to be a prime condition of industrial peace.[11] Instead they seek to destroy public confidence in the statute by assailing the methods of its administration.

Those who cry "government autocracy" and "bureaucracy run rampant" find a ready audience in a country which has only recently and reluctantly forsworn rugged individualism. The opponents of the Act and the critics of its administration have sown a whirlwind of confusion by impugning the impartiality of the Board and by denouncing its methods. As a result of their efforts, many thoroughly honorable individuals have concluded, without critical study of the matter, that the procedures of the National Labor Relations Board, whatever may be the nobility of its ends, conduce to injustice.

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[4] A total of 95 injunction suits were filed in federal district courts from the time the Board began to administer the statute until the validation of the Act in April 1937, with the Supreme Court finally sustaining in January 1938, the position that the Board had urged from the outset—namely, that the Board had *exclusive* jurisdiction to determine whether an employer had engaged in unfair labor practices affecting interstate commerce, subject to subsequent judicial review by the Circuit Court of Appeals. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Newport News Shipbuilding & Dry Dock Co. v. Schauffler, 303 U.S. 54 (1938); see Note, *Conflict of Jurisdiction Between Federal District Courts and the National Labor Relations Board* (1938) 23 WASH. U. L. Q. 425. The cases are discussed in (1937) 25 GEO. L. J. 470; (1938); 86 U. OF PA. L. REV. 541; (1938) 24 VA. L. R. 699; *cf.* Note, *Power of a State Court to Enjoin National Labor Relations Board Officials* (1938) 36 MICH. L. REV. 1344. For a cumulative summary of injunction litigation as of November 15, 1937, see NLRB ANN. REP. (1937) 36–40; *cf. id.* 31–32; (1936) *id.* 46–50; (1938) *id.* 221.

[5] See, *e.g.*, United States Senate, Committee on Education and Labor, 76th Cong., 1st Sess., *Violation of Free Speech and Rights of Labor* (1939) Rept. No. 6; Chamber of Commerce of the United States, Dept. of Manufacture Committee, *Legislation Relating to Labor Disputes* (1938); Saposs, *Current Anti-Labor Activities* (1938) NLRB REP. (Z–207).

[6] Sen. Gerald Nye, Statement, N.Y. Times, July 22, 1937.

[7] Radio commentator (privately identified as Boake Carter), quoted in Edwin Smith, *How the National Labor Relations Board Administers the Wagner Act*, Address before the 24th Annual National Business Conference, Babson's Institute, Oct. 6, 1937, NLRB Press Rel. R–354.

[8] General Hugh Johnson, "No More OGPUS", N.Y. World-Telegram, July 26, 1937.

[9] Editorial, 102 COLLIER'S WEEKLY, 54 (Nov. 5, 1938).

[10] Sen. Edward Burke, Address before Congress of American Industry and Annual Convention of National Association of Manufacturers, N.Y. Times, December 10, 1938.

[11] *Report of the Commission on Industrial Relations in Great Britain* (U.S. Dept. of Labor, 1938); *Report of the Commission on Industrial Relations in Sweden* (U.S. Dept. of Labor, 1938).

We now propose to consider point by point the procedural charges that have been made against the National Labor Relations Board, so that their truth or falsity may be established in the light of the record. We do not intend to address ourselves to the problems of substantive law raised by the Board's decisions; in other words, we shall not discuss the Board's determinations of what constitute unfair labor practices,[12] for these interpretations, by and large, have elicited fewer outspoken denunciations than have the alleged inquities of the Board's procedural behavior.[13]

What have been the chief attacks upon and criticisms of the NLRB? "It stirs up labor strife by bringing in unwarranted charges against employers." "It doesn't give respondents fair notice of the charges against them, so that they can not properly prepare their defense." "Its hearings are conducted in an arbitrary and disorderly fashion." "It doesn't observe the rules of evidence, and decides cases without any support in the record." "The Board doesn't do its own work, but passes on to inconspicuous subordinates or to complete outsiders the duty of deciding controversies." "There is too much confusion of the roles of judge and prosecutor in the Board's work, so that it can not objectively appraise the cases before it."

The authors have examined in turn each of these criticisms and others suggested by them. They are convinced that no one of them is fairly supported by the record of the events that have actually occurred in the administration of the National Labor Relations Act. Let us analyze them separately.

Perhaps, before the analysis is commenced, it is proper to say a word concerning the authors' point of view. Both authors are in sympathy with the policies of the National Labor Relations Act. Both feel that the obstacles in the path of better industrial relations are being reduced by the Act, and that they will be still further reduced if the Act continues to be administered in a vigorous and sympathetic manner. It is fair to say, therefore, that they are favorably disposed toward the NLRB and would more readily detect its virtues than its defects. Having conceded this much, however, the authors concede no more. Neither

[12] For a discussion of the principles established by the Board, see NLRB ANN. REP. (1936) 70–134; (1937) *id.* 58–156; (1938) *id.* 51–215.

[13] For a general discussion of the Board's procedure, see Janofsky, *Procedure Under the National Labor Relations Act* (1938) 13 LOS ANGELES B.A. BULL. 236; Wolf, *Administrative Procedure Before the National Labor Relations Board* (1938) 5 U. OF CHI. L. REV. 358.

Similarly we put aside for present purposes any critique of the campaign of personal vilification of the members of the Board. The charge that the Board members have in any respect been other than upright adjudicators could not be, and has not been attempted to be, supported by one iota of evidence. The further assertion that, though honest, the Board members are biased in favor of industrial as opposed to craft unions, and in favor of one labor organization and against another, seems scarcely supported by the actual record. At the close of 1938, approximately 84 cases had arisen in which unions affiliated with the American Federation of Labor had maintained that a craft unit was the appropriate bargaining unit, and of these, the Board wholly rejected their contentions in only 11 instances and partially rejected them in 4 others. Even in these 15 cases, the decisions did not rest upon any principle antagonistic to craft unionism as such, but rather upon reasons peculiar to the particular cases—such as, for example, that the employees within the alleged craft unit were not members of an A.F. of L. union and had exhibited no desire to be included in a craft unit.

Of all the cases in which both the A.F. of L. and the C.I.O. participated, there was complete agreement on the appropriate unit in 77 cases, and substantial agreement in 98 others. Of a total of 60 proceedings in which there was substantial disagreement as to the appropriate unit, the Board adopted the contention of the A.F. of L. in 29 cases; that of the C.I.O. in 23 cases; that of both groups, in part, in 7 instances; with no decision being necessary in 1 other proceeding. For a full list of the cases, with discussion, see NLRB, Publications Div., *Data on Administrative Problems of the National Labor Relations Board* (1939), Ser. No.Y–9; *cf.* NLRB ANN. REP. (1938) 6–8; *The National Labor Relations Board Faces A.F. of L.–C.I.O. Rivalry* (1937) 6 I.J.A. BULL. 41; Note, *Effect of the A.F. of L.–C.I.O. Controversy on the Determination of Appropriate Bargaining Unit Under the National Labor Relations Act* (1937) 47 YALE L.J. 122; Note, *The Influence of the National Labor Relations Board Upon Inter-Conflicts* (1938) 38 COLUMBIA LAW REV. 1243.

of them has been, is now, or expects to be employed by the NLRB in any capacity whatsoever. Neither of them has been connected personally or professionally with any party litigant before the Board. In short, except as their reactions are affected by their views concerning matters of substantive law (which, as noted, they do not propose to discuss), they come to the present study without prejudice. In the summer of 1938 they first began their study of NLRB procedure. This study was undertaken as part of a larger investigation of Federal administrative procedure, under the supervision of Professor Joseph P. Chamberlain of Columbia University and under the sponsorship of the Commonwealth Fund. The study of the NLRB has necessitated the reading of every reported judicial decision relating to the work of the NLRB: the reading of every decision rendered by that body since the date of its creation until February 15, 1939; the examination of the files and records of the NLRB; the interrogation of numerous NLRB employees, as well as its highest officers and its members themselves; and the discussion of NLRB work with many attorneys who have practiced before it as representatives of employers or of labor unions. So far as it is possible to make objective a study of living legal problems, they have sought to make objective the investigation upon which this paper is based.

I.

The Board Makes Reckless Charges of Unfair Labor Practices Against Employers[14]

What course of conduct could conceivably justify the charge suggested? Would it be that the Board attempts by "snooping" to discover some episode which can be blown up into a colorable tale of unfair labor practices, and that it then proceeds to inject itself into situations previously unmarked by employer-employee rancor? Can it be that the Board exacerbates rather than mollifies, that it insists upon a prosecution when peaceable adjustment is readily realizable? Can it be that the Board acts merely upon the irresponsible promptings of disgruntled employees or dishonest labor officials, thus exposing employers either to the expense of vindicatory litigation or, as an alternative, to a species of industrial blackmail? Upon what other hypotheses could such an attack upon the Board be grounded? No others suggest themselves to the authors. As for those which have been indicated, they may readily be shown to be wholly false.

In the first place, the National Labor Relations Board does not now initiate nor has it at any time in the past initiated formal proceedings against employers in the absence of the filing of charges of unfair labor practices.[15] The Board has consistently adhered to the view that while many other administrative agencies have found it desirable to commence proceedings on their own motion, it should eschew any action which could properly subject it to charges of "bureaucratic

[14] *Cf.* Sen. Edward Burke, Address before Rochester, N.Y., Chamber of Commerce, N.Y. Times, December 1, 1938, p. 18, col. 6; Isaac Don Levine, So Runs the World, N.Y. Journal & American, May 7, 1938: "It takes no courage to be an inquisitor, a snooper, a muckraker in the pay of a powerful Government and under its protections."

[15] Although the Act, 49 Stat. 449 (1935), 29 U.S.C.A. 151 (1938 Cumulative Supp.), is silent as to who may file charges of unfair labor practices, the Board permits "any person or labor organization" to file such charges [Rules and Regs., art II, § 1; *cf.* Act, § 10(a)]. Thus, local labor unions, represenatives of national trade union centers, state federations of labor, and even at times discharged employees, or relatives or acquaintances of affected employees, have filed with the Board charges of illegal employer activity under the Act.

snooping" or "inquisitorial methods"—charges which would almost inevitably accompany Board investigation or prosecution of suspected violations of the Act upon its own motion. Indeed, even had the Board reached a different conclusion, it is more than doubtful that the institution of proceedings *ex mero motu* would be warranted by the statute which governs it. It is apparent, therefore, that the depiction of the Board as a fomenter of strife bears not the slightest resemblance to reality, for it is only *after* strife has arisen, only *after* charges have been filed with it, that it first moves into action.

But, since the filed charge represents only an unsubstantial allegation of illegal activity on the part of the employer,[16] the Board might still be subject to proper criticism if it launched aggressive proceedings merely upon being notified of a grievance, without sufficient investigation of its own. In fact, of course, it does no such thing. Let us examine the route followed by a charge of unfair labor practices after it has been filed.[17]

A charge of unfair labor practices is immediately docketed upon its receipt. Within twenty-four hours after the Regional Director of the Board has assigned the case to a field examiner, who in turn commences his work within forty-eight hours. The Field Examiners—among whom are former personnel officers in industry, businessmen, lawyers, academicians, and others with a degree of competence in industrial relations—are instructed that in complaint cases the primary purpose of their investigation is to obtain compliance with the Act, rather than to prepare a case for prosecution. If preliminary investigation discloses either that the Board is probably without jurisdiction or that there is an insufficient basis for the filing of an unfair labor practice charge, the Field Examiner requests withdrawal of the charge. If, however, further inquiry appears to be justified, the Field Examiner within a few days arranges a meeting between the employer, the representatives of the affected trade union or unions, and himself.[18] At this preliminary conference, the employer is frankly informed of the results of the Field Examiner's investigations. The employer and other interested parties present are encouraged to state their position at this time. Often a request is made, and if made in good faith is invariably granted, that the meeting be adjourned so that necessary information or more people may be brought into the conference room by the employer. It should be emphasized that the Field Examiner is not vested with any inquisitorial powers, may not cross-examine witnesses who refuse to testify, or subpoena records not voluntarily sub-

[16] In practice, the Board permits the filing of charges at will. For it is recognized that it is preferable carefully to sift beliefs as to the existence of unfair labor practices, many of them unfounded, after filing with the Board, rather than impose bars to the filing of such charges. This is wise, for it shifts the burden of deciding whether a violation of the Act does in fact exist from the allegedly affected party to a governmental agency especially equipped with the skills and understanding necessary to make such a determination.

[17] As in the case in the major administrative statutes, the Act is silent as to the initial administrative disposition of a charge which is filed, merely stating that the Board or its agent shall "have power to issue" a complaint [§ 10(b)]; and the regulations are equally vague by stating that "after a charge has been filed, if it appears to the Regional Director that a proceeding in respect thereto should be instituted," a formal complaint shall be issued. RULES & REGS., art II, § 5.

[18] In the first year or so of the Board's operation, the opposition of the employer to trade unions was usually so violent that he often refused to confer with the Board's representative in the presence of and in participation with the representative of his employees' trade union. In such cases the Board representative first conferred with the employer and then with the employees' representatives. Today, only in extremely rare instances, is such procedure necessary.

While throughout these informal proceedings, the Field Examiner is the representative of the Board, the Regional Director is available for consultation with any of the parties who may be dissatisfied with the methods or attitudes of the Examiner.

mitted by the interested parties. If at this preliminary conference the charges are satisfactorily answered by the employer, so that the Field Examiner is of the opinion that no violation of the Act exists, the Examiner suggests to the complainant that his charge be withdrawn. Over a quarter of all the charges that have been filed with the Board have been abandoned or have been withdrawn by the end of this conference period.[19]

In some instances, despite the urging of the Field Examiner, the complainant has refused to withdraw his charge. In such cases the Regional Director is required to review the entire case to date with a view to determining whether the charge should be dismissed. Almost one of every five charges filed since the Board's inception has been dismissed by the Regional Director at this stage.[20] Hence, in some 43 per cent of all the cases, the charge has either been voluntarily withdrawn or has been officially dismissed by the Board's agent prior to the issuance of a formal complaint. And in addition to these cases, the Board disposed of yet another 1.5 per cent of the total by determining, in advance of lodging a formal complaint, that it had no jurisdiction over the employers against whom charges had been filed.

But this is not the whole story. In the event that the Field Examiner is satisfied that the charge filed by the union has a sufficient statutory bases, the Board does not thereupon issue a complaint, with all the publicity that would be attendant upon such issuance. Instead the Field Examiner now privately suggests to the employer that he settle or adjust the case.[21] It will not do to say, as has Senator Burke, that those suggestions are coercive in character. One would be naive to suppose that employers have typically during the past several years been cowed by the agents of the NLRB. The truth is that the suggestion to settle is offered as an opportunity to escape some of the humiliating consequences of past and demonstrable wrongdoing, in the expectation that the prospects for future accord will thereby be brightened. That employers generally so regard the matter is evidenced by the fact that approximately eight out of every nine to whom the opportunity is given, grasp it. Roughly a half of all the charges have been settled in this manner before the issuance of a complaint. The value of these settlements as an alternative to strikes and the latter's attendant hardship and privation need not be discussed at any length here. Suffice it to say that these settlements, substituting persuasion for tests of strength in industrial warfare, represent one of the outstanding achievements of the administration of the National Labor Relations Act. The enemies of the Labor Board are conspicuously silent about this phase of the Board's activities, and indeed well they might be. For this achievement substantially dissipates the force of any contention that the administration of the Act has led to increased industrial strife.

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[19] For these and subsequent figures treating of cases closed before issuance of complaint, see NLRB Ann. Rep. (1936) 35–36; (1937) *id.* 20–21; (1938) *id.* 30–31.

[20] The complaintant is notified that he may secure a review of the Regional Director's order of dismissal simply by writing to the Board in Washington within the ensuing two-week period and requesting such review. Appeals are thus made today in approximately 15 per cent of the dismissed cases. So thoroughly painstaking is the work of the Field Examiner and the Regional Director, that seldom is a dismissal by the Regional Director reversed.

[21] These settlements must be in conformity with the policy of the Act, and if reached after authorization for the issuance of a complaint, are usually submitted to the Secretary of the Board for his approval. Many are settlements in which the representatives of the affected employees are recognized or consent elections agreed to; others result in reinstatement of discharged employees, reinstatement and recognition, disestablishment of company unions, arbitration, *etc.* See NLRB Ann. Rep. (1937) 16–17; (1938) *id.* 21–22.

By withdrawal, dismissal, or settlement of charges, then, approximately 95 per cent of all Board cases have been terminated before the Board itself has gone so far as to make a formal accusation.

In the remaining cases the Field Examiner again thoroughly reviews the whole matter in a memorandum prepared for signature by the Regional Director. This memorandum contains a history of the case, the issues and facts involved, the steps taken to secure compliance, and any peculiar problems which are raised. In a period of a few weeks the Field Examiner's work has been concluded. The Regional Director, if he and the Regional Attorney approve the Field Examiner's analysis, thereupon submits to Washington all the information necessary for consideration by the Secretary as to whether or not a formal complaint should be authorized.[22] When, as is customarily true, the matter is not marked by exceptional factors, a *pro forma* authorization for the issuance of a complaint is made by the Secretary or the Assistant Secretary. In those rare instances when the case is a complicated one, the Secretary will present it to the Board in considerable detail. If the Regional Director's report is complete, and if the case raises no serious question of policy, no more than two or three days will usually elapse before a decision is reached as to whether a complaint should be issued.

The thoroughness with which the Field Examiner, the Regional Director, and the Regional Attorney investigate filed charges results in the issuance of *formal complaints in only 5 per cent of all instances in which charges are made to the Board.*[23]

The criticism of the Board that it acts upon unwarranted charges against employers is itself thus shown to be completely unwarranted. Only after the failure of every effort at voluntary adjustment of violations of the Act, and only after the most careful preliminary investigation, does a formal complaint issue. It is with a rather grim irony that one notes a collateral effect of the highly commendable Board practice in this respect. Since in over 80 per cent of the cases involving alleged unfair labor practices which have been adjudged after formal hearing, the Board has found that the employer had violated the Act, it has been asserted that the Board has shown itself to be infected by an anti-employer bias. When it is remembered, however, that the Board so painstakingly sifts its cases that twenty-four out of twenty-five never even reach the stage of formal complaint, the assertion loses all force. If the Board were more interested in creating a statistical appearance of impartiality than it is in impartiality in fact, it could easily have permitted cases to be tried and to be decided in favor of the respondents. Fortunately, the Board did not choose to respond to a false but plausible attack by an equally false but equally plausible answer.

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[22] The Regional Director's memorandum does not amount to a trial brief. It confines itself, in the main, to statements of the essential and ultimate matters of fact upon which the case rests. Appropriate attention is given to the Board's jurisdicion, that is, to the question of interstate commerce. As concerns the merits, the report does not detail what every witness will testify, but rather states that credible evidence, direct, circumstantial, or documentary, is available to substantiate the story set forth in the memorandum, with an indication of the Regional Director's opinion as to the strength of such evidence and the availability of corroborative evidence. It also indicates the character of the respondent's defense.

[23] In 1937–38, moreover, the Board's closing of cases before the issuance of complaint was higher than the aggregate three-year total, averaging 96.4 per cent.

II.

Employers Do Not Have Fair Notice of Charges Against Them [24]

The charge that the Board does not so conduct its affair as to permit adequate preparation of the defense is woven out of whole cloth. When there have been intentional efforts to impede unionization, employers, even in the absence of notice by the Board, are not ignorant of the unfair labor practices which they have directed against their employees. In such instances, the employer need not be notified, for example, of his utilization of industrial spies, his discharge of employees because of union activities, or his refusal to bargain collectively with the representatives of his employees; notice is implicit in such employer-employee relations. But nothing need be left to speculation in this respect; for, in all events, the employer receives a full appreciation of the nature of the charges that have been made against him upon his attendance at the previously described preliminary conference between himself, the union representative, and the Field Examiner. At that time, he is informed not only of the nature of the charges against him, but also of the tentative conclusions drawn by the Field Examiner from his own investigation. An employer who in good faith participates in this conference will leave the conference room with no uncertainty as to those matters upon which he will be expected to defend. Notwithstanding this, the Board in every case issues a formal complaint and notice of hearing to the respondent, which is predicated upon the charge previously filed.[25] The complaint details the allegations of unfair labor practices of which the Board believes it has found *prima facie* evidence, and is worded with the evident purpose and effect of notifying the respondent of the *specific* illegal activities concerning which he will be expected to defend.[26]

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[24] See *e.g.*, Sen. Edward Burke, *We Must AMEND the Wagner Act* (1938) 6, 83 Cong. Rec. 1325 (April 5, 1938).

[25] The Act [§ 10(b)] states that "whenever it is charged that any person has engaged in . . . unfair labor practices . . . the Board . . . shall have power to issue . . . a complaint stating the charges in that respect . . ."; the Rules and Regulations [art II, § 5] declare that "After a charge has been filed . . . the Regional Director . . . shall issue . . . a formal complaint . . . stating the charges . . ." Although neither the Act nor the Board's rules *explicitly* require a compaint to be based upon the filed charge, the Board has doubted the validity of complaints relating to matters not disclosed by the charges. Accordingly the Board has predicated the allegations in the complaint upon charges previously made by the aggrieved parties. In Matter of Jefferson Electric Co., 8 NLRB no. 33 (1938), however, the complaint was amended *during* the hearing to include an allegation of an illegal contract, which evidence adduced at the hearing indicated the respondent had negotiated, although the charge was not at any time amended in this respect.

[26] A copy of the charge is attached to the complaint [Rules & Regs., art. II, § 5; *cf.* Matter of the Jacobs Bros., Co., Inc., 5 NLRB 620 (1938); Matter of Lone Star Bag & Bagging Co., 8 NLRB no. 30 (1938)], and a copy of the Board's Rules and Regulations is enclosed.

Amendment may occur at any time before and during the hearing, and at times is even permitted after the conclusion of the hearing. The amendment process may become vexations only in the event of substitution of or addition to the subject-matter of the complaint, in regard to which the respondent or other interested party does not have sufficient opportunity to prepare a defense—and the authors have discovered but one clear instance in which this has occurred. In that case, Matter of Lone Cotton Mills, Inc., 9 NLRB no. 91 (1938), the Board ordered a further hearing, so that the respondent could adequately cross-examine the Board's witnesses and present further evidence in its defense.

In all instances in which the complaint is amended, the respondent may amend his answer within a reasonable period to be fixed by either the Trial Examiner or the Board, as the case may be.

The explicitness of the complaint explains why the Board has almost invariably refused to grant requests for bills of particulars in the relatively few instances in which employers have made them.[27] As Judge Learned Hand remarked in the well-known *Remington Rand* case,[28] "Such a bill [of particulars] is only important when a party must meet his adversary's case without an opportunity to prepare; it is of slight value in a trial by hearings at intervals. The notion that its absence handicaps respondent in its cross-examination seems to us illusory."

Time of hearing. The accusation that the Board gives insufficient notice to employers, if by that it is meant that the complaint affords the respondent insufficient information as to the nature of the illegal activities of which he is charged, is therefore shown to be without solid foundation. Is there perchance a more tenable suspicion that the NLRB flouts the constitutional requirement of due notice by denying to the respondent a sufficient temporal opportunity to prepare a defense? We think not.

Both the Act and the regulations of the NLRB specify that the hearing may not be held less than five days after the service of the complaint.[29] Were this to be the actual time-period allowed, there clearly would be no violation of due process of law,[30] and in fact, no hardship caused the employer because of his familiarity with the general nature of the Board's case as a result of the preliminary investigations. In practice, however, the Regions permit more than the minimum statutory five-day period, some, like the Second Region, affording as many as fourteen days' notice in all proceedings.[31] In addition, the employer or any other interested party may request that the commencement of the hearing be postponed or that the progress of the trial be adjourned until a later date. If the motion is made in good faith, and not for dilatory purposes, it is granted.[32] Thus, if the employer fails to appear, or appears without counsel, or if he has not completed the preparation of his case by the time of the commencement of the hearing, or if he has not been adequately served and therefore has failed to receive due notice, or if his chief witness is absent from the city, or ill, or needed in the business at the particular date of the hearing, as for example a salesmen's convention which is proceeding at the same time,

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[27] See, *e.g.*, Matter of Bradford Dyeing Association, 4 NLRB 604 (1937); Matter of Zenite Metal Corp., 5 NLRB 509 (1938); Matter of Swift & Co., 7 NLRB 287 (1938).

In accord with the decision of the Supreme Court in Myers *v.* Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), cited *supra* note 4, it is clear that no judicial tribunal may interrupt the proceedings to compel the Board to furnish an employer with a bill of particulars. In the event of court review of a final order the employer may urge the Board's denial of a bill of particulars as a procedural error warranting the setting aside of the Board order. *Cf. In re* Bank of Yorktown, N.Y.L.J., Sept. 17, 1938, p. 706, col. 3.

[28] National Labor Relations Board v. Remington Rand, 94 F.(2d) 862, 873 (C.C.A.2d, 1938), *cert. denied*, 304 U.S. 576 (1938).

[29] Act, § 10(b); Rules & Regs., art. II, § 5.

[30] National Labor Relations Board v. American Potash and Chemical Corporation, 98 F.(2d) 488, 492 (C.C.A. 9th, 1938); *cert. denied*, February 27, 1939.

[31] When a complaint is authorized by the Secretary, the Trial Examiners' Division is so notified, and the Chief Trial Examiner awaits word from the Regional Director as to when he desires the projected hearing to commence. Even after the date is set, the Trial Examiners' Division still does not designate the Trial Examiner who is to preside at the hearing. For if confirmation of the hearing date is not received from the Regional Director at least four days before the date originally fixed, then the Chief Trial Examiner strikes the case from his list of scheduled hearings. The reason for not receiving such confirmation is that approximately 35 per cent of the Board proceedings are either settled before hearing, and therefore cancelled, or are postponed for other reasons.

[32] See, *e.g.*, Matter of the Ontario Knife Co., 4 NLRB 29 (1937); Matter of International Harvester Co. Tractor Works, 5 NLRB 192 (1938); Matter of H. E. Fletcher Co., 5 NLRB 729 (1938); Matter of American Manufacturing Co., Inc., 7 NLRB 375 (1938). If the request for postponement is made prior to the commencement of the hearing it will be granted by the Regional Director, and if made after the start of the hearing, by the Trial Examiner.

the Board will communicate with all the interested parties concerning the postponement of the hearing. In most instances, all concerned parties agree to the requested postponement, and even in the absence of acquiescence by the parties, the Board will always grant the request, if reasonable.[33]

III.

"No Hearings Should Be Held by the Board Except Upon Notice to All Interested Parties. . . . Every Person Having An Interest in the Dispute Should Be Permitted to Intervene"[34]

We have shown that at least as to the respondent—that is, as to the person against whom the complaint has been made and to whom any consequent order of the Board will be directed—there is no proper objection to the NLRB's notice procedure. But of late it has become fashionable to insist that, while the content and timing of the Board's notice may be unexceptionable, the NLRB is nevertheless guilty of failing to give notice to appropriate parties other than the respondent. This allegation against the Board requires us to consider a group of related questions: Who by constitution or statute is *entitled* to receive notice? Who in addition *ought* to receive notice? Who does *actually* receive notice?

The Act itself [Section 10 (b)] requires only that the employer-respondent be served with a copy of the complaint in a proceeding involving allegations of unfair labor practices. The Board has, however, provided in its regulations that the person or labor organization filing the charge should also be served with a copy of the complaint. In proceedings not involving unfair labor practices, but looking toward the certification of employee representatives (*i.e.*, representation proceedings), the Board has given the "due notice" of hearing, demanded by Section 9 (c) of the Act, to the petitioner, to the employer or employers involved,[35] and to any known individuals or labor organizations who maintain that they represent employees directly affected by the investigation.

The basis for the charge that the Board does not afford notice to all interested parties is to be found in its practice in the less than three score cases in which the employer has been charged with signing a contract with an employees' organization in order to prevent the majority of his employees from selecting a union of their own choice. The Board has held, as the Act commands, that that activity is illegal. In such instances the Board has not given notice to the company union, and the judiciary has sanctioned the Board's action in this respect by holding that the company union is not a necessary party to the proceedings; it

[33] See, *e.g.*, Matter of Atlantic Footwear Co., Inc., 5 NLRB 252 (1938); Matter of Richmond Hosiery Mills, 8 NLRB No. 134 (1938); Matter of Uxbridge Worsted Co., 6 NLRB No. 107 (1938) (not reported in bound volume); Matter of Swift & Co., 7 NLRB 269 (1938); Matter of American Manufacturing Co., Inc., 7 NLRB 375 (1938); *cf.* National Labor Relations Board v. American Chemical and Potash Corp., *supra* note 30, at 491–92.

Thus also, if the chief witness of the union is ill, or if the union is involved in other court cases, or in a strike, or if the Board's calendar is crowded and it needs more time for the preparation of its case, or if time is needed by the parties for consideration of stipulations, the hearing will be postponed or adjourned until a later date. See, *e.g.*, Matter of Friedman-Blau Farber Co., 4 NLRB 151 (1937); Matter of David and Hyman Zoslow, 4 NLRB 829 (1938); Matter of La Crosse Garment Industries, 5 NLRB 127 (1938).

[34] John Lord O'Brian, Address before Young Republican Clubs, N.Y. Times, October 16, 1938.

[35] Although representation proceedings are not proceedings against the employer, the Labor Board, unlike the National Mediation Board, follows the practice of permitting the employer to participate in the proceedings in as active a fashion as he desires.

is not deemed entitled to notice or hearing because its presence is not requisite in order to enable the Board to determine whether the respondents have violated the statute.[36] In 14 of the 50 odd cases the matter has been altered by the circumstance that the employer's *vis-à-vis* was not a company union, in the technical sense of the term, but was a union affiliated with the American Federation of Labor, or, in one instance, with the Congress of Industrial Organizations. In *Consolidated Edison Company* v. *National Labor Relations Board*,[37] involving a situation of this type, the Supreme Court held that the American Federation of Labor affiliate must be given formal notice of the hearing, since the Board in its final decision might, because it constituted an unfair labor practice, order the dissolution of a contract to which it was a party. It cannot well be said that the Board's failure to give notice to the union was allegedly *particeps criminis* of the employer, was reflective of a base design to disregard the demands of procedural due process. In the first place, at the time that the NLRB issued its complaint, no contract between the company and the union had been made; the complaint had originally charged that the respondent was interfering with free unionization by employing industrial spies, discriminatorily discharging active trade unionists, and contributing financial support to the A.F. of L. affiliate. In the second place, the Supreme Court had said with some vigor in the *Pennsylvania Greyhound Lines* case [38] that "As the order did not run against the Association [a party to the employer's contract] it is not entitled to notice and hearing. Its presence was not necessary in order to enable the Board to determine whether respondents had violated the statute or to make an appropriate order against them." Not only the NLRB but also the Circuit Court of Appeals for the Second Circuit thought that this language was fully applicable to the situation disclosed in the *Consolidated Edison* case.

In any event, the excited discussion aroused by the case is but a tempest in a teapot. For it was the Board's practice even before that case was decided by the Supreme Court on December 5, 1938, formally to notify affiliates of national labor organizations which the employer was charged with assisting, of the pendency of the proceedings, regardless of whether or not a contract existed.[39] In addition, *before* the Supreme Court decision in the *Consolidated Edison* case, the Board voluntarily amended its procedure, and today, in all cases involving contracts entered into between employers and unions, whether *company* or *bona fide* unions, which serve as a basis for an allegation of a violation of Section 8 (2) of the Act, the Board gives notice to all the contracting parties, as well as to the respondent and to the original complainants.

The insistence, therefore, that the Act must be amended so that "every known interested party will be served", as proponents of amendment have put it, is founded either upon ignorance or disingenuousness.

[36] See, *e.g.*, National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U.S. 261 (1938); National Labor Relations Board v. Wallace Manufacturing Company, 95 F. (2d) 818 (C.C.A. 4th, 1938); National Labor Relations Board v. J. Freezer & Son, 95 F.(2d) 840 (C.C.A. 4th, 1938).

[37] Consolidated Edison Co. v. National Labor Relations Board, 59 Sup. Ct. 206 (1938), *partially reversing* 95 F. (2d) 390 (C.C.A. 2d, 1938).

[38] National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U.S. 261, 271 (1938).

[39] Board officials have indicated to the authors that no departure from the Board's usual practice was intended in the *Consolidated Edison* proceedings, but rather due to a clerical error the wrong local of the A.F. of L. affiliate was served.

for amendment of this character would be merely declarative of the actual present practice of the Board. But even if this were not the case, a statutory provision providing for notice to "every interested party" would be of small legal significance. The term "interested party" is an abstraction, which permits the judiciary to decide in each case whether a particular non-party should have been afforded notice of the proceedings. It seems clear under the *Consolidated Edison* case, as well as innumerable familiar cases arising from circumstances not related to the NLRB, that the courts, without any explicit statutory instruction, will inquire into the question whether "interested parties" were ignored and were thus deprived of procedural due process.[40]

To contend, therefore, that the Act should be amended to require the Board to afford adequate notice to "every interested party" is illusory and dangerous—*illusory* because the Board in fact does afford notice to interested parties, and because, further, such amendment would not extend the scope of judicial review of the Board's orders; *dangerous* because it adds to the public fear, carefully nurtured by critics of the Act, that the Act and its administration must be basically defective if such fundamental amendment is required to preserve constitutional forms of procedure.

Intervention. The National Labor Relations Act, like other major administrative statutes, includes provisions permitting collaterally affected non-parties to petition the administrative agency for permission to become a party to proceedings of whose pendency they have been informed. The nature of the interest which must be present in order to permit intervention is not formulated in explicit terms either by the Act or by the regulations.[41] In practice, however, the Board's treatment of the intervention problem has been marked by a consistency which furnishes an adequate basis for predicting future conduct.

National or local organizations claiming to represent employees in respondent's plant, whether American Federation of Labor, Congress of Industrial Organizations, or independent, as well as company unions, are almost invariably permitted to intervene in Board proceedings.[42] A careful examination of the Board's decisions reveals that the Board has in truth permitted intervention with great liberality,[43] its

[40] The conclusion just stated is inescapable unless the proponents of amendment mean by "interested party" something quite different from "necessary party". If this is so, they have never indicated the fact. Indeed, if "interested party" is intended to be coextensive with "any person who is interested in the outcome of the case", one is staggered by the possible confusions that would ensue if the Act were changed to require notice to each such individual. Literally thousands of persons may, in the layman's sense, be "interested" in each case considered by the Board.

[41] The Act, § 10(b), says merely that "In the discretion of the member . . . conducting the hearing . . . , any other person may be allowed to intervene in the said proceeding. . . ." The RULES & REGULATIONS, art. II, § 19, provide that any person "desiring to intervene in any proceeding shall file a motion in writing with the Regional Director. . . ." The Regional Director, or, if the motion is made at the hearing, the Trial Examiner, may by order "permit intervention in person or by counsel to such extent and upon such terms as he shall deem just."

[42] See, *e.g.*, Matter of Pacific Gas & Electric Co., 3 NLRB 835 (1937); Matter of Waterbury Clock Co., 4 NLRB 120 (1937); Matter of R. C. Mahon, 5 NLRB 257 (1938); Matter of American Steel & Wire Co., 5 NLRB 871 (1938); Matter of Red River Lumber Co., 5 NLRB 663 (1938); Matter of American Smelting and Refining Co., 7 NLRB 735 (1938); Matter of Midwest Stamping Co., 8 NLRB no. 63 (1938).

[43] The intervener becomes a party of the proceedings to the full extent of his interest [Matter of Blanchard Brothers and Lane, 8 NLRB no. 157 (1938)], entitled like any other party to testify himself [Matter of R.C. Mahon, 5 NLRB 257 (1938)], or produce evidence [Matter of Phelps Dodge Corporation, United Verde Branch, 6 NLRB 624 (1938)]; to make motions [Matter of John Morrell & Co., 4 NLRB 436 (1937)], or file briefs [Matter of Pure Oil Co., 8 NLRB no. 25 (1938)]; to call, examine, and cross-examine witnesses [Matter of Biles-Coleman Lumber Co., 4 NLRB 679 (1937)], and be heard in person or by counsel [Matter of National Motor Bearing Co., 5 NLRB 409 (1938)]. In addition, interveners sometimes file answers to the original complaint [Matter of Newport News Shipbuilding and Drydock Co., 8 NLRB no. 107 (1938)], may move to dismiss the complaint [Matter of Titan Manufacturing Co., 5 NLRB 577 (1938)], and in all cases, their testimony is considered as part of the record in the preparation of the Trial Examiner's report [Matter of New Idea, Inc., 5 NLRB 381 (1938)]. (Footnote continued on p. 346.)

denials being limited to a few instances in which, as far as the reported decisions disclose, the authors are of the opinion that the Board could well have granted the petitions.[44] But possible errors in isolated cases may hardly serve as a rationale upon which to peg an amendment allowing intervention "as a matter of right".

What is there to be said for the view that the Board should be required to grant intervention whenever it is requested? The authors can find *nothing*. In not a single instance has it been held by any court that the NLRB has denied leave to intervene to any party whose petition should have been granted. In fact, the Board's practice in respect of petitions for intervention is already so liberal that, except for the residual control which is reserved, though sparingly exercised, by the Board, there is already a close approximation of "intervention as a matter of right".

If there is an approximation, it may be asked, what harm could be done by regularizing and extending the existing practice? The answers to this question, we think, are plain. "Interest" is not a pervasive or an abstract quality; rather it is related to, and its presence or absence can be determined only by examination of, the particular circumstances of specific, concrete cases. An "interest" in the controversy, we may assume, would make it desirable that leave to intervene be granted. But is it fanciful to suggest, in connection with NLRB proceedings at the present time, that some would-be interveners may be interested in intervening, even though they have no "interest" in the case?

To enact that petitions for intervention must be granted as a matter of right and not of discretion, would permit frustration of the Act's objectives by an unnecessary prolongation of what are already frequently too protracted proceedings. It is not a barely imagined possibility with which we are now dealing. The opportunity to extend, duplicate, and confuse the formal hearings of the Board through the connivance of a recalcitrant respondent and his allied "interveners" is an obvious one. As the NLRB said of numerous petitions to intervene in the *Pennsylvania Greyhound Lines case*, "These petitions are hereby denied. Had they been granted, it is impossible to tell how many more petitions to intervene would have been filed, or how long it would have taken to reach a final determination of the issues in the cases which had been regularly presented."[45]

A change in the Board's present practice in respect of intervention would, it is submitted, accomplish but two things—both undesirable: It would further embarrass the effective administration of the National Labor Relations Act by making possible intolerable delays in the completion of former hearings; and, although the actual record establishes the contrary beyond all doubt, it would suggest to persons already alarmed by the acerbitous comments of an unfriendly press, that the Board has been remiss in its consideration of intervention proceedings, and has thus denied to interested parties the opportunity to be heard.

It may be observed that in some instances, rare it is true, non-parties have participated in the proceeding although not formally becoming a party to the proceeding [Matter of Midwest Stamping Co., 8 NLRB no. 63 (1938)], either by being substituted for one of the original parties [Matter of Tennessee Electric Power Co., 7 NLRB 24 (1938)], or by being permitted to appear before the Trial Examiner or administrative agency as *amicus curiae* [Matter of National Motor Bearing Co., 5 NLRB 409 (1938)].

[44] Matter of Star Publishing Co., 4 NLRB 498 (1937); Matter of Hershey Chocolate Corp., 7 NLRB 14 (1938); Matter of Metropolitan Engineering Co., 8 NLRB no. 70 (1938).

[45] Matter of Pennsylvania Greyhound Lines, 3 NLRB 622, 649 (1937).

IV.

"Hearings Are Employer Prosecutions, in Which the Board Representatives, Instead of Taking Impartial Fact-Finding Attitudes Identify Themselves With the Union Case Against the Employer. . . . His Guilt Is Assumed, Not Only by the Complaining Union, but by the Board Counsel, and Even by the Trial Examiner Who Specifies the Rules." [46] . . . "The Board Is a Travesty on Justice" [47]

No charge against the administration of the Act or the procedure of the Board has assumed greater proportion than the charge that the Board does not afford a fair and impartial trial to employers who have allegedly violated that Act.

In part, the antagonism on this score is but a reflection of an antagonism toward the whole administrative process, founded upon the inarticulate major premise that justice administered by men in black robes is superior to justice administered by men in sack suits. On the other hand, it is doubtless true that some, though the authors believe not many, of those who distrust the impartiality of the Board hearings developed their distrust from actual, saddening experiences with individual trial examiners, who, like other judges, referees, and special masters, have admittedly made mistakes. In the main, however, the authors' study has convinced them that "Unfair!" has not been an adjective descriptive of the Board's behavior, but has been a slogan by whose use the enemies of the Act have been better able to rally opposition to its present administration. In truth, in the presence of a wide popular approval of the principles of collective bargaining, public support for amendment of the Act could never be obtained unless the layman, wholly unfamiliar with the procedure of the Board, were actively to suspect that the personnel of the Board comprised judicial tyrants to whom the concept of justice is completely alien.[48] Let us examine the charges addressed to the actual conduct of the hearing by first considering the setting in which the hearing takes place.

Although the Act specifies no requirements as to the place of hearing, and the regulations are equally silent, the Board in practice has almost always scheduled hearings in the city where the plant of the respondent company is located, so as to facilitate the presentation of evidence on the part of the employer as well as the Board. In order to avoid possible misunderstanding and recrimination, the hearing is not held at the regional offices of the Board, but is held in federal, state, or municipal buildings or in the quarters of the local board of trade, chamber of commerce, bar association, or like organization.

Although the Board has the power to order otherwise, the hearing is always a public one, subject to the observation of the curious and the

[46] Varney, *The Case Against the Labor Board* (1938) 43 Am. Merc. 129, 152.

[47] William Green, Address before Massachusetts Federation of Labor, August 5, 1938, N.Y. Times, August 6, 1938: *cf., e.g.,* Sen. Arthur Vandenberg, Address over Columbia Broadcasting System, N.Y. Times, October 30, 1938: "[The Board is] a star-chamber inquisition which is a law unto itself."

[48] When on February 10, 1939, Mr. William Green announced for the Executive Council of the American Federation of Labor that it favored ripper legislation which would abolish the present Board and displace its entire staff, he of course gave tremendous impetus to the growth of such a popular belief. One who is sympathetic to the ultimate purposes of the A. F. of L. finds considerable difficulty in understanding its espousal of the very positions taken by the most reactionary of its opponents. See William Green, *supra* note 47: "We will mobilize all our political and economic strength in an uncompromising fight until the Board is driven from power."

critical—few of whom, it may be added, choose to attend in order to see whether their criticism is well founded. A Trial Examiner, designated by the Chief Trial Examiner in Washington,[49] conducts the hearing for the purpose of taking evidence.[50] He is chosen from a Trial Examiners' Division, which is composed of a permanent staff of slightly under forty people, of whom all but three are lawyers, and all of whom operate outside of Washington.[51] In the main, they are people who have a mature understanding of labor relations, unions, and employers, though it is doubtful that every member of this group, any more than every member of any other numerous staff, is a paragon of all the virtues. The quality of a man's mind and the character of his spirit are matters not readily susceptible of objective proof. In expressing a judgment concerning the NLRB's staff of trial examiners, therefore, the authors concededly state a personal opinion. Yet it is perhaps proper to say that their personal opinion is based, first, upon their observation of the conduct of numerous trial examiners in the course of actual hearings, and, second, upon extended conversation with individual members of the examining staff. We now set forth as our measured conclusion that the trial examiners whose work we have watched or whose acquaintance we have made, have been conscientious men; that they have recognized that acceptance of policies embodied in the Act they help to administer will more surely be brought about by moderation than by excessive assertiveness in administration; that to a very marked extent in the cases before them they have dealt intelligently and tactfully with conflicting claims, sympathies, and prejudices of high explosive content; and that they have been qualified by native capacity, character, education, and training for the important

[49] While the regulations also permit the Board or the Regional Director to designate the Trial Examiner [RULES & REGS., art. II, § 23; art. III, § 5; see NLRB ANN. REP. (1937) 23], the Chief Trial Examiner, alone, selects the person who will preside over the hearing.

[50] The regulations provide that at any time during the course of the trial a new Trial Examiner may be designated to take the place of the Trial Examiner previously designated to conduct the hearing. RULES & REGS., art. II, § 23; art. III, § 5. The authors have been able to discover only three cases in which this has occurred during the course of the hearing. In one instance the trial examiner was replaced because of illness [Matter of American Smelting and Refining Co., 7 NLRB 735 (1938)]; in another case, his appointment expired [Matter of Calco Chemical Co., 7 NLRB No. 124 (1938)]; and in the Weirton proceeding, the hearing of which consumed eighteen months, he was relieved at his own request. Of course, in the event of a second or further hearing, which usually occurs a considerable time after the conclusion of the first hearing, a trial examiner different from the one who presided over the first hearing is at times designated. See, *e.g.*, Matter of Metro-Goldwyn-Mayer Studios, 7 NLRB 662 (1938); Matter of Calco Chemical Co., *supra*.

It has been argued that the substitution of one Trial Examiner for another during the course of the hearing violates the constitutional rights of the respondent. Such objections have been overruled [Matter of American Smelting and Refining Co., 7 NLRB 735 (1938)] and the courts have sustained this view in non-NLRB proceedings. See *e.g.*, United States *ex rel.* Chin Cheung Nai v. Corsi, 55 F.(2d) 360 (S. D. N. Y. 1931), Nicoli v. Briggs, 83 F.(2d) 375, 378 (C. C. A. 10th, 1936). Clearly every effort should be made to avoid a change in examiners during a hearing, for the new presiding officer may be handicapped by not having observed the demeanor of earlier witnesses, and the parties may be inconvenienced by having to "educate" an Examiner not conversant with the complexities of the case as it has thus far developed.

[51] The Board has on occasion, though with greatly decreasing frequency, also utilized the services of special Trial Examiners, who have been men of great standing, experience, and ability. Among them may be mentioned Dean Charles E. Clark, Dean Francis M. Shea, and Judge Edward Grandison Smith of West Virginia.

functions they perform.[52] The matter was well put by the Chairman of the Board in a recent address, when he said, "I have no doubt that in a handful of cases, new and inexperienced Trial Examiners have not comported themselves in accordance with proper standards of judicial dignity. But by careful selection and experience and instruction, our staff of Examiners is becoming as competent to do its specialized work as American judges in general are to administer the general law. I do not mean that they can make rulings and decisions which will be welcomed by the losing party, nor that they can decide the same case for both sides." [53]

But much of the discussion of the alleged vices or virtues of the trial examiners is irrelevant in fact, for their findings and determinations do not have the effect of judgments of trial courts. Their conclusions do not stand in the absence of an appeal. On the contrary and as a matter of course, in the absence of the employer's acceptance of the Trial Examiner's recommendations, *every case tried before an Examiner goes for decision to the Board*, which is subject to the pressures of a critical public opinion, and then, if need be, to the courts, which review the administrative order predicated upon the record formed at the hearing. As will be shown in a later portion of this discussion, the Board, in making its final order, relies upon the Trial Examiner only to the extent of accepting his observations of the witnesses' demeanor, a traditional deference to the person who presides at the trial.

Right to Counsel or Other Representation. Parties may, under the Act and the Board's regulations, appear either in person or by any representative they may desire. Board officials have estimated that in approximately twenty to thirty per cent of all Board proceedings at least one party is present without the aid of counsel. In almost every

[52] The Board has been severely criticized because the Act details no qualifications limiting it in its choice of trial examiners. Of course, so far as the authors recollect, it is not frequent that qualifications of either federal or state judges are prescribed by statute, nor do instances come to mind in which legislatures have set forth specifications for trial examiners in other agencies. Perhaps the failure to list qualifications is attributable to a very sound belief that no statutory requirement of quality could be very meaningful. Even so ascertainable a qualification as the age of the applicant is of doubtful value in choosing trial examiners. Senator Walsh, for example, has proposed that NLRB examiners must be at least thirty years of age—a rather purposeless suggestion, in view of the fact that, so the authors are informed, the average age of the present staff of Trial Examiners is about 45 years. But mathematical measurements are hardly to be applied in determining one's capacity for participating in the work of adjudication. Possibly bringing the trial examining staff within the protection of the civil servce laws would be wholesome, but only because it would prevent a flagrant abuse in appointments, rather than because it would ensure good appointments. Another possibly fruitful consequence of including trial examiners in the classified civil service would be the acquisition by them of the independence given by security of tenure. Against these potential gains, of course, one would have to set off the fact that some features of the existing federal civil service laws are not calculated to concentrate attention on merit, but rather on such irrelevancies (for present purposes) as war service records and geographical origins. *Cf.* Lapp, *Shall the National Labor Relation Act Be Revised?* (1938) 28 Am. Lab. Leg. Rev. 165, 168–69.

[53] J. Warren Madden, Address Delivered over Columbia Broadcasting System, August 29, 1938, 3 Lab. Rel. Rep. 9, 11 (1938). It may be noted that whether or not possessed of previous legal training, new Trial Examiners are today trained in the Board offices in Washington for a period of four to six weeks, before being assigned as an examiner to a hearing. They are subjected to a reading course of about three to four weeks, and then assigned to sit with an experienced Trial Examiner for a number of hearings, after which they are designated as Examiners in the simplest type of Board hearings, namely, the usual hearing on a petition for the certification of representatives.

instance, however, the respondent employer appears with counsel, or, if appearing alone, has had the hearing already in progress adjourned so that he might obtain counsel.[54] Local labor unions, usually because of financial difficulties, are on the contrary frequently not represented by counsel, but rather by some officer or administrative agent. The representatives of the parties have the full status of legal counsel in a court of law—they are privileged to present and cross-examine witnesses, introduce exhibits, make and argue motions and objections, and otherwise build a record to support their theory of their principal's case.

Cross-Examination of Witnesses. Any party to the proceeding or his representative may examine and cross-examine witnesses.[55] The Board has indicated that, as is required by orderly judicial process in any tribunal, cross-examination must be related to the issues at hand.[56] It can nevertheless be generally stated that extreme latitude is given the respondent employer as concerns cross-examination, so that he may on cross-examination even interrogate witnesses on matters not included in the direct examination. Notwithstanding the cries of denial of due process resulting from limitation of the right of cross-examination by Trial Examiners, in not one single instance has the Board, a Circuit Court of Appeals, or the Supreme Court found it necessary to reverse a Trial Examiner's ruling limiting the continuation of cross-examination. Our conclusion is, therefore, that the complaint of unfair procedure in this respect has no basis in fact, but reflects rather the ill temper of attorneys who, by making unsubstantiated charges against the conduct of the hearing, seek to draw attention from the finding that their clients have engaged in illegal activities.[57]

It may not be wholly inappropriate to observe at this point that the tactics of respondent's counsel in Board proceedings have in a few instances been so reprehensibly unprofessional that the Board has felt constrained to take counsel severely to task for misconduct. Thus, for example, in one case an attorney, after adducing the testimony of five witnesses in his client's behalf, withdraw from the hearing "solely on

[54] Matter of Richmond Hosiery Mills, 8 NLRB no. 134 (1938). But *cf.* National Labor Relations Board v. American Chemical and Potash Co., 98 F. (2d) 488, 491–92 (C.C.A. 9th, 1938), *cert. denied*, February 27, 1939.

[55] RULES & REGS., art. II, § 25. The privilege of cross-examination may, of course, be waived. Matter of Martin Dyeing and Finishing Co., 2 NLRB 403 (1936); Matter of Lane Cotton Mills, 7 NLRB no. 104 (1938) (not reported in volume).

In representation proceedings, the employer is today more overtly neutral and more cognizant than hitherto of the effect upon public relations of espousing one union as against another, and therefore often does not participate in the cross-examination, confining his questions, when indulged in, to attempting to determine whether the employees were "coerced" into union affiliation.

Witnesses are examined orally under oath, which may be administered by any member of the Board, or any agent or agency designated by the Board for that purpose [Act § 11(1)], except that in unusual circumstances, the Trial Examiner permits the testimony of witnesses to be taken by deposition under oath. Matter of American Manufacturing Co., Inc., 7 NLRB 375 (1938). Any such deposition is taken in accordance with the procedural requirements for the taking of depositions provided by the law of the state in which the hearing is pending. RULES & REGS., art. II, § 20.

[56] Matter of Lenox Shoe Co., 4 NLRB 372 (1937).

[57] Other charges that have been made, as, *e.g.*, that the employer was denied the right to give testimony [Matter of Inland Lime & Stone Co., 8 NLRB no. 116 (1938)], or that the Board attorney bullied the witnesses, or that the Trial Examiner admitted incompetent testimony and excluded competent evidence offered by the employer [National Labor Relations Board v. Remington Rand, Inc., 94 F.(2d) 862 (C.C.A. 2d, 1938), *cert. denied*, 304 U.S. 576 (1938)], have never led the Supreme Court or any Circuit Court of Appeals to set aside a Board order on the ground of unfairness at the hearing. In only one instance has the Board ordered a new hearing because of what it found to be improper and prejudicial rulings by the presiding Trial Examiner. Matter of Owens-Illinois Glass Co., Case no. C–630, Feb. 7, 1939; but *cf.* Matter of Union Die Casting Co., Ltd., 7 NLRB 846 (1938).

the ground of the unfairness of the examination of the witnesses called so far." The Board in its decision replied: [58]

"This statement is without foundation. It was an obvious appeal to passion and prejudice of the sort which has been rebuked by courts when resorted to by lawyers in jury trials where the evidence is strong against their clients. There is not a word in the record of this long hearing to justify in the slightest degree counsel's outburst.

"The record shows that the conduct of the government's trial attorney amounted to no more than a vigorous effort to bring out the relevant facts. His cross-examination of respondent's witnesses was no more severe than can be observed any day in a court house where counsel are opposing each other in jury trials. The imputation of impropriety to the Trial Examiner because he asked questions of the witnesses is likewise unfounded. It is not the proper function of a judge or other presiding officer at a trial to sit dumbly and leave the questioning of the witnesses solely to the lawyers, regardless of whether they succeed in bringing out the truth. Counsel must have known that this conception of a trial is outmoded and disreputable and nowhere more so than in the jurisdiction where he practices in the courts. The Trial Examiner cannot be criticized because he elicited the truth from reluctant witnesses."

The Board is not vested with the power to punish contemptuous conduct, except by exclusion from the hearing.[59] The Board has been extremely reluctant to invoke even this relatively mild sanction because of the unfavorable publicity which would almost inevitably result from such action, however justified it might have been. In the *Weirton Steel case*,[60] Mr. Clyde A. Armstrong, counsel for the employer, had over an extended period of time impeded the efforts of the Trial Examiner, Judge Edward Grandison Smith, to conduct the proceedings as a dignified trial. Mr. Armstrong's conduct at different times was described as "defiant and snarling", "aggressive, contemptuous, contumacious, and defiant", "impertinent and out of order". He was repeatedly cautioned by the Trial Examiner, but the record is replete with instances of continued scorn for the Trial Examiner and the proceeding over which he presided. Finally, the Trial Examiner ordered Mr. Armstrong's exclusion. Upon an immediate appeal, the Board concluded, after oral argument before it and the introduction of evidence on behalf of Mr. Armstrong, that counsel's actions could be interpreted only as an intentional attempt to undermine the Trial Examiner's control of the hearing; and that in the absence of any assurances of future professional conduct, the Board was convinced "that the hearing cannot proceed if he is present." The Board therefore affirmed the Trial Examiner's action and ordered that the hearing be further adjourned, proceedings already having been stayed pending the Board's decision on appeal, so that other counsel participating with

[58] Matter of National Electric Products Corp., 3 NLRB 475, at 504 (1937).

[59] RULES & REGS., art. II, § 31. *Cf.* Freedman, *The Inquisitorial Powers of the National Labor Relations Board* (1936) 22 WASH. U. L. Q. 81; see generally, Note, *Power of Administrative Agencies To Punish for Contempt* (1935) 35 COLUMBIA LAW REV. 578.

The regulations, it may be observed, provide that the refusal of a witness at any hearing to answer any questions which have been ruled to be proper shall be ground for the striking out of all testimony previously given by such witness on related matters. RULES & REGS., art. II, § 31. So far as can be determined, this provision has not been utilized by the Board.

[60] Matter of Weirton Steel Co., 8 NLRB No. 60 (1938). In only one other case, now pending for Board decision, has the Board excluded counsel from the hearing room for alleged contumacy, and then only for the remainder of that particular day.

Mr. Armstrong could prepare to resume the presentation of the company's defense.

We find, then, in concluding this branch of our discussion, nothing either in the nature of the proceedings themselves, in the manner of their conduct, or in the character of the men who preside over them, which prevents a full and fair exploration of the matters at issue—nothing, that is, except an occasional manifestation of contumacy by gentlemen who should and who probably do know better. Perhaps, however, the real gall in the cup is not the failure of the Board to explore fully, but its readiness to explore *too* fully, manifested by its relaxation of exclusionary rules of evidence as well as by the pertinacity of the trial attorneys who seek to establish the allegations of the complaint.

V.

"At One Stroke All Rules of Evidence, Built Up Through Centuries of Experience To Test the Credibility of Witnesses, Develop the Facts and Protect the Rights of Litigants, Are Tossed Aside." [61] . . . "Let Me Write the Findings of Fact, and Make My Conclusions Binding, and I Will Guarantee Never To Be Reversed on Appeal" [62]

Two provisions of the Act have subjected the Board to a stream of caustic criticism from its detrators. Section 10(b) of the Act provides that in any complaint proceeding, "the rules of evidence prevailing in courts of law or equity shall not be controlling"; section 10(e) provides, *inter alia*, that "the findings of the Board as to the facts, if supported by evidence shall be conclusive." These two provisions have between them sired a goodly number of the "dead cats" which have been hurled at the Board. They have afforded an opportunity to the critics of the Board to minimize the significance of the Board's successful record in the courts. They have been publicized in such a way as to suggest to the layman that the "rules of evidence" represent the distilled wisdom of the ages, never questioned by honest lawyers. They have been attacked in so ferocious a manner that one almost expects some Joyce Kilmer of the legal profession to write, "Only God can make a tree; and only a judge can find a fact." From the furore created by these provisions an ignorant person would conclude that nothing like them had ever before been seen, but that on the contrary some Machiavelli bearing a strong physical resemblance to Mr. John L. Lewis had slipped them into the Wagner Act when no one was observing. Both provisions are, of course, in actuality, so commonplace in major administrative statutes, be they local, state, or federal in origin, that only their absence would be noteworthy.

The declaration that common law rules of evidence need not be observed in Board proceedings is justified by the nature of the administrative process. The assignment of the adjudicative function to a new agency rather than to the courts themselves, reflects in good measure understandable popular belief that the procedural habits of the judiciary are too rigidly established. "Technicalities" are not, as many people think, unmixed evils. They may add to the dispatch with which

[61] Jullien, *The Case Against the Wagner Act*, in Brooklyn Bar Association Symposium on Labor Relations (1938) 36–42.
[62] Burke, *We Must AMEND the Wagner Act*, 83 Cong. Rec. 1325 (April 5, 1938).

the business of the courts is disposed of, and they may keep in clear focus the issues which must necessarily be examined. But they may also be obstructive when, as sometimes happen, they become but stale formulae to be observed even though their significance is not perceived. Moreover, many, though by no means all, of the rules of evidence find a major justification in the notion that no reliance should be placed upon the perspicacity of a juryman who is by every hypothesis of practice, if not of legal theory, a dimwitted dullard. Few people faced by the necessity of making momentous decisions carrying practical or personal consequences, limit investigation of the facts upon which their judgments rest by a faithful observance of the "rules of evidence". In short, the "rules of evidence" may contain many useful suggestions to those who must settle controverted issues, but the whole experience of mankind bears testimony that there may be other rules of equal and sometimes of superior virtue. The statutes which free administrative agencies from the necessity of observing the common law rules have not purported to free them from the necessity of considering only such evidence as may reasonably be regarded as having a persuasive quality. The statutes have sought to free them, however, from a narrow categorization of what may be regarded as persuasive. In so doing they have given the administrative agencies the power to receive and to examine evidence that would have been excluded at common law, and then, having examined, to act upon it if it is relevant and persuasive. Under the exclusionary rules, the agencies would never have had even the chance to examine, let alone to accept or reject, much potentially useful evidence; because, upon the basis of an *a priori*, formulated doctrine that it could *not* be useful, it would have been improper to receive it initially.

In its administration of the Act, the Board has utilized sparingly its power to depart from the well-trodden paths: the evidence to which it has assigned probative weight has usually been of a character which even the most precedent-ridden court would accept.[63] The Chairman of the Board has said:[64] "In our deliberations we give no weight to evidence unless we believe it to be such as would be accorded weight by reasonable people in making important decisions relating to their own affairs. That is, I believe, the exact judicial test, when technical shackles are removed, as they are in our statute."

This policy has been rather carefully followed by the Board's Trial Examiners, as well as by the Board itself in its final orders. In over 3,000 cases which have been presided over by Trial Examiners, it would be conservative to estimate that thousands of objections have been

[63] In considering offered evidence, the Board has not deemed itself bound to limit the evidence to that bearing upon incidents occurring only before the filing of the charges and the issuance of the complaint, but has permitted evidence bearing upon alleged unfair labor practices even when happening after the issuance of the complaint. *E.g.*, Matter of M. Loewenstein and Sons, Inc., 6 NLRB 216 (1938); Matter of American Smelting and Refining Co., 7 NLRB 735 (1938). The Board recognizes that the purpose of the Act is to vest it with the power to prevent specified unfair labor practices. In pursuance of this view, the Board has even permitted evidence to be introduced to show events happening before the enactment of the Act, to determine whether valuable light could be shed upon the relationship between the respondent employer and his employees. *E.g.*, National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U.S. 267, 270 (1938); National Labor Relations Board v. Pacific Greyhound Lines, 303 U.S. 272, 274 (1938); Matter of The A. S. Abell Co., 5 NLRB 644 (1938), *partially set aside on another ground*, 97 F.(2d) 951 (C.C.A. 4th, 1938); but *cf.* National Labor Relations Board v. Columbian Enameling & Stamping Co., decided U.S. Sup. Ct., February 27, 1939.

[64] J. Warren Madden, Address over the Columbia Broadcasting System, August 29, 1938, 3 LAB. REL. REP. 9, 11 (1938).

urged by the various parties in response to the rulings of the Trial Examiners on evidence questions.[65] The Board in its final orders has reversed these rulings in only an insignificant number of instances. Lest it be thought that the Board is overly-indulgent of its Trial Examiners, we add that neither the Supreme Court nor any Circuit Court of Appeals has held that the Board relied on improper evidence or refused to admit evidence or other material which should have been admitted.[66]

To obtain an understanding of the extent to which the Board has itself imposed restraints upon the admissibility of evidence, it would be well to examine the Board's treatment of hearsay evidence, for which it has been severely criticized.[67]

The truth of the matter is that the admission of hearsay testimony in Board proceedings is much less common than is customarily supposed, and the authors have found no indication in the detailed decisions of the Board that it frequently, if at all, rests its findings solely on hearsay.[68] The Board itself recognizes that much hearsay testimony is of doubtful probative value, but nevertheless has found it unwise, as have the more ancient tribunals themselves, to bar the use of hearsay testimony entirely. Thus, the Chairman of the Board has but recently said:[69] "For one thing many of the witnesses before the Board have not had the benefit of formal education and are quite unaware of the significance of various facts which may be relevant to the proceeding. Consequently it is often advisable for the trial examiner to allow considerable leeway with respect to hearsay upon the theory that it may introduce or point the way to important leads hitherto undeveloped."

In other situations, the necessity to protect a trade union's membership lists or records from inspection by the employer-respondent may lead to the acceptance of hearsay evidence as having some probative value. In other instances, the Board considers hearsay testimony which it is within the employer's knowledge either to affirm or deny, but concerning which he produces no evidence. If, for example, a discharged employee testifies that he was discriminatorily discharged and that employees who worked next to him near his work-bench told him that as soon as he was discharged another worker was hired in his stead, the failure of the company to offer evidence to rebut his testimony will lead to its acceptance by the Board. For the Board holds the reasonable view that in such instances, since the ability to disprove the testimony of the discharged employee is readily available in the employer's

[65] In a relatively few number of cases, usually representation cases, no objections to the admissibility of the evidence have been made by any of the parties to the proceeding. See *e.g.*, Matter of Mosaic Title Company, 5 NLRB 133 (1938); Matter of Hamrick Mills, 7 NLRB 459 (1938).

Objections to the conduct of the hearing, including any objection to the introduction of evidence, are stated orally, together with a short statement of the ground of the objection, and are included in the stenographic report of the hearing. No such objection is deemed waived by further participation in the hearing. RULES & REGS., art. II, § 28.

[66] However, in Consolidated Edison Co. v. National Labor Relations Board, 59 S. Ct. 206 (1938), the Court indicated that the Board's refusal to receive certain testimony was "unreasonable and arbitrary", but since the Act [§ 10(e), (f)] affords an opportunity to petition the Circuit Court of Appeals for leave to adduce additional evidence, the petitioner could not be heard to complain when he did not avail himself of this procedure.

[67] See *Hearings Before Committee on the Judiciary on S. Res.* 207, 75th Cong., 3d Sess. (1938) 82–3.

[68] *Cf.* J. Warren Madden, Address at Thirty-Sixth Annual Meeting, Association of American Law Schools, Dec. 30, 1938, NLRB Press Rel. Z–401 (1938) 14–15. Compare Consolidated Edison Co. v. National Labor Relations Board, 59 S. Ct. 206 (1938), *reversing* 95 F.(2d) 390 (C.C.A. 2d, 1938); National Labor Relations Board v. Remington Rand, Inc., 94 F.(2d) 862 (C.C.A. 2d, 1938), *cert. denied* 304 U.S. 590 (1938); National Labor Relations Board v. American Potash and Chemical Corp., 98 F.(2d) 488 (C.C.A. 9th, 1938), *cert. denied*, Feb. 27, 1939; National Labor Relations Board v. Union Pacific Stages, 99 F.(2d) 153 (C.C.A. 9th, 1938).

[69] *Cf.* J. Warren Madden, *supra* note 68, at 14.

records and files, failure to offer such evidence should reasonably result in assigning some probative value to the discharged employee's hearsay testimony. The alternative, of course, would be to compel individuals still in the service of the respondent to give testimony against their employer.

But the courts have suggested that the Board's power to utilize hearsay as the basis for its finding is not unlimited:

"He [the Trial Examiner] did indeed admit much that would have been excluded at common law, but the act specifically so provides, section 10(b), 29 U.S.C.A. § 60 (b); no doubt that does not mean that mere rumour will serve to 'support' a finding, but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which reasonable persons are accustomed to rely in serious affairs." [70]

So, also, in the *Consolidated Edison* case,[71] the Supreme Court has said:

"The companies urge that the Board received 'remote heasay' and 'mere rumor.' The statute provides that the 'rules of evidence pervailing in courts of law and equity shall not be controlling.' . . . But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute 'substantial evidence.'"

It seems clear, therefore, that the self-imposed, as well as court-imposed restraints, upon the utilization of hearsay evidence as the basis for Board findings, afford adequate protection to the parties to the proceeding. No reasonable purpose would be served by the suggestion, sometimes seriously advanced by the more hysterical viewers-with-alarm, that the Board be barred from consideration of all hearsay evidence. Indeed, in general, such a proposal militates against the flexibility which is the hall-mark of the administrative process, and might well impede the full administration of justice.

Court review. It is sometimes said that—despite the appearance of respectability presented by the Board, despite the maintenance of decorum in its proceedings, despite its professed attentiveness to the teachings of the masters of evidence—the NLRB makes findings of fact outrageously lacking support in evidence of record and thus nullifies the effect of all its prior good deeds. If it were true that the Board's findings of fact did not rest on persuasive evidence adduced at the hearings, then of course the most punctilious behavior in the respects we have already considered, would be meaningless. It is our belief, however, that this last attack, like those already examined, fails to withstand critical analysis.

A final order of the Board, as is well known, has only the coercive force of public opinion until it has been confirmed by a Circuit Court of Appeals, either in a proceeding brought by the Board to enforce or by one of the parties to set aside the order. In the proceedings at the appellate stage, the findings of fact made by the Board are not sacrosanct. They are not binding unless they are supported by evidence. As the Supreme Court has indicated,[72] "All questions of the jurisdiction of the Board and the regularity of the proceedings, all questions of

[70] National Labor Relations Board v. Remington Rand, Inc., *supra* note 68, at 873.
[71] Consolidated Edison Co. v. National Labor Relations Board, *supra* note 68, at 217.
[72] See National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 47 (1937).

constitutional right or statutory authority are open to examination by the court."

It is true of course that the reviewing court should not consider the testimony anew, nor pass upon the credibility of witnesses, nor make its own findings, for the weight to be given to evidence and the inferences to be drawn therefrom are matters for the fact-finding body.[73] But what is "evidence" which may be weighed and which, when present, supports a finding? Although the Act in section 10 (e) specifies that unadorned "evidence" will be sufficient to support the Board's finding, the courts have frequently added to the language of the provision a decorative adjective or two. For example, it has been said that the plain "evidence" referred to in the Wagner Act is the same as the "substantial evidence" referred to in the Interstate Commerce Act and the Federal Trade Act.[74] At other times, courts have indicated that when the statute said that the findings should not be disturbed if supported by evidence, what it really meant was that the findings must be supported by "*the* evidence",[75] "*sufficient* evidence",[76] "*competent* evidence",[77] "*material and relevant* evidence",[78] or "*relevant evidence of probative force*".[79]

On its face, it would therefore seem that the courts have amended the statutory indication that mere "evidence" is sufficient to support the findings of the Board. The authors, however, are satisfied that the courts have in the main properly interpreted the statutory direction that the findings should not be set aside if based on evidence. Surely Congress did not desire unsupported suspicion or theory to masquerade as fact. Surely by "evidence" it meant more than the whisper of gossip. By "evidence" it meant matters that could influence the judgment of a fair-minded man conscientiously seeking to arrive at the truth.

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[73] *Cf.* National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U.S. 261 (1938); National Labor Relations v. Washington, Virginia and Maryland Coach Co., 85 F. (2d) 990 (C. C. A. 4th, 1938); National Labor Relations Board v. Wallace Manufacturing Co., 95 F. (2d) 818 (C. C. A. 4th, 1938); National Labor Relations Board v. Oregon Worsted Co., 96 F.(2d) 193 (C. C. A. 9th, 1938); National Labor Relations Board v. Biles-Coleman Lumber Co., 96 F.(2d) 197 (C. C. A. 9th, 1938); Fansteel Metallurgical Corp. v. National Labor Relations Board, 98 F.(2d) 375 (C. C. A. 7th, 1938), *aff'd* U.S. Sup. Ct., Feb. 27, 1939.

[74] See, *e.g.*, Washington, Virginia and Maryland Coach Co. v. National Labor Relations Board, 301 U.S. 142 (1937); Jeffery-DeWitt Insulator Co. v. National Labor Relations Board, 91 F.(2d) 134 (C. C. A. 4th, 1937); Appalachian Electric Power Co. v. National Labor Relations Board, 93 F.(2d) 985 (C. C. A. 4th, 1938); National Labor Relations Board v. Thompson Products Co., 97 F.(2d) 13 (C. C. A. 6th, 1938); Ballston-Stillwater Knitting Co. v. National Labor Relations Board, 98 F.(2d) 758 (C. C. A. 2d, 1938). But *cf.*, *e.g.*, National Labor Relations Board v. Oregon Worsted Co., 96 F.(2d) 193 (C. C. A. 9th, 1938); Clover Fork v. National Labor Relations Board, 97 F.(2d) 331 (C. C. A. 6th, 1938).

In words which have often been cited with approval by other courts, the Fourth Circuit Court of Appeals has indicated that "substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can be reasonably inferred, and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences." Appalachian Electric Power Co. v. National Labor Relations Board, 93 F.(2d) 985, 989 (C. C. A. 4th, 1938); accord: National Labor Relations Board v. Thompson Products, 97 F.(2d) 13, 15 (C. C. A. 6th, 1938).

[75] National Labor Relations Board v. Fruehauf-Trailer Co., 301 U.S. 49 (1937); National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937); National Labor Relations Board v. American Potash and Chemical Corp., 98 F. (2d) 488 (C. C. A. 9th, 1938), *cert. denied*, Feb. 27, 1939.

[76] Standard Lime and Stone Co. v. National Labor Relations Board, 97 F.(2d) 531 (C. C. A. 4th, 1938); National Labor Relations Board v. Hopwood Retinning Co., 98 F.(2d) 97 (C. C. A. 2d, 1937).

[77] National Labor Relations Board v. Bell Oil & Gas Co., 98 F.(2d) 870 (C. C. A. 5th, 1938).

[78] National Labor Relations Board v. Bell Oil & Gas Co., 98 F.(2d) 406 (C. C. A. 5th, 1938), *rehearing*, 98 F.(2d) 408 (C. C. A. 5th, 1938).

[79] Peninsular & Occidental Steamship Co. v. National Labor Relations Board, 98 F.(2d) 411 (C. C. A. 5th, 1938), *cert. denied*, 59 S. Ct. 248 (1938).

When the courts speak of *substantial* evidence or *material and relevant* evidence they neither extend nor restrict the import of the legislative prescription, except verbally. When they speak of *competent* evidence or of evidence of *probative force*, however, they may be adding an entirely new concept; these words may suggest that the evidence must do more than persuade the mind of a fair judge—that it must also fit into a recognized category of "legal" evidence. If this be the meaning of the courts in questions, they have indeed amended the Act, for, as has been shown in earlier discussion, it was desired by Congress to free the Board from the rules of evidence *qua* rules. An instance of such aberrational interpretation, clearly illustrating the possible difficulties, is *National Labor Relations Board* v. *Bell Oil and Gas Co.*[80] There the Circuit Court of Appeals acknowledged that the Board was not bound by the previously prevailing rules of evidence. Yet, it continued, when it fell to the court to consider whether findings of fact made by the Board were supported by evidence, the court was still restricted by the "rules of evidence prevailing in courts of law and equity." Hence, it said, it could not and would not consider certain hearsay and opinion testimony urged as contributing to the evidential foundation of the Board's conclusions. Note that the court did not conclude that the particular testimony had no persuasive quality, but rather that it was by its very nature so incompetent as to prevent an appellate court from even looking at it!

We have said that, by and large, little fault is to be found with the judicial interpretation of the statutory language relative to NLRB findings. We agree that "evidence" means "substantial evidence". The extraordinary thing is that many judges, if they were themselves to be judged by their deeds rather than words, would be found guilty of thinking that "substantial evidence" means something quite different—that it means "Evidence which persuades me as a judge; if I am not satisfied, it must be insubstantial."

An example is a case involving an allegedly discriminatory failure to rehire. The record clearly showed and the Board found that the employee had worked for the respondent for nearly ten years, had during that time never been warned of inefficiency, and had seniority over all other workers in his classification; that he was an active and identified union representative; that following a strike the employee was not rehired, despite his seniority and his efficiency, while all the other men in his classification were re-employed and another non-union worker was offered part-time employment; that the respondent's superintendent had stated to an officer of the NLRB that he would not re-engage the employee because of his efforts to "intimidate" non-union employees, although the record showed no acts of "intimidation" but only a concededly proper solicitation of union membership. In the face of the record and of these findings, the reviewing court held that there was no "substantial evidence" that there was any discrimination against the employee because of union membership.[81]

[80] Cited *supra* note 78.

[81] National Labor Relations Board v. Bell Oil & Gas Co., *supra* note 77; *cf.* Matter of Bell Oil & Gas Co., 1 NLRB 562 (1937); Brief for Petitioner in Fifth Circ. Ct. of App., No. 8712, Nov. Term, 1937.

In another instance, *National Labor Relations Board v. Columbian Enameling & Stamping Company*, decided by the Supreme Court on February 27, 1939, the record chronicled a series of unsuccessful negotiations between the employer-respondent and the union, eventuating in a strike on March 23, 1935, by 450 of respondent's 500 employees. The strike continued until July 23, when the respondent resumed operations. The NLRB subsequently determined that the respondent had failed to bargain collectively with the representatives of the employees, and because of this violation of the Act, the Board ordered the employer to reinstate its employees and to desist from further refusal to bargain with the union. The finding upon which this order rested was thought by Justice Stone, writing for a divided Court, to be "without support." In order to hold that the employer had declined to bargain with his employees, it was necessary (said Justice Stone) that the employees "must at least have signified to the respondent their desire to negotiate." It was here, the Justice thought, that the Board had failed to establish a case against the employer, for there was in his estimation no substantial reason to believe that the employees' desire to negotiate had been brought to the respondent's attention.

Let us look at the record.

The record of the hearing before the Board's Trial Examiner contains direct and uncontradicted testimony that on July 23, two conciliators of the Conciliation Service of the United States Department of Labor, acting at the request of the union, conferred for three hours with the respondent's president, in an effort to arrange a meeting between him and union representatives. The president agreed to this meeting, and acknowledged in his testimony that he understood the purpose of the requested conference; later, however, he informed one of the conciliators by telephone that he would not meet with either the conciliators or the union committee, and this refusal was in turn communicated by the conciliator to the union.

The employer's refusal could not, in the light of evidence in the record, be justified on the ground that his relations with the union were of such a character that any attempt to negotiate would be futile. While it is true that the parties had some weeks previously broken off direct communications, it is also true, as the Board found, that conditions were markedly different when, on July 23, the employer once more declined to meet with the union. Limitations of space prevent a complete statement of the facts here. It suffices for present purposes to note that on July 23 the respondent's factory was re-opening; martial law had been declared and picketing had been forbidden: the employer had struck at the morale of the strikers by directly soliciting individual members to return to work. One might readily infer from what has just been said that the union would by now be prepared to discuss in a conciliatory way the possibility of settling its disagreements with the employer, by compromise if not by outright capitulation. But nothing need be left to inference, for in fact the union did request the Labor Department conciliators, who were on the scene for the sole purpose of effecting a settlement of the dispute, to approach the respondent on behalf of the employees, and to arrange for them a conference with the employer.

On this evidence the Board found that the respondent had violated the Act by refusing to bargain collectively with the representatives of his employees. Its conclusion was energetically endorsed by the Seventh Circuit Court of Appeals which, although setting aside the Board's order for other reasons not material to the present discussion, stated that it did not "approve or uphold the refusal of the respondent to meet the request of the conciliators and enter into negotiations looking towards the settlement of disputes after the employees had quit their employment. Respondent's employees were largely unionized. Under the Act, respondent, when requested to negotiate, had a moral duty to do so. . . . Instead it lent a friendly ear to unwise counsel wholly out of sympathy with the legislation designed to avoid and settle capital-labor disputes. It erred in its refusal to respect that law and ignored the request of those charged with the burdensome task of working out a peaceful solution of what had become a bitter controversy. There is little or no explanation which we can find for their refusal, save an open, defiant flouting of the law of the land." [82]

Despite all this, Justice Stone, with two of his colleagues dissenting and a third not participating, felt that the Board's findings could not be sustained because there was "no evidence that the Union gave to the employer, through the conciliators or otherwise, any indication of its willingness to bargain".

The authors find it difficult to reject the view of the dissenting Justices, that "to conclude that the company—through its president—was unaware that the conciliators were acting at the instance of the Union, and, therefore, is not to be held responsible for its flat refusal to meet with its employees, is both to ignore the record and to shut our eyes to the realities of the conditions of modern industry and industrial strife. The atmosphere of a strike between an employer and employees with whom the employer is familiar does not evoke, and should not require, punctilious observance of legalistic formalities and social exactness in discussions relative to the settlement of the strike. It is difficult to imagine that—during several hours of conversation between the conciliators and the company's president concerning a future meeting of Union and company—the conciliators refrained from reference to the Union's request that the conciliators arrange such a future meeting. In a realistic view, the company's statement of July 23 to the conciliators, that it would meet with them and the Union, clearly indicated the company's acceptance of the fact that the conciliators were appearing for the Union. The company's declaration to the conciliators, several days later, that it would not meet with the Union or the conciliators, equally represents the company's recognition and acceptance of the fact that the conciliators were a means of dealing with the Union."

Still another case, *National Labor Relations Board* v. *The Sands Manufacturing Company*, decided by the Supreme Court contemporaneously with the *Columbian* case we have just discussed, exhibits a determination by judges that the Board's findings rested upon a barren record, although other judges, by dissenting, showed that in their estimation the findings were supported by persuasive evidence.

[82] National Labor Relations Board v. Columbia Enameling & Stamping Co., 96 F. (2d) 948, 954 (C.C.A. 7th, 1938).

In the *Sands* case the respondent-employer and a union of its workers had disagreed in their interpretation of the employer's rights under a contract governing their relations. Because of the disagreement the employer closed down its plants on August 21, 1935, "until further notice." On September 4, however, the plant (without any notice to the former employees who were members of Union A) was reopened; and when it was reopened, it was staffed with new men recruited from rival Union B and from a county relief organization, while the members of Union A were not called back to work. The Board, after a hearing, concluded that the respondent had refused employment to the men because they were members of Union A; and it concluded also that the respondent had disregarded its statutory duty to bargain collectively with its employees' representatives. The Court, in an opinion by Justice Roberts, two Justices dissenting and a third not participating, thought that these conclusions were arbitrary.

Again, let us look at the record.

In the first place, the Board had before it a record containing testimony which, if believed, established that the officers of the respondent were definitely hostile toward Union A and were friendly toward Union B following strikes which had been successfully conducted by the former in May and June, 1935, only a few months before the events which gave rise to the present case. The Board's finding that hostility toward Union A did exist, was supported by testimony that the respondent's superintendent preferred Union B because it was "a more conservative union" and "more apt to arbitrate with any management before they walked out on strike"; the statement of the assistant superintendent (described by Justice Roberts as a "shipping clerk") to a laid-off member of Union A that "I will get you back when we break this union up"; testimony that the respondent's secretary-treasurer had offered re-employment to two members of Union A upon condition that they drop affiliation with Union A and join Union B (contradicted by the secretary-treasurer, who, however, admitted that he obtained an application card of Union B for one of the men and stressed to both men the allegedly advantageous wage provisions of an agreement with Union B); the uncontradicted testimony of a member of Union A that the secretary-treasurer intimated to him that Union A was trying to "break" him; and the testimony of the secretary-treasurer that when another member of Union A sought re-employment after the plant reopened, he chided the old employee for having picketed the plant together with other members of Union A, and then concluded discussion by stating that no jobs were open.

The employer denied that its refusal to re-employ the members of Union A was attributable to an attempted discrimination. Instead, it was variously suggested that the failure to give jobs to the workers who belonged to that organization was a consequence of their having violated their contract with the respondent; that the employees of Union A were too highly paid, so that respondent was compelled to reduce expenses by hiring men at a lower wage rate; and, finally, that none of the members of Union A had applied for re-instatement until all of their places were filled.

The respondent's first explanation is somewhat shaken by the presence in the record of evidence indicating that the employer sought to re-employ four members of Union A, of whom some had actually

been members of the negotiating committee of Union A and were thus probably peculiarly guilty of the alleged offense of "contract-breaking." Nor does the record give force to the employer's second suggestion, that the reason for the discharge is attributable to a desire for economy; for, so far as the evidence discloses, the respondent never so much as hinted to Union A prior to the closing of the plant that it desired to negotiate concerning wage rates. The employer's final suggestion that none of the members of Union A applied for re-instatement until all of their places were filled fails to carry conviction, since the men were given every reason to believe that they would be notified to return to their jobs; since, further, some positions were filled by the employer prior to the date of the reopening, before the members of Union A knew their positions were being filled, and before they had any opportunity to apply for them; and since, in any event, it was clear that the employer was determined not to rehire members of Union A, so that formal application would have been a futility.

In the light of such a record it should not occasion surprise that the Board believed the employer had discriminatorily discharged the members of Union A, or that its belief was "fortified rather than weakened" by the inconsistent and contradicted explanations advanced by the employer for his discharges.

The opinion of Justice Roberts, however, does surprisingly reflect surprise that the Board reasoned as it did. The opinion first recounts "respondent's long course of conduct in respect of union activities and in dealing freely and candidly" with Union A, which, it is suggested, "definitely refutes" any conclusion that the respondent was hostile to that organization. Then the opinion briskly brushes to one side the statements of the superintendent and assistant superintendent concerning Union A, for "Neither of the men who are quoted held such a position that his statements are evidence of the company's policy. . . ." Curiously enough, the conclusion of Justice Roberts concerning the significance to be assigned the pronouncements of these supervisory officers, is a conclusion which, so far as the authors are able to discover, the Justice did not bother to rest upon any evidence, substantial or otherwise. Even more startling is the facility with which Justice Roberts completely disregarded—did not even note the existence of—evidence showing that the secretary-treasurer, who was actively in charge of the employer's labor policy, was opposed to Union A.

In addition to the findings of discriminatory discharge, the Board also found that on August 21, when the plant was closed, there was nothing to indicate that a permanent impasse had been reached. Substantially uncontradicted evidence shows the following: The employer and the union were "diametrically opposed" in their interpretation of the seniority provisions of a contract entered into on June 15, 1935. Their disagreement led on August 19 to a suggestion by the secretary-treasurer or by the union itself (there is a conflict as to who did the suggesting, but not as to what was suggested) that the union committee should choose either to consent to the operation of part of the plant with junior employees and the temporary shut-down of the other departments, or a *temporary* shut-down of the entire plant. It was understood that the plant would remain closed until sufficient orders accumulated to warrant the taking back of all the "old" men in their own departments. The Committee consulted its members and found

that the unionists desired the *temporary* shut-down of the entire plant, whereupon on August 21 the plant was shut, though neither the union nor the respondent seems in any respect to have regarded the closing as a strike on the one hand or as a lockout on the other. On the day of the closing the management posted a notice on the time clock reading "The factory will shut down Wednesday, August 21st, until further notice."

At this stage, then, one might conclude that negotiations between the parties were in a state of suspension, rather than in a state of collapse. The closing of the factory, under the circumstances, might be regarded either as an armistice or as a surrender, but scarcely as an indication that from that day the employer was warranted in proceeding as though all his employees had been lawfully discharged so that there was no longer an obligation to bargain with their representatives.

But even if it were to be assumed that on August 21 the parties had arrived at an impasse in respect of their rights under the contract of June 15, it would not follow that the employer's obligation to negotiate was at an end; for the understanding arrived at on that day and the events which occurred later, brought forward new issues quite apart from those arising under the contract. Of still more significance is the fact that, immediately after August 21, the employer itself brought sharply to the foreground the fundamental issue of wage rates, as to which there had been no attempt to bargain collectively with Union A, and as to which no subsequent attempt was made or opportunity given by the respondent. The Board upon all this evidence concluded that the employer's failure to meet and bargain with Union A after August 21, taken together with its dealings with Union B, was a violation of the obligation imposed by the Act to bargain collectively with its employees' representatives.

But Justice Roberts concluded otherwise. In his view, the respondent was not under a continuing duty to negotiate, since "When the representatives of the two parties separated on August 21st, no further negotiations were pending, each had rejected the other's proposals, and there were no arrangements for a further meeting." What Justice Roberts omitted to note, however, was the presence of the material indicated above, showing that while literally speaking "no arrangements for a further meeting" had been made, still the parties contemplated a resumption of negotiations rather than a final severance of relations when they "separated on August 21st". As was true in the other branch of the case, the opinion at this point merely ignores the circumstances which buttress the Board's findings; and as to the inference of the Court itself, that further negotiations were neither contemplated nor conceivably useful, the opinon, ironically, fails to point to any evidence which compels that single inference and allows no other.

These not unrepresentative illustrations of judicial intrusion into the fact-finding process have been detailed not in order to ridicule the courts which have usurped the administrative function, but because they serve strongly to emphasize the extraordinary proportions of the NLRB's triumphs when its fact finding have been at issue. A largely unfriendly and an occasionally unrestrained judiciary has had numer-

ous occasions to consider specifically whether the findings of fact made by the Board were supported by that substantiality of evidence which would prevent their being regarded as arbitrary. In fewer than ten instances has an NLRB order been completely set aside because it was not based on findings amply, as the courts thought, supported by evidence.

A record of this character can give but slight comfort to those who would have the public believe that the Board is an irresponsibly arbitrary trier of facts. Unless we are to assume that the federal courts have themselves shirked the responsibility of careful adjudication, we must conclude that the Board has scrupulously predicated its orders upon evidence—and upon evidence, moreover, whose acceptability in a trial court would by and large not be seriously doubted.

It is fruitless to suggest that the record is insignificant because affirmance of the Board's findings does not necessarily indicate that the courts would themselves have reached the same conclusions, if the matters had been submitted to them originally. This is of course true as a matter of theory, though it may be suspected that variance between court and administrative appraisal of the evidence is less frequent in practice than might be possible under the hypothesis. Yet, if we assume *arguendo* that in no instance did the courts agree with (though they accepted) the conclusions of the triers of fact, there is still not the slightest reason to assert that the Board's findings were arbitrary in character. This follows inescapably from the formulation of the "substantial evidence" rule: The evidence is substantial if it could bring conviction to an honest mind dispassionately probing into the facts. Clearly if the court concludes that the Board acted upon evidence of that character, there is no room to say that the Board acted arbitrarily; the most that can properly be said is that the record may have been such as to permit of contrary, but equally honest and reasonable, findings as to what it established. We must remember that in the type of issues disputed before the NLRB, the process of trial can produce only a belief concerning the facts, rather than a disclosure of the facts themselves. It is obvious that a reviewing court, in examining a record made before the NLRB, has no readier access to the facts than did the Board; like the Board, it must be content to have a belief concerning the facts, rather than knowledge of them. Once we understand that what we will end with in any case is only a conclusion as to what the facts were (whether it be the conclusion of the Board or of a court), we must put aside the quest for absolute *rightness*, and be satisfied instead by an inquiry into whether the conclusion was a reasonable one. This is the very task assigned to the courts by the National Labor Relations Act. They have performed their task. And they have decided that the NLRB's conclusions were of that quality of reasonableness which entitled them to acceptance and to the courts' aid in enforcement.

VI.

The Rules of the Board Concerning the Issuance of Subpoenas Are Unfair [83]

The attack upon the Board's exercise of the subpoena power is twofold. It has been insisted that the Board too generously issues subpoenas for use by its own agents, and that it too niggardly issues them for use by others.[84] We are inclined to believe, on the contrary, that the Board has exhibited a proper restraint in both respects, and that there is no present abuse connected with the NLRB's compulsive process which calls for a legislative corrective.

Although the Act permits the Board to prosecute "any inquiry necessary to its functions in any part of the United States",[85] the Board has utilized the subpoena power only in connection with the preparation and progress of a trial hearing. It has not utilized subpoenas in the course of the fact-finding inquiries which it conducts through its Division of Economic Research, nor have the review attorneys or the Board itself obtained information via subpoena to supplement any matters discussed at the trial hearing. In no instances have subpoenas issued in aid of an *ex parte* investigation, or, as some would put it, an "inquisition", except that prior to the issuance of a complaint subpoenas have occasionally been used to obtain material which will disclose whether the employer is subject to the jurisdiction of the Board.[86] Today, the use of subpoenas even to this limited extent is rarely necessary, for most employers voluntarily present their business records for the inspection of the Board's representatives. Once the proceeding has formally commenced, the Board's counsel, barring unforseen incidents, has had little occasion to request the aid of compulsory process, except when present employees of the respondent, or the relatives of such employees, have exhibited a reluctance to testify for fear that continuance of employment might be jeopardized by their appearing.

Almost never do employers in complaint proceedings have any need for subpoenas either before or during the course of the hearing. Documentary evidence relating, for example, to the alleged encouragement of a company union or to the alleged discriminatory discharge of certain employees, will almost always be found, if at all, in the employer's own files and records; and the respondent's witnesses attend to testify

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[83] *Cf., e.g.*, John Lord O'Brian, Address before Young Republican Clubs, N.Y. Times, October 16, 1938.

[84] See Act, § 11(1); Rules & Regs., art. II, § 21; *id.* art. III, § 4.

[85] Act, § 5. The Board is also permitted to have access for the purposes of examination and transcription, to evidence of any person being investigated or proceeded against that relates to the matter under investigation. *Ibid.* It is clear that the Board is vested with investigatory powers into the relation between employers and employees only when that relation affects interstate commerce [Eagle-Picher Lead Co. 1. Madden, 15 F. Supp. 407 (N.D. Okla. 1936)], and that such provisions for search and seizure by the Board do not violate the Fourth Amendment, for the Board lacks the power to enforce attendance of witnesses or the production of evidence, but must await judicial examination of the propriety of any demand. Precision Castings Co. 1. Boland, 13 F. Supp. 877 (W.D.N.Y. 1936).

[86] The General Counsel has instructed that Board attorneys must request the Board to issue subpoenas a reasonable period of time before the commencement of the hearing, so that the Secretary of the Board may pass on their requests seasonably.

The Act provides that any member of the Board may issue subpoenas requiring the attendance and testimony of witnesses. Section 11(1). As a matter of practice, any application for the issuance of a subpoena which is filed before the commencement of the hearing, regardless of the identity of the petitioner, must clear through the Secretary's office in Washington. After the commencement of the hearing, the Trial Examiner rules directly upon all applications, whether made by the employer, labor union, or the Board attorney himself.

without compulsion by the Board.[87] At times, for reasons not readily comprehended, employers in complaint proceedings have requested the production of the constitution and by-laws of labor unions, or material treating of their internal administration. In such instances, the constitution and by-laws, being usually matters of public record, are voluntarily supplied by the labor union upon being informed of the employer's request; but the Board has properly refused to issue any subpoenas requiring the production of union books, records, papers, or documents whose relevance or materiality to the issues of the hearing can not be suggested.[88] Thus, for example, the Board has declined to compel a union to produce the minutes of its meeting at which a resolution was passed allegedly authorizing the filing of a petition for the certification of representatives,[89] or to produce "all books of record, membership lists, membership records, books of account, financial records, minute books, by-laws and correspondence" of the union.[90] In other words, the Board refuses to permit employers to engage in "fishing expeditions" into the internal administration of labor unions through the medium of subpoenas issued by the Board.

It is true, of course, that employers may have perfectly legitimate needs for subpoenas during hearings in complaint cases. A subpoena may be required, for example, to assure the attendance of a discharged employee, working at the time of the hearing for another employer. Testimony of such an individual may be needed to compute accurately the amount of back wages payable by the employer in the event the Board finds that the discharge was of a discriminatory character. But the authors have been able to learn of no instance in which the issuance of a subpoena was refused in such circumstances, nor have they discovered any case where a subpoena was not granted an employer who desired the production of material to contradict evidence already introduced, as, for example, that a particular employee had not been convicted of any crimes.

The Trial Examiners and the Board have, we believe, followed a generally liberal policy in issuing subpoenas. To be sure, applications have been regularly denied when not even a suggestive showing of materiality has been made. But, except in the instances where the inutility of desired testimony or evidence is at once apparent, the Board has taken the position that the relevance of specified materials

[87] In extremely rare instances, the employer will desire to subpoena a labor union representative who participated in a confefence between the employer and the union; in such instances the employer's request has been communicated to the trade union, and in every case the desired testimony has been forthcoming without the necessity of commanding the witness to attend.

[88] All applications for subpoenas are required to be "timely", must specify the name of the witness and the nature of the facts to be proved by him. *Cf.* Matter of Rabhor Co., 1 NLRB 470 (1936). Applicants for subpoenas must specify the documents whose production is desired, with such particularity as will enable them to be identified for purposes of productionn. RULES & REGS., art. II, § 21. Failure to conform to the required procedure will bar the applicant from complaining before the Board that a refusal to issue subpoenas was prejudical. Matter of Rabhor Co., *supra*; Matter of Electric Boat Co., 7 NLRB 572 (1938); *cf.* Matter of Wilson & Co., 7 NLRB 986 (1938).

[89] Matter of The Sorg Paper Co., 8 NLRB no. 67 (1938).

[90] Matter of Marlin-Rockwell Corp., 5 NLRB 206 (1938); *cf.* Matter of General Petroleum Corp. of California, 5 NLRB 893 (1938); Matter of the Serrick Corp., 8 NLRB no. 66 (1938).

or particular testimony should be permitted to be established at the hearing, when it is there offered in due course.[91]

Instances have perhaps arisen in which the Board has erred in the utilization of the subpoena power vested in it, although the author's examination of decided cases and of a substantial number of transcripts has not disclosed them. In a technical sense the Board may appear to have relinquished full control of the subpoena situation by furnishing blank subpoenas to its regional directors, for dispensation by them to the trial attorneys. While the practices in the several regions probably show some degree of variation, actual control over the use of subpoenas by the Board's attorneys is maintained, first, by a developed awareness of the Board's policies which govern its subordinate employees, and, second, by the necessity of demonstrating to the Regional Director that subpoenas are properly employed. It remains true, however, that the Board's attorneys need not, like the other attorneys in the proceedings, make formal application to the Trial Examiner for issuance of a subpoena. This differentiation in treatment may possibly be justified by the fear that employees who were known by the respondent to have been subpoenaed, might be subjected to discriminatory treatment if they were not actually called upon to testify. The Act, section 8(4), denounces as an unfair labor practice only the discharge of or discrimination against an employee who has "given testimony under this Act", and makes no mention of employees who have been summoned but have not taken the witness stand. The authors are not satisfied that this is a sufficient justification for failure to require Board attorneys to apply for the issuance of subpoenas in the same way as must other parties to the proceedings. But in any case it is perfectly clear that no legislation is required to alter a practice which might be, though we do not believe that it has

[91] As a matter of policy the Board has refused to issue subpoenas to compel attendance, with or without records, of public officials, its own members or employees, or civic or labor leaders not directly involved in the case. See, *e.g.*, Matter of Triplett Electrical Instrument Co., 5 NLRB 835 (1938). There is no indication that refusal of a subpoena in any such instance has embarrassed the respondent's presentation of the case.

While the Act, § 11(1), permits the Board to require the attendance of witnesses or the production of evidence from any place in the United States, the NLRB has declined to grant subpoenas to bring witnesses from far places. This is justified by reason of the fact that the testimony of such witnesses may be obtained by deposition, instead.

Nor will the Board grant applications for subpoenas whose issuance would unduly delay the closing of the hearing, as, for example, when the desired testimony would clearly be repetitive of material already securely in the record [Matter of General Petroleum Corp. of California, *supra* note 90], or when applications are made only as the hearing is about to terminate, in which event it may be said that they are not "timely". See note 88, *supra*.

Finally, after one experience whose true importance was undoubtedly much exaggerated, the Board has acted warily in issuing subpoenas which might be regarded as an invasion of a real or supposed "privilege". See Madden, statement, Dec. 12, 1937, NLRB Press Rel. (R–479) ; *cf.* Matter of Mansfield Mills Inc., 3 NLRB 901 (1937) ; Matter of Muskin Shoe Co., 8 NLRB no. 1 (1938) ; Matter of Mock-Judson-Voehringer Co., 8 NLRB no. 16 (1938) ; *N.L.R.B. and Free Speech* (1938) 7 I. J.A. BULL. 25 ; Editorial (1938) 95 NEW REPUBLIC 347 ; but *cf., e.g.*, Editorial, N.Y. World-Telegram, Dec. 6, 1937 ; Sen. Bridges, Statement, N.Y. Times, Dec. 3, 1938. Today, trial examiners are prohibited from subpoenaing editors, publishers, or others connected with the press with respect to matters which may be thought to involve the "freedom of the press", unless the matter has first been fully submitted to the General Counsel for his consideration.

been, an evil in the present processes of the NLRB. The Board can itself remove the possibility that persons not familiar with the facts might be alarmed by a seeming laxity in supervision over the use of subpoenas by its agents.

On the available evidence we find no conclusion possible other than that the Board has temperately utilized its subpoena power. In the four instances in which the Board has applied to district courts for the enforcement of subpoenas,[92] three applications for enforcement were granted,[93] and in the remaining instance was denied only because the necessity for the requested material had already passed.[94] There is not even a scintilla of evidence to support the charge that the Board, armed to the teeth with subpoenas, has engaged in "inquisitorial activities", nor is evidence available to indicate that the Board is arbitrary or discriminatory in the utilization of its power of subpoena.

VII.

The Board's Decisions Are Made by Underlings, and Parties Aggrieved Have No Fair Opportunity To Present Their Cases To Those in Whom Power Is Lodged

The actual procedure involved in the issuance of the Board's final order has unfortunately been obscured by charges whose heat has not been equaled by the light they shed.[95] The Board itself has said little that would help clear the air.[96] It may therefore be well to describe the movements of a case through the Board's offices after it has left the hands of the Trial Examiner, so that one may appraise the extent to which the Board examines each case and the extent to which personal examination is foreclosed by considerations of administrative efficiency.

[92] The Board, like other administrative agencies, does not have the power to enforce subpoenas which it issues, but must, in the event of contumacy or refusal to obey a subpoena issued to any person, apply to a District Court of the United States for enforcement. The court is empowered to pass upon the application of the Board, and, if reasonable order the contumacious witness to appear before the Board or its designated agent and produce evidence or testify upon the matter under investigation. A failure to obey the court's order is, of course, punishable as a contempt of court. Act, § 11(2) ; and see note 59, *supra*.

[93] National Labor Relations Board v. New England Transportation Co., 14 F. Supp. 497 (D. Conn. 1936) ; National Labor Relations Board v. Dominick Calderazzo, (N.D.N.Y. Feb. 14, 1938), C.C.H. 1938 Lab. Law Serv. § 18109 ; National Labor Relations Board v. United Shipyards Inc., (S.D.N.Y. June 1, 1938), noted NLRB Ann. Rep. (1938) 241.

[94] National Labor Relations Board v. Dwight Manufacturing Co. (N.D. Ala. 1936), noted NLRB Ann. Rep. (1936) 55.

[95] See, *e.g.*, Sen. Burke, in *We Must AMEND the Wagner Act*, 83 Cong. Rec. 1325 (April 5, 1938), at 6: "The findings as to what facts have been proved at the trial are commonly drawn up *not by the person who actually presided at the trial and saw and heard the witnesses, but by a group of young, radical lawyers with headquarters in Washington, called the Review Section, who have never been near the actual trial room and have not seen nor heard a single witness.*" (italics in original)

[96] For a discussion of the public character of a Board proceeding at its various stages, see NLRB Ann. Rep. (1938) 256.

When the record, including the Trial Examiner's intermediate report and the exceptions of the parties,[97] is received in Washington, it is assigned by the Assistant General Counsel to an attorney in the Review Section who is instructed to consider the entire record *de novo*, together with the briefs filed by the parties and the stenographic transcript of oral argument before the Board itself.[98] In view of the explicit requirement in the Board's regulations that the parties must except to any objectionable matter at the trial in order that it may be saved for appeal,[99] this complete and gratuitous review of the record significantly illustrates the Board's desire to reach correct, rather than merely technically unassailable, results.

The analysis of the Review Attorney may extend from only a few days to as many as four months, varying according to the complexities of the case which he is examining, during which time he makes numerous notes and often engages in research upon legal matters involved in his case. After the Review Attorney has completed his consideration of the record, he reports to a supervisor the results of his examination of the materials upon which ultimate decision rests. This discussion is the final preparation before conference with the Board.

At the conference with the Board the supervisor and the Review Attorney give a brief chronological report of the case and then state the uncontradicted evidence. Although the Review Attorney is particularly cautioned to consider carefully the evidence concerning interstate commerce, especially in unusual manufacturing cases, there is customarily little or no discussion of the question of commerce in the conference with the Board; indeed, the facts as to jurisdiction are

[97] After the close of the hearing the Trial Examiner prepares an intermediate report, containing his conclusions concerning the matters alleged in the complaint, including his conclusions of law and his recommendations for remedial action, if any. In close cases, the Trial Examiner makes detailed and specific references to the attitude and demeanor of the witnesses whose testimony bears upon the controverted matters. The intermediate report is served on the parties by the Regional Director. Some respondents thereupon comply with the Trial Examiner's recommendations. Others choose to file exceptions to the report and to contest the matter further before the Board. The exceptions so filed focus the attention of the Board upon the particular issues as to which disagreement has continued, and lead to a careful consideration of the particular points in dispute; no doubt, however, the directory utility of exceptions is much diminished where their number indicates that they are being made without discrimination. In the Ford St. Louis case, for example, the respondent filed 573 exceptions to the Trial Examiner's report; it seems scarcely possible that even the most perverse judge could have erred with such frequency in a single case. Occasionally the Board, in order to expedite consideration of a case by saving the time involved in preparation of an itermediate report, has removed a case from the Trial Examiner immediately at the close of the hearing, and has proceeded without intermediate report or exceptions thereto. This procedure, rarely utilized, has been held to be thoroughly consistent with the demands of due process of law. National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938); Consolidated Edison Co. v. National Labor Relations Board, 59 Sup. Ct. 206 (1938), though it was criticized by the Circuit Court of Appeals in the latter case, 95 F.(2d) 390 (C.C.A. 2d, 1938). See Handler, *The Morgan Case and the National Labor Relations Board* (1938) C.C.H. Lab. Law Comm., No. 5; *cf. Judicial Control of Administrative Procedure: The Morgan Cases* (1939) 52 Harv. L. Rev. 509. Since March 1938, moreover, the Board has in every complaint case in which there was no intermediate report, issued its own proposed findings, after which the parties may file exceptions, argue orally, or file briefs.

[98] Requests for oral argument, invariably granted, have been made in a substantial number of all cases decided by Board order. The members of the Board devote two full days of each week to hearing argument. The oral argument is not an occasion for a re-trial or for a presentation of new evidence [see, *e.g.*, Matter of David Strain Co. Inc., 8 NLRB no. 36 (1938)], but for emphasizing to the ultimate deciders the parties' belief as to the proper conclusions to be drawn from the record. See, *e.g.*, Matter of Ronni Parfum, Inc., and Ey-Teb Sales Corp., 8 NLRB no. 37 (1938). It is unquestionably true that while in some instances the chief value of the oral argument is seemingly the psychological satisfaction of the participants in it, the Board frequently gains a sharper perception of what might otherwise remain obscured by the very bulk of the case under consideration. In addition to the opportunity to argue orally the parties are permitted to file written briefs. Although the Board is probably under no legal compulsion to accept briefs, it has never withheld its consent to a request that it do so.

[99] Rules & Regs., art. II, § 35. The Act, moreover, in § 10(e), provides that "No objection that has not been urged before the Board, its member, agent or agency, shall be considered" by a court reviewing a Board order. But *cf.* National Labor Relations Board v. American Potash & Chemical Corp., 98 F.(2d) 488, 491 (C.C.A. 9th, 1938), *cert. denied*, Feb. 27, 1939.

rarely contested. The Board evidently assumes that the thorough investigation of the Field Examiner, followed by the consideration of the Regional Director and Regional Attorney, Trial Examiner, and Review Attorney, will afford sufficient and adequate examination of this matter. The record of the Board in the courts as far as the matter of interstate commerce is concerned, fully supports this belief.[100]

The Review Attorney, who brings to the conference the entire record of the proceedings, together with the notes and memoranda he has prepared, presents the contradicted evidence for the consideration of the members of the Board. He details the evidence on both sides of each issue, and explains the arguments of both parties. Where the facts are controverted, the Board questions the attorney, frequently at great length, as to the existence of evidence on certain matters, the credibility of particular witnesses, and the like. *The Review Attorney makes no findings for the Board, nor does he ever make formal recommendations to it.* His is the task of the reporter and the conscientious assistant. For the Board members do not read the entire record, though they do at times study significant exhibits or read sections of the testimony on crucial points. Confronted with a staggering work-load,[101] the Board cannot reasonably be expected to consult the massive record of each case. In failing to do so, the Board is charting no new paths, but is following the precedent set by other agencies and, where they are forced to deal with records of similar character, by the judges themselves. As was said by the court in *National Labor Relations Board* v. *Biles-Coleman Lumber Company*,[102] "It is obvious that such an administrative body with scores of cases for its decision, many involving complicated questions of fact and often intricate questions of law, properly will rely upon its employees for assistance in their preparation. The administrative duties imposed on the Board by the Congress could not proceed otherwise."

In its deliberation upon the case, the Board may decide separate issues as the Review Attorney proceeds or may without decision on various matters pending the report on other aspects of the case. After interrogating the Review Attorney, the Board members discuss among themselves and with him the proper manner in which to resolve conflicting testimony, the inferences to be drawn from the fact, as well as the legal questions which are involved. Usually, during this process, the Board quizzes the Review Attorney again with respect to matters raised by the discussion. Frequently, the Board is confronted with a difficult decision and therefore requests the Review Attorney to restudy the evidence in the record and to bring the matter back for the Board's consideration at a later date. At other times, the Board requests the

[100] In only two cases (one of which is now pending on appeal) since the validation of the Act in April, 1937, have the courts held that the Board has improperly assumed jurisdiction. National Labor Relations Board v. Idaho-Maryland Mines, 98 F.(2d) 129 (C.C.A. 9th, 1938); National Labor Relations Board v. Fainblatt, 98 F.(2d) 615 (C.C.A. 3d, 1938), *cert. filed*, U.S. Sup. Ct., No. 514 (1938) 6 U.S. L. WEEK 443.

[101] As of January 1, 1939, the Board and its staff had handled 19,176 cases, including both charges of unfair labor practices and petitions for the certification of representatives, which involved 4,284,608 workers. NLRB Press Rel., Jan. 31, 1939 (R–1494). The volume of work looms even more imposing when one contemplates that for the calendar year 1938, Board hearings in close to 1,500 cases totalled 860,344 pages of record, and that on January 1, 1939, there were pending before the Board approximately 469 complaint cases, totalling 663,845 pages. Board officials estimate that the average length of the record in a complaint case is somewhat over 1,000 pages, and in a representation case is about 200 pages.

[102] National Labor Relations Board v. Biles-Coleman Lumber Co., 98 F. (2d) 16, 17 (C.C.A. 9th, 1938); and note also Morgan v. United States, 298 U.S. 468, 481 (1936): ". . . Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. . . ."

supervisor to review the record himself in order to determine whether additional relevant material is therein contained. The members of the Board, be it noted, have themselves already had the benefit of oral argument before them in the vast majority of controverted cases,[103] so that they bring to their conference with the Review Attorney and the supervisor an apprehension of the critical issues involved in the pending matters.

At the conclusion of its consideration of the case, the Board indicates to the Review Attorney the nature of the decision that the Board desires to issue, and the Review Attorney then prepares a draft of the findings and order which is sent to each member of the Board, as well as to the head of the Review Section, for review and correction. It is true that the actual decision is not *written* by any member of the Board. It is *written* by a member of the Review Section. But the decision is the Board's decision, the product of its detailed deliberations, for whose official articulation the Review Attorney has been chosen as the ghost-writer.

VIII.

"The Board . . . Makes the Final Decision Upon the Complaint Originally Filed by It, Prosecuted by It and Heard by Its Trial Examiner" [104] . . . "This Tyrannical Procedure . . . Has No Place in a Democracy. The Act Should Be Amended To Provide a Tribunal in Keeping With American Practices" [105]

No criticism of the judicial functioning of the Board has received the same wide acceptance as has the charge that the NLRB combines within itself the roles of prosecutor, jury, and judge. For no judicial concept has a more elemental or traditional appeal than that "one should not be a judge in one's own case."

The authors do not propose to discuss here the nature of this general criticism of administrative tribunals or the extent to which such criticism is justified. It is enough at this point to say that the form of administrative organization encountered in the NLRB is in essential respects the same permitted by statutes governing the other major administrative tribunals. The Board, in short, has not itself created a new type of administration, but on the contrary has been modeled after established and revered agencies like the Interstate Commerce Commission. The attack upon the alleged "merging" of functions is an attack upon the whole administrative process, though those who make it may for momentary tactical reasons appear to be aiming their shafts particularly at the NLRB.

While the authors will not now address themselves to the basic question whether the amalgamation of diverse functions in a single agency is governmentally desirable, they do propose to discuss the extent to which the three members of the National Labor Relations Board participate in the issuance of the complaint, the choice of the Trial Examiner, the conduct of the trial hearing, and the actual decision in any

[103] See *supra* note 98.

[104] John Lord O'Brian, Address before Young Republican Clubs, N.Y. Times, Oct. 16, 1938; accord: *e.g.*, Edward Corsi, *id.*, N.Y. Times, Oct. 23, 1938; Henry L. Stimson, Letter to the Editor, N.Y. Times, No. 3 ,1938; (1939) 97 Factory Management and Maintenance 38.

[105] Tom M. Girdler, Statement before Senate Civil Liberties Committee, N.Y. Times, Aug. 12, 1938.

proceeding before the Board. If in the course of the examination it will be revealed that *in fact* there is a division of function, then criticism of the administration of the Act in this aspect becomes more a matter for theoretical than for practical debate.

The nature of the preliminary investigation which may result in the issuance of the complaint has already been discussed in detail. In the overwhelming majority of instances, the members of the Board are completely ignorant whether a charge or petition has been filed in any particular instance; they know nothing of the nature of the preliminary investigations and the recommendations of the Field Examiner and Regional Director relative to the filed charge or petition; and they are uninformed of the final disposition of these recommendations by the Secretary. In the few instances in which the Board does consider whether a complaint should issue, or whether a hearing in a representation proceeding should be authorized, it is merely bringing to the consideration of the problem the understanding and experience of the individuals charged by the statute with the responsibility for administering the Act. The members of the Board might have seen fit to permit the Secretary himself to make the final decision in all instances. But if this were the Board's practice, complicated cases might arise in which, after the entire administrative process had been exhausted, the Board would dismiss the complaint either because it lacked jurisdiction or felt that the matters complained of did not constitute illegal employer activities under the Act. Under the present procedure the Board members may, by considering the Regional Director's recommendation that a complaint issue, make at least a preliminary determination of such matters in the troublesome, though rare, cases in which they arise. The Board would have been subjected to severe criticism if, by reason of installing a less practical procedure, it had found itself compelled to dismiss cases after the termination of exhausting and expensive trial proceedings. The reference of troublesome problems, though few in number, for its consideration prior to the commencement of any formal proceedings enables the Board to sift out the cases which would not warrant eventual orders, regardless of the facts, because of some issue of law. The early consideration of the question whether a *prima facie* case could be stated against an employer, represents not a prejudgment of the merits, but a device for avoiding costly futilities.

The Trial Examiner who presides at the hearing, is chosen not by the Board itself but by the Chief Trial Examiner, who "by order of the Board" signs the order designating a particular person. Usually, the members of the Board are unaware and indeed unconcerned as to the identity of a Trial Examiner in any particular proceeding. In only the most unusual instances, in which there have arisen matters of policy not directly related to the facts of the controversy, has the Chief Trial Examiner consulted with the members of the Board as to the choice of a Trial Examiner. When, for example, the Governor of Iowa announced that by a declaration of martial law he had ousted the Board of its jurisdiction in a then pending case, the Chief Trial Examiner naturally conferred with the Board concerning the individual who would be its representative in this troubled situation. Similarly, when proceedings were instituted against the steel company of Mr. E. T. Weir, one of the Board's most intransigent foes—proceedings which it was known

would be lengthy, bitter, and well publicized—the Board was consulted on the question whether a regular member of the staff should be assigned or whether an outsider should be retained as Trial Examiner.

Not only does the Trial Examiner have no immediate connection with the Board itself; he does not even have contact with any of the regional offices or officers, for he is assigned from Washington, travels in circuit, and does not meet with any member of the Regional Staff in regard to the hearing. He is never assigned at the request or recommendation of the Regional Director or Regional Attorney. Except in those unusual instances when he presides over two or more cases consecutively in the same city, the Trial Examiner does not appear in the city where the hearing is to be held until the day of the hearing, and then goes directly to the hearing room. Until that day the Region is usually not aware of the identity of the person who will preside at the hearing. The Trial Examiner knows nothing of the case "except that when he is assigned to it, if he is wise he goes over the complaint, answer and motions to acquaint himself with the issues, as a judge may familiarize himself with the pleadings in a case he is to try." [106]

The Board attorney who is to represent the Board at the trial hearing is selected by the Regional Attorney.[107] His identity is unknown to the Board members in Washington or to the Chief Trial Examiner, and he operates directly under the supervision of the Regional Attorney and the Associate General Counsel. The Trial Examiner and the Board attorney have strict instructions to be strangers to each other at or in connection with the trial hearing. While disregard of the Board's directions to its employees in this respect has never, so far as the authors are able to learn, been established by any respondent, several violations of its inflexible rule have been reported to the Board, and the participants in the alleged conferences have been severely reprimanded by the Board even in the absence of substantiation of the reports. On the basis of rather careful inquiry, initiated with a considerable degree of skepticism, the authors have come to the conclusion that the relations between the Board's examiners and its attorneys are ordinarily not sharply different from those existing between many District Judges and United States Attorneys: They are known to one another; they develop a certain respect for and confidence in one another; the attorneys learn something of the habits of mind of the judges, and are thus enabled to present their cases with some reference to their idiosyncratic individualities; they may even have social relationships; but they do not conspire together over the luncheon table to deny a fair trial to persons who are to be prosecuted by one and judged by the other.

It may thus be observed that in unusual cases the Board members play a minor, but certainly not a prejudicial role, in the issuance of particular complaints or in the appointment of the Trial Examiner

[106] Charles Fahy, Address at Duke University on Law in Modern Society and Administrative Practice, Dec. 3, 1938, NLRB Press Rel. (R–1347) 13.

[107] After the complaint is authorized and issued, the Regional Attorney assigns the case to one of the attorneys on the Regional legal staff. This attorney has instructions to review the case independently of the examinations of the case theretofore made by the Field Examiner and the Regional Director. He is usually given a week in which to prepare his case, although sometimes as much as a month may pass before the case is actually heard. The attorney is expected to prepare his case for argument just as carefully as a case would be prepared for argument before a Circuit Court of Appeals. Two days before the case is to be tried, the attorney must have seen all his witnesses and prepared a trial memorandum and a trial brief. He at that time discusses the case in detail with the Regional Attorney. After a review by the Regional Attorney, the case is in the hands of the attorney trying the case.

who is to sit in a named case; but in any event, they never participate in the prosecution of a case at the hearing stage in either an active or an advisory capacity. Their agents do. But the members of the Board have no relationship to the current activities of these agents in any particular proceeding, nor does it meet with them at any time after the event. The Board's function, and theirs only, is the task of finding the facts upon which the final order of the Board must rest. It is therefore incorrect to charge that the performance of this special function is perforce a prejudiced one because in rare instances, months before the actual analysis of a particular case, a major question of policy, which is practically divorced from the facts of the controversy, is brought to the Board's attention for consideration.[108]

Conclusion

The administration of the National Labor Relations Act is not wanting; the procedures developed by the Board have been characterized not by a despotic disregard of the Constitution or of less formal demands that administrative adjudication be fair as well as swift, but rather by a lively desire to afford to the parties the fullest opportunity to urge their points of view before the Board and its agents.

Enemies of the NLRB have, however, sought to demonstrate the contrary by asserting that the Board, by maladministration, has produced "one of the worst epidemics of strikes and class conflicts in American history",[109] and has thereby impeded the return of business prosperity.[110] If such charges were true, then the Act or its administration, or both, might properly be discredited, for Congress, in passing the statute, had enunciated as its major purpose the mitigation of industrial discord.[111]

We are doubtful that attacks of this character are related to the administration of the Act, but believe, rather, that they are addressed directly to the question whether any statute like the Wagner Act is a desirable governmental regulation. In any event, the record is perfectly clear, as we shall show, that the Board's work has in fact diminished labor warfare. Even were it otherwise, one might pardonably be tempted to meet the accusation by an *argumentum ad hominem*. The charge that industrial bitterness has not been reduced by the Act's operations comes with particular ill grace when, as often happens, it comes from the ranks of those very people who with the grimmest determination have fought from the outset the effective enforcement

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[108] *Cf.* Feller, *Administrative Justice* (1938) 27 Survey Graphic 494: "Rivalries develop between different sections of one agency just as they do between different agencies. The structure of organization is such that the judgment of deciding officers can hardly be warped by the influence of prosecuting officers."

[109] Varney, *The Case Against the Labor Board* (1938) 43 Am. Merc. 129.

[110] See, *e.g.*, National Small Man's Business Association, Statement, N.Y. Times, September 15, 1938; John Lord O'Brian, N.Y. Times, Statement, Nov. 4, 1938; First Voters' League, Statement, N.Y. Times, Dec. 19, 1938.

[111] Section 1 of the Act states its objective to be the elimination of obstructions to the free flow of commerce by encouraging the practice and procedure of collective bargaining, disregard of which has led "to strikes and other forms of industrial unrest."

At the same time, Congress recognized that strikes otherwise occasioned might very possibly continue to exist, and it therefore specifically provided in § 13 of the Act that the statute should in no respect "be construed so as to interfere with or impede or diminish in any way the right to strike." At the time of approving the Act, the President observed that "This act, defining rights, the enforcement of which is recognized by the Congress to be necessary as both an act of common justice and economic advance, must not be misinterpreted. It may eventually eliminate one major cause of labor disputes, but it will not stop all labor disputes." N.Y. Times, July 6, 1935. It follows, therefore, that the continuance or even the increase of labor disputes over wages, hours, and working conditions would constitute no reflection upon the efficacy of the Act or its administration, since the statute was not framed in terms of the problem presented by controversies of that character.

of the law. Professions of devotion to employer-employee accord ring slightly hollow when they issue from the lips of those whose deeds and words suggest the motto, "No labor peace without honor—and there can be no honor until the enemy is destroyed!"

If the question of the Act's effectiveness is to be examined without prejudgment, one would at the threshold of his consideration note that many of the most prominent of American employers have loyally accepted its principles, and that the history of their labor relations has since exhibited a peacefulness notably absent in non-cooperating branches of similar businesses. One may, for example, readily contrast the harmony that has been manifest in some of the complying steel companies with the hostility and physical violence that have been present elsewhere in the steel industry—a contrast by no means peculiar to that industry. Unquestionably the development of sound labor relations practices is in many instances not solely, perhaps not even primarily, to be attributed to the work of the Board. It is our belief, however, that the NLRB has, by its forthright insistence upon observing the policies of the Act, aided in neutralizing resistance to the acquisition of a new point of view, and has in numerous cases made possible the substitution of amicable association in place of previous animosities. Today, the majority of American employers recognize, with greater or lesser reluctance, that they must accord to their employees the equivalent of their own privilege to elect representatives of their own choosing in their *employers'* association, free from outside interference. By and large, only a handful of diehards, more powerful than numerous, maintain a different position. Their intransigence, rather than the present administration of the Act, constitutes the real threat to the effective operation of the law; the influence of their hostility, rather than the Board's procedures, gives whatever color of reality there may be to the statement that under the Wagner Act industrial strife has increased in intensity.

It has been asserted frequently and truthfully, that during the year 1937, after the Act had nominally been in force for some two years, strikes had grown in number and in terms of affected employees well above the figures of previous years.[112] What is often omitted from the assertion is an explanation that it was not until April 12, 1937, that the Act received the approval of the United States Supreme Court and thereupon for the first time marched boldly from the pages of the statute book to commence an active existence in the world of affairs. Over a majority of the workers involved in the strikes of 1937, it has been estimated,[113] left their employment because of the denial to them of the very rights granted by the law; it was not the administration of the Act, but the defiance of it, which created the industrial warfare. It is interesting to speculate as to what the story would have been had the Supreme Court decided more expeditiously, or had American industry as a whole emulated its English counterpart in accepting the principles of collective bargaining. The speculation may be answered substantially by the observation that during the first nine months of 1938, the

[112] Support for the assertion may be found in United States Dept. of Labor, Bureau of Labor Statistics, *Analysis of Strikes in 1937* (1938) 46 Mo. Lab. Rev. 1221, 1222; *cf. id., Review of Strikes in 1936* (1937) 44 Mo. Lab. Rev. 1186, 1188.

[113] The Bureau of Labor Statistics, U.S. Dept. of Labor, estimated that 57.8 per cent of the strikes of 1937, and 76.4 per cent of the work-days lost, were attributable to employer attempts to hinder union organization. See (1938) 46 Mo. Lab. Rev. 1186, 1200, *supra* note 112.

latest period for which figures are available and a period during which the NLRB was no longer throttled by injunctions or threatened injunctions, the number of strikers had decreased to about 531,000 workers, who lost approximately 6,780,000 days of work; during 1937 the figure stood at over 1,860,000 strikers, with a loss of more than 28,424,000 work-days as a result.[114]

In truth, of course, strike statistics are revealing only if they address themselves, not to the question, "How many strikes have occurred since the Act has been in operation?"—because strikes are subject to the pressure of economic fluctuations, industrial recessions, and many other factors—but, rather, to the question, "To what extent are unions resorting to the Act instead of to economic weapons?" When bitterly denied the privilege of unionization, unions previously had only one choice other than abject surrender: Strikes. Today they have alternatives: They may strike or they may appeal to the Board. In 1936 and in the spring of 1937, unions chose the former alternative in approximately 3,200 instances, their strikes resulting in stoppage of work by about 1,287,000 men. In the same period, only slightly more than 1,800 cases, involving 677,000 men, were brought before the NLRB for decision. But in April 1937, the Supreme Court approved the Act, a different trend commenced. From that time until September, 1938, there have been about 5,500 strikes, affecting approximately 1,894,000 employees, while the Board has had presented for its consideration over 6,150 cases, affecting over 3,208,000 employees.[115] Comment upon the significance of such figures is superfluous.

But the story in this regard might still be incomplete if we did not touch upon the Board's success in achieving a lasting peace, rather than a mere postponement of hostilities. As of January 1, 1939, in cases involving nearly 8,000 different employers and 1,500,000 workers, the contesting parties had, under the leadership of a representative of the Board, settled their differences—by agreeing to a policy of recognizing representatives; by arranging elections to choose employee representatives; by consenting to abide by the result of a payroll check; or by voluntary adjustment of grievances which had given rise to charges of unfair labor practices. Each one of these settlements terminated a strike, averted a threatened one, or eliminated the potential causes of a

[114] See NLRB ANN. REP. (1938) 285–87, containing figures based on data released by the U.S. Dept of Labor, Bureau of Labor Statistics; (1938) 46 MO. LAB. REV. 1186, 1189, *supra* note 112.

Despite these figures Senator Burke has recently insisted that "in number of disputes, in the total of workers involved, and in work days lost," the United States exceeded in the past few years the combined totals of other countries examined by the International Labor Office in Geneva. To this Chairman Madden of the Board has relied: "This assertion is wholly misleading. You enlist in your aid the ILO tables which omit France, Japan and Sweden, but which include such countries as Palestine and Esthonia; thus you fall into the error of comparing the predominantly agricultural nations listed with our own highly industrialized nation. Although the ILO yearbook which you cite advises caution in using the figures because 'the diversity of method of the different national statistics assembled here renders international comparison very difficult,' let us choose your own method: the figures show that for the eight most important industrial centers in which labor is permitted to be active and for which data was available for 1936 (Sweden, Great Britain, Japan, Canada, Czechoslovakia, Belgium, France and The Netherlands), there were 215 strikes per million of gainfully employed persons as compared with 44 for the United States in 1936, 97 in 1937, and 45 for the eleven months of 1938." Madden, Letter in answer to radio address of Senator Burke, Jan. 7, 1939, NLRB Pr. Rel. R–1445 (1939) 1–2; *cf. Days Lost Through Industrial Disputes in Different Countries* (1938) 37 INT. LAB. REV. 674.

[115] See NLRB ANN. REP. (1938) 285–87; *Trend of Strikes* (1939) 48 MO. LAB. REV. 140; *supra* note 112. The preliminary statistics for the number of cases brought before the Board, and workers involved therein, for July, August, and September, 1938, was supplied to the authors by the Bureau of Economic Research of the Board.

It should be noted that the statistics for April, 1937, are included in those pertaining to the period following the Supreme Court decision.

future one. In addition, in 6,300 cases, involving approximately 1,150,000 employees, the Board's action resulted in the withdrawal or dismissal of charges against employers, and thus, it may properly be supposed, demonstrated to affected employees that they were without grievances justifying organized action against their employers.[116]

The Bureau of Public Affairs, Inc., has recently culled from the files of various regional offices of the NLRB, examples of its value in settling labor disputes without the rancor either of protracted strikes or of formal proceedings.[117] In one instance a union of transport workers, asserting that it represented a majority of the employees, was seeking to negotiate a contract with the employer when he suddenly signed a closed-shop contract with another union. The first union immediately called a strike, which effectively tied up seventy per cent of the employer's equipment; at the same time, it filed a charge of unfair labor practices against the employer and requested that it be certified by the Board as the bargaining agent of the employees. The employer countered by a threat to commence suit against the strikers for money threatened to be lost because of inability to fulfill prior contracts. At this point, with the chances for peace apparently slight, the Board officials arranged a meeting with the employer and with representatives of the two unions. Two conferences, lasting eight hours, brought a solution to the conflict. The employer signed a closed-shop contract with the union representing the striking employees; this contract and the contract previously signed with the rival union were held in escrow by the Regional Director pending outcome of a consent election to determine which of the two unions the employees desired as their bargaining agent; the strike was thereupon terminated. The election resulted in the choice of the striking union by a large majority of the employees, and the contract with that union then came into effective operation.

In another case, two allied unions sought recognition for bargaining purposes in different units of a factory, but recognition was refused them by an employer engaged in dalliance with a company union. When the employer closed his factory for mechanical repairs, the unions filed with the Board a detailed charge of unfair labor practices, in the belief that the shutdown of the plant was designed to break the unions' strength. Upon investigation, the Board found that the shutdown was legitimate, and thereupon closed this branch of the case. At the same time it secured the employer's promise to recognize the outside unions and to ignore the company union for collective bargaining purposes upon the resumption of operations. The employer violated his pledge upon reopening his plant; the unions struck; the company attempted to continue production with "loyal" employees; the employer aided the formation of a vigilante organization of citizens, prepared to break the strike with rifles and shotguns, while the unions countered by obtaining the promised help, if needed, of 200 additional pickets from nearby locals. The Regional Director of the Board meeting with representatives of both sides for two days, effected a settlement on substantially the same terms as had been previously accepted, then ignored, by the employer. The Mayor of the city has since expressed to the Board his gratitude for its work in "avoiding serious violence and instituting friendly collective bargaining."

[116] See NLRB Press Rel. R–1494.
[117] See (1938) 2 LAB. REL. REP. 676–77.

Still another case involved a dispute between an A.F. of L. union, representing a limited number of employees, but hopeful of representing all, and a C.I.O. union competing for majority representation. The employer was willing to bargain with either union, or with both of them. Each union had previously negotiated a separate contract with the employer. That with the A.F. of L. had expired, and it threatened to strike if its contract were not renewed. The C.I.O. union, in turn, threatened to strike if the employer negotiated a contract with the A.F. of L. union before the NLRB acted upon the C.I.O. union's previously filed petition for the certification of representatives. The harassed employer appealed to the Board, and a consent election was arranged. The A.F. of L. union won the election, became the exclusive bargaining agent for all the employees in the plant, and all talk of strikes ceased.[118]

These examples sufficiently illustrate the development by the Board of ingenious and effective informal procedures, in addition to the formal procedures previously discussed. Both the informal and the formal procedures exhibit that the NLRB has, with singleness of purpose and a thoroughly developed sense of fairness, sought the effectuation of the Act's objectives by means well adapted to that end.

By some the Board has been denounced for methods alleged to be un-American and not in harmony with the genius of our democratic institutions. The authors are satisfied that the denunciations find no support in fact. Government agencies are rarely popular when they control and command; new government agencies which control and command are even more rarely popular; and a new government agency which controls and commands in situations so surcharged with emotion as have been those committed to the NLRB would be a latter-day miracle if it were popular with all whom its operations affect. The NLRB is not a miracle. But its failure to be so regarded is not attributable to "un-Americanism" on its part, unless by governing effectively it has shown itself guilty of that offense. If it be violative of the genius of our democratic institutions to encourage the voluntary settlement of

[118] Cases of the character just described are sometimes cited in support of the proposition that employers, as well as employees, should be permitted to file petitions, looking toward the certification of employee representatives. The purpose of the Act, however, as is also true of the Railway Labor Act, is to assure to employees the privilege of selecting their own representatives for purposes of collective bargaining. While the Act does not explicitly forbid employers from filing petitions, the Board has by its regulations foreclosed the possibility of their doing so. RULES & REGS., art. 3, § 1. The obvious justification for the Board's action is the possibility that unscrupulous employers might file petitions in an untimely fashion, in an effort not to help but to impede the employees' free choice of their union representatives. See the testimony of Chairman Madden before Senate Judiciary Committee, Jan. 28, 1938, *Hearings on S. Res. 207* (75th Cong., 3d Sess.) p. 85.

The decision of the Board not to receive employer petitions has not been harmful to employers genuinely desirous of bargaining collectively with their employees, but confronted by a jurisdictional struggle between two contending labor unions. When any such employer has notified the Regional Director of his predicament, the representatives of the Board have, in most instances, been able to convince one or the other of the contending unions to file a petition, and the Board has immediately conducted an election.

The authors are persuaded that the recurrent clamor for permission to employers to file petitions is a product of misapprehension of the need for such permission. The experience of the New York State Labor Relations Board, which permits such employer filing, is persuasive that the eagerly coveted privilege is not one having great utility in practice. For, from the effective date of that law in 1937 until February 1, 1939, a total of only 64 employer petitions had been filed; of these, 38 had been withdrawn before any hearing by the Board, 5 more were dismissed for lack of prosecution by the petitioner, 5 were dismissed for other causes, 9 were still pending, and only 7 resulted in certification of employee representatives, 5 of these 7 cases being by agreement of the parties and the other 2 being cases in which a union had also filed a petition. These figures scarcely suggest that the opportunity to file petitions is one of great moment to employers in New York, and there is no reason to suppose that the experience of intrastate business there is different from that of employers elsewhere.

industrial disputes, or to insist that they shall not be caused by disregard of basic employee rights, or to vitalize the Bill of Rights in hundreds of communities which had previously known it only as a term appearing in Independence Day orations, or to facilitate the unionization of 4,000,000 previously unorganized and inarticulate workers by protecting them from interference with their efforts to organize, then the NLRB has comported itself in a manner out of harmony with the spirit of our democracy.

We would not maintain that the NLRB has never erred or that its practices leave no room for improvement, any more than we would maintain that the established courts are free from the risk of error or above the possibility of improvement. But one may conservatively insist, we think, that the Board has made a largely successful effort to perform a difficult assignment by a procedure which, while minimizing the chance of mistake, fully preserves the basic values of traditional judicial processes.

WALTER GELLHORN,
SEYMOUR L. LINFIELD,
Columbia University School of Law.

14. (76th Congress, 1st Session, Report of Special Committee to Investigate the National Labor Relations Board,* House of Representatives, Report No. 1902)

LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, D.C., March 30, 1940.

Hon. WILLIAM B. BANKHEAD,
Speaker of the House of Representatives, Washington, D.C.

DEAR MR. SPEAKER: By direction of the special committee, appointed pursuant to House Resolution 258 of the Seventy-sixth Congress to investigate the National Labor Relations Board, I hand you herewith the intermediate report of that committee.

Sincerely yours,

HOWARD W. SMITH.

TO INVESTIGATE THE NATIONAL LABOR RELATIONS BOARD

March 29, 1940.—Referred to the House Calendar and ordered to be printed

Mr. Smith of Virginia, from the Special Committee to Investigate the National Labor Relations Board, submitted the following

INTERMEDIATE REPORT

[To accompany H. Res. 258]

FOREWORD

In presenting the following report, the Special Committee to Investigate the National Labor Relations Board has carefully considered every aspect of the evidence before it and has endeavored to evaluate that evidence properly in order to present to the Congress an accurate and impartial report of the activities of the Board. The record is based on the testimony and exhibits of the National Labor Relations Board, the committee not permitting itself to be made a sounding board for disgruntled litigants.

The committee wishes to express its very great appreciation for the invaluable services rendered by its staff. The committee was fortunate to have secured the services of such an exceptionally competent attorney as Edmund M. Toland, its general counsel. It realizes fully the very great debt owed to Mr. Toland for his extremely able and comprehensive presentation of matters relevant to the investigation. The devotion displayed by Mr. Toland has been truly inspiring, especially in view of the great personal sacrifice made by him in order to assist the committee. Tribute is paid to the committee's staff of attorneys and

*Appointed pursuant to H. Res. 258, to investigate the National Labor Relations Board.

assistants whose unflagging efforts and unselfish devotion were largely responsible for the development of the record. Acknowledgment is also made to Dr. Meyer Jacobstein, a former Member of Congress, of the Brookings Institution, for his contribution to the work of the committee.

The committee desires to thank Dr. Walter H. E. Jaeger, technical adviser, professor of law and director of graduate research in the School of Law, Georgetown University, for his valuable assistance in the preparation and editing of this preliminary report.

Introduction

From the very beginning of the administration of the National Labor Relations Act, adopted by Congress on July 5, 1935, a storm of criticism has attended the work of the National Labor Relations Board, both as to the activities of individual Board members and of the staff, and the policies and regulations made by the Board. Rivalry between the two major bodies of organized labor complicated an already difficult task and aroused further resentment.

While this committee deprecates the overzealousness of the Board in its conduct and its interpretation of the law that has led to a nation-wide storm of criticism, they have not undertaken anywhere to brand the Board with any such scathing denunciations as have been heaped upon it by the heads of the two great labor organizations; namely, the Congress of Industrial Organizations and the American Federation of Labor. For instance, Mr. William Green of the American Federation of Labor charges that the Board in its determinations in representation cases has been guilty of "all the crimes in the calendar" [II 285 (2)]. Mr. Green further said:

> But our complaint is against the administration of the Act. We believe that the Act has been administered contrary to both its spirit and letter. We charge the Board with maladministration, with bias, with an attempt to apply their own peculiar philosophy in the disposition of cases, rather than the plain provisions of the Act.
>
> The Board in our judgment is anything but a judicial body, * * * [Green, II 282].

Mr. John L. Lewis, in his presidential report to the Congress of Industrial Organizations at the convention recently held in San Francisco (October 9, 1939), sharply criticized the administration of the National Labor Relations Act stating:

> But when the Act is so administered as to thwart the development and maintenance of stable industrial relations, then it becomes necessary to consider and weigh carefully whether the benefits of the Act outweigh the dangers which its administration inflicts upon organized labor.

Senator Burke, of Nebraska, introduced a bill to investigate the National Labor Relations Board in 1938; the investigation was authorized and a few hearings were held. In addition, in 1939, thousands of pages of testimony were taken before the Senate Committee on Education and Labor and the House Committee on Labor relative to the various bills proposing amendments to the National Labor Relations Act.

The criticisms embodied in these suggested amendments and developed at these hearings resulted in the introduction of House Resolution 258 by Representative Howard W. Smith, of Virginia, on July 13,

1939. This resolution was reported from the Rules Committee on July 18, 1939, and passed by the House of Representatives by a vote of 254 to 134 on July 20, 1939. Pursuant to this resolution, 5 Representatives were appointed as a Special Committee to Investigate the National Labor Relations Board.

On August 1, 1939, an office for the committee was established in the Old House Office Building. Preliminary matters pertaining to the investigation occupied the committee's time until September 11, 1939, when Edmund M. Toland, of Washington, D.C., was appointed by the committee as general counsel. He completed the selection of his staff by October 1, 1939, and the intensive work required by this investigation was undertaken immediately.

More than 60,000 questionnaires were sent to every person mentioned in the case dockets of the National Labor Relations Board as having been a party to a case before the Board or as having had a case before the Board. These included employers, unions, individual employees, and interveners. More than 8,000 answers were received from employers, and over 2,000 answers were received from unions and individual employees. These answers were tabulated and made available to the committee.

Another questionnaire was sent to the chief of police of every town and city in the United States. More than 600 answers were received and tabulated for the use of the committee.

Individual invitations to participate in the hearings before the committee were sent to the responsible heads of labor and employer organizations. Letters were also sent to every professor of administrative law, constitutional law, and labor law in every accredited law school in the United States, requesting opinions on certain aspects of the administration of the National Labor Relations Act by the National Labor Relations Board, and inviting comment on the provisions of the act itself. These professors were also notified that their appearance before the committee would be welcome.

Outstanding leaders and experts in the fields of industrial relations and business management were urged to participate in the work of the committee. Hundreds of persons were interviewed by members of the committee and the committee's staff regarding their experiences with the National Labor Relations Board in the administration of the act. Thousands of letters, telegrams, and telephone calls were received, giving information believed relevant to the scope of the inquiry. The information contained in these communications was carefully sifted and analyzed and, whenever found pertinent, presented to the committee. In addition, members of the committee's staff were assigned to investigate and report on matters deemed by the committee to be necessary for the successful prosecution of its investigation.[1]

The committee concluded that its investigation of the Board would necessitate a thorough survey of the operations of the Board and its principal officers, beginning with the time of its establishment. As the committee did not wish to hamper the Board in its work by the

[1] The hearings on amendments to the National Labor Relations Act, held during the spring and early summer of 1939 before the Senate Committee on Education and Labor and the House Committee on Labor, were analyzed; a report entitled "A Brief History of Labor Law" was prepared, which dealt with legislative enactments from early times to the present day, the debates in the House and Senate on the National Labor Relations Act being emphasized therein; and a monograph dealing with the British Trade Disputes Act of 1927 was compiled, attention being directed to the parliamentary debates preceding the adoption of that measure.

removal of material required in the conduct of its business, certain members of the committee's staff were assigned to an office in the Shoreham Building (where the Board has its headquarters). This was done primarily for the convenience of the Board, and, in view of the quantity of Board files searched and analyzed, the interference with the Board's work was negligible.

The committee did not feel it essential to request the files of every person employed by the Board; however, the complete files of all of the principal officers of the Board and of certain subordinates were obtained and analyzed. Photostatic copies of relevant material were made and the entire search accomplished with celerity and dispatch in order that these files might be returned as speedily as possible.

Case notes of all review attorneys were requested and submitted to the committee. From time to time, these notes and other documentary material were introduced as exhibits in the committee's record.

Minutes of the proceedings of the Board, copies of its decisions, instructions for review attorneys, regional directors, trial examiners, and field examiners were made available by the Board to the committee. Appropriate extracts from these were identified and spread upon the record.

The committee, in view of its limited appropriation and personnel, although realizing the importance of the 22 regional offices of the Board, confined its field investigation to the regional offices in San Francisco, Los Angeles, Minneapolis, Milwaukee, Chicago, Cincinnati, Indianapolis, and New York. The committee's investigation of these offices was in no wise complete.

Meetings of the committee were held from time to time to consider matters of policy and to consider progress reports presented by General Counsel Toland. It was soon decided that in admitting testimony the committee would seek to follow insofar as possible the rules of evidence prevailing in the district courts of the United States, and that hearsay, opinion, and rumor had no place in the record as far as the committee's presentation of its case was concerned. Committee Counsel Toland made every effort to comply with the wishes of the committee and, for the most part, introduced documents obtained from the Board's own files.

Public hearings were held by the committee in Washington, D.C., from December 11, 1939, until February 28, 1940, with a recess from December 19 to January 5. Through February 28, 1940, 37 days of hearings were held, and approximately 1,600 printed pages of transcript and exhibits were published.[2] For the committee, General Counsel Toland introduced 1,094 exhibits, while Mr. Fahy presented 246 exhibits for the Board.

The Board was given an opportunity to present matters for the consideration of the committee from January 29 to February 5, and from time to time thereafter. The Board's affirmative testimony consisted principally of statistical material and general data and statistical surveys of trends in labor relations, compiled for the purposes of the investigation by the Division of Economic Research of the Board, and adopted and presented through Mr. Madden, the Board chairman. In most cases these statistical surveys were accompanied by an explanatory comment prepared by the same Division, and

[2] This would equal approximately 10,000 pages of typewritten manuscript.

adopted by Mr. Madden during the course of his testimony. Mr. Madden claimed that their work had been hampered by the pronounced initial opposition from some groups of employers.

Part I.—Administrative Practices of Board Members

A. BLACKLISTING

An unwarranted attempt on the part of the Board to impose extra-legal sanctions on employers was revealed to the committee during Board Chairman Madden's own testimony.[3] This attempt was to "blacklist" [4] employers alleged to be violating the National Labor Relations Act through the withholding of United States Government contracts.[5] These contracts were not only to be denied to employers *found guilty* by the Board of committing unfair labor practices in violation of the act,[6] but they were also to be denied to employers merely *accused* by the Board of such violations.[7] This punishment on the basis of a mere accusation is foreign to all concepts of justice and fair play and contrary to those principles that have been the keystone of American jurisprudence.

There can be no doubt of the facts in respect to this attempt—they were admitted by Mr. Madden.[8] He identified various documents introduced by Committee Counsel Toland, which documents were letters to the Procurement Division of the Treasury Department concerning certain companies either accused or found guilty by the Board of violating the act and asking that division to refuse the award of Government contracts to these companies.[9] In one letter sent in September 1936, Mr. Madden said:[10]

SEPTEMBER 2, 1936.

Capt. HARRY C. MAULL,
Procurement Division, Treasury Department,
Washington, D.C.

DEAR SIR: This is to advise you that Weiss & Klau Co., of New York City, manufacturer of window shades, has been charged by the employees with a violation of the National Labor Relations Act.

The preliminary investigation made by our agents in that region has shown a sufficient probability that these charges are well founded, so that *we have issued a complaint against this company and have scheduled a hearing. We cannot tell just when a formal decision will be made by the Board in this case,* but we want to advise you of the present status of the case, in the hope that your department will find itself able to cooperate with our work to the extent of not giving the benefit of Government contracts to persons and companies who violate other Federal laws. [Italics supplied.]

Note that this communication stated that charges had been filed against the company and a complaint had been issued thereon, but that no hearing had been held or decision made by the Board. However, in spite of the fact that there had been no determination of the company's guilt, Mr. Madden requested the Procurement Division not to give the benefit of Government contracts to the company.

[3] Madden, III 10–25.
[4] So characterized by Committee Member Routzohn (Madden, III 24 (3)).
[5] Madden, III 11–14; Madden, III 21–22, Healey, III 80.
[6] Committee exhibit 887, III 13 (3); committee exhibit 888, III 13–14.
[7] Committee exhibit 886, III 12 (1).
[8] Madden, III 10–14.
[9] Committee exhibits 886, 887, and 888, III 12, 13–14.
[10] Committee exhibit 886, III 12 (1).

Other letters in a similar vein were written during April 1937.[11] These letters specifically requested the Procurement Division to withhold contracts from the companies named therein because of their alleged violations of the act.[12]

In regard to the April 1937 communications, Mr. Madden testified that the letters were written after a representative of the Procurement Division had invited such letters following an interview with employees of the Board.[13] This was later denied by a representative of the Procurement Division.[14] Regardless of this conflict concerning April 1937 letters, it is clear that the Board had initiated the proposal in September 1936.[15]

The committee learned that this blacklisting activity on the part of the Board had been purely voluntary [16] and was in no wise connected or related to the proper administration of the act [17] or authorized by the general statutes of the United States.[18] Mr. Madden himself stated that he was doubtful at the time whether a governmental agency had the power to resort to such practices in implementing its own decisions.[19] In spite of these doubts, Mr. Madden did not seek to obtain an opinion from the Comptroller General of the United States with respect to the legality of this practice prior to writing to the Procurement Division, but postponed this detail until after he had communicated with that Division in September 1936 and April 1937.[20] Eventually the Comptroller General ruled that it was not permissible for the Procurement Division to refuse Government contracts to persons either accused or found guilty by the Board of violating the act, not even when the decisions of the Board had been enforced by a United States Circuit Court of Appeals.[21]

In addition to its activities with the Procurement Division in regard to Government contracts, officials of the Board entered into dealings in the summer of 1939 with officials of the Reconstruction Finance Corporation in an effort to prevent the granting of loans or the payment on loans already granted to companies allegedly violating the act.[22] Some of these activities were carried on without the knowledge of Mr. Madden, but he unhesitatingly approved of them when testifying before the committee.[23]

Here, too, the Board made no differentiation between those companies accused and those companies found guilty of violating the act.[24] So long as the company was in any way before the Board, it felt perfectly free to recommend these extra-legal penalties.

A clear conflict appears in the testimony as to whether the Board or the Reconstruction Finance Corporation initiated the negotiations in the summer of 1939 leading to the understanding under the terms of which the Board was to furnish information to the Reconstruction

[11] Committee exhibits 887 and 888, III 13–14.
[12] Note that Board Member Edwin S. Smith knew of attempts at blacklisting of the Remington Rand Co. See committee exhibit 888, III 13–14.
[13] Madden, III 21–23 ; Board exhibits 199 to 204, III 22, 56.
[14] Healey, 80–81.
[15] Committee exhibit 886, III 12 (1).
[16] Madden, III 12 (1) and III 13 (1).
[17] Madden, III 11 (1).
[18] Madden, III 11 (1, 2) a nd III 24 (1). See also opinion of Comptroller General, Madden, III 23 (1, 2).
[19] Madden, III 23 (2, 3) and III 23–24.
[20] Madden, III 23–24.
[21] Madden, III 23 (1, 2).
[22] Board exhibits 205, 206, and 207, III 25.
[23] Madden, III 25 (2).
[24] Board exhibit, 205, III 25 (1, 2).

Finance Corporation concerning alleged violators of the act and the Reconstruction Finance Corporation was to make use of that information in its loan policies.[25] Regardless of which agency was the initiator, it is clear that the Board was acting outside of the scope of the act in participating in such practices.[26] Moreover, it appears that as early as 1936 the Board had communicated with the Reconstruction Finance Corporation in an endeavor to have a loan withheld from a company accused of violating the act.[27]

B. BOYCOTT PROMOTION

Extra-legal pressure activities in connection with the *Berkshire Knitting Mills case*, which in the opinion of the committee, amounted to the aiding and abetting of a "boycott" [28] of that company, were engaged in by Board Member Edwin S. Smith.[29] Mr. Smith's activities in this respect were purely voluntary, as at the time of his activities there had been no charge filed with the National Labor Relations Board against the company which would give the Board any jurisdiction to intervene in the matter.[30] The committee believes that the Congress should be informed in detail of the conduct of this Board member in respect to this incident. Therefore a complete account of Mr. Smith's participation in that case is hereinafter set out.

Some 300 out of 6,000 employees [31] of the Berkshire Knitting Mills engaged in a strike because the wage policies of the mills were not deemed satisfactory.[32] These 300 employees were members of the American Federation of Hosiery Workers,[33] at that time affiliated with the Committee for Industrial Organization,[34] while the rest of the employees either belonged to no union [35] or were members of an independent union.[36] Attempts to terminate the strike were made by the United States Department of Labor Conciliation Service, the Pennsylvania Labor Department, and the Philadelphia regional office of the National Labor Relations Board.[37]

Mr. Smith was fully apprised of these mediation and conciliation activities of the Board's Philadelphia office by the regional director, Maj. Stanley W. Root.[38] The intervention of this regional office in the Berkshire matter is contrary to the express prohibition contained in section 4(a) of the National Labor Relations Act, which reads:

> * * * Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work) where such services may be obtained from the Department of Labor.

In contrast to Mr. Smith's interest in the mediation and concilation activities of the Philadelphia regional office is his conception of the policy of the Board with respect to such activities as expressed in a

[25] Madden, III 25 (1); Schram, III 78; Madden, III 166; Emerson, III 166.
[26] Madden, III 11(1, 2), 24 (1).
[27] Committee exhibit 914, III 127, 134.
[28] So characterized by Committee Members Halleck, I 230–B (1), and Routzohn, I 198 (2).
[29] Smith, I 200 to 230–G. See also Robb, I 190–200.
[30] Committee exhibit 104, I 193 (3); committee exhibit 106, I 194, 195 (2); committee exhibit 124, I 212–213; Robb, I 196 (2).
[31] Committee exhibit 106, I 195 (2).
[32] Committee exhibit 104, I 193–194 (1).
[33] Committee exhibit 104, I 193, 194 (1); committee exhibit 106, I 195 (2).
[34] Robb, I 196 (3); Smith, I 211 (3).
[35] Committee exhibit 109, I 197 (2).
[36] Idem.
[37] Committee exhibit 105, I 194 (2).
[38] Committee exhibits 105, 106, 107, and 108, I 194–195.

telegram sent November 2, 1936 (about the same time that the Philadelphia office was carrying on these activities), to Regional Director Charles Hope in Seattle, wherein he said: [39]

* * * In the meantime, I think you can accept it as *Board policy that you should keep out entirely of attempts to interest yourself* in the present maritime strike.—Edwin S. Smith. [Italics supplied.]

Thus Mr. Smith demonstrated his awareness of the limitations imposed by section 4(a) of the act upon the Board.

In fact, Mr. Smith himself was desirous of mediating in the Berkshire matter,[40] but made no attempt to communicate with the company for the settlement of the strike [41] when he was advised by the Board's Philadelphia regional office that his intervention would be fruitless at that time.[42]

Subsequent to the several reports from Major Root on the progress of the attempts to settle the strike,[43] Mr. Smith on October 23, 1936, received a communication from Mr. John Edelman, director of research of the American Federation of Hosiery Workers (of which the striking employees were members), which concluded as follows: [44]

* * * They [the Berkshire Company] have spoken for Hitler, the G. O. P., and the Liberty League. They contributed to a fund to carry on the pro-Hitler propaganda. They have complained that the Government here does not imitate the government of Germany in jailing strike leaders. They have refused to comply with the request of Governor Earle that they negotiate with the union. They have refused mediation offers of the Textile Labor Relations Board. *The union plans to carry its fight on this company to every big city. It will appreciate any cooperation possible from large purchasers of Berkshire goods.* [Italics supplied.]

Three days later, on October 26, 1936, Mr. Smith addressed a letter to Mr. Louis Kirstein, vice president of William Filene & Sons Co., a large department store in Boston, Mass.,[45] relating some of the historical aspects of the controversy between the Berkshire Co. and its striking employees and stating: [46]

* * * I understood from the [Philadelphia] office that an attempt was to be made to appeal to some of the larger customers of the Berkshire Knitting Mills to take up with the company the question of its wage scales for the reason that its low wage policy was tending to break down not only the wage structure but the price structure throughout the industry. * * *

* * * * * * *

I do not know whether you will care to make any approaches on this matter to the Berkshire management, *nor do I know what volume of business Filene's does with Berkshire. I do most certainly feel that any standard which you might adopt would be listened to with greatest respect by the Berkshire Company.* I am enclosing a letter from John Edelman, research director of the Hosiery Workers Federation, which gives some interesting facts regarding the company. [Italics supplied.]

To this communication Mr. Kirstein replied on October 28, 1936, in part as follows: [47]

[39] Smith, I 214 (2, 3).
[40] Committee exhibit 106, I 194, 195 (1).
[41] Smith, I 215.
[42] Committee exhibit 105, I 194 (2, 3); committee exhibit 106, I 194, 195 (1).
[43] Committee exhibits 104, 105, 106, 107, and 108, I 193–196.
[44] Committee exhibit 109, I 197 (1, 2).
[45] Robb, I 197 (3).
[46] Committee exhibit 110, I 198 (1).
[47] Committee exhibit 111, I 199 (2, 3).

* * * For instance, would like to know where and how they [the Berkshire Company] have spoken for Hitler. In fact, I should like the confirmation of all the facts with regard to wages, hours, etc. that Mr. Edelman claims in his letter.

Preceding this was the following:

I have heard something about the subject of which you write, but will look into it more carefully *and also call my associates' attention to it.* * * * [Italics supplied.]

Accordingly, on October 20, 1936, Mr. Smith requested of Mr. Edelman the additional information expressly desired by Mr. Kirstein.[48] Mr. Edelman later furnished this information,[49] and it was then forwarded by Mr. Smith to Mr. Kirstein.[50] Included in the supplementary material was a strong appeal by the union to boycott hosiery manufactured by the Berkshire Mills.[51] In the face of these communications, Mr. Smith when testifying before the Committee, nevertheless denied that his letter suggested a boycott against the Berkshire Co.[52]

Not only did Mr. Smith engage in the activities above set out, but, when finally charges were filed by the union against the Berkshire Co. and a complaint issued thereon and a hearing held, Mr. Smith participated in the decision which found the Berkshire Co. guilty of violating section 8, subsections (1), (2), and, (3) of the act.[53] Mr. Smith, when questioned by Committee Member Halleck, as to the propriety of participating in the decision, stated that he felt in no way disqualified from such participation because of his previous activities in connection with the Berkshire strike.[54]

The committee, feeling that the duty of a member of the Board is to preserve industrial peace, submits to the Congress for its consideration this report of the activities of Board Member Smith, querying whether this conduct does not reveal an absence of that judicious and impartial temperament which the American people demand from their quasi-judicial officers.

C. LOBBYING

1. Amendments

Extensive examples of Board lobbying are furnished in the efforts made by the Board and its employees to prevent amendments to the National Labor Relations Act.[55] The morality, and indeed the legality, of these activities may well be challenged.

Cumulative opposition was solicited among member unions of the American Federation of Labor, particularly in regard to amendments to the act being sponsored by the executive council of that Federation.[56] These activities could only be conducive to arousing dissatisfaction among the rank and file (especially the local unions) with the announced policies of the governing body of the American Federation

[48] Committee exhibit 112, I 199 (3).
[49] Committee exhibit 115, I 202 (2); committee exhibit 118, I 203–210.
[50] Committee exhibit 116, I 203 (1).
[51] Committee exhibit 118, I 203, 204–205.
[52] See, for example, Smith, I 222 (3) and I 230–A (3).
[53] 17 National Labor Relations Board No. 17 (November 3, 1939); Smith, I 222 (1).
[54] Smith, I 222 (2).
[55] Madden, II 694–703, III 4–7, 207–208; Rosenberg, III 81–86, 100–103, 201–207; Condon, III 86–103; Wolf, III 146–151; and exhibits introduced in connection therewith.
[56] Committee exhibit 842, II 695–6; committee exhibits 845, 847, II 696; committee exhibits 850–853, II 697 (2, 3); committee exhibit 920, III 91 (2); committee exhibit 921, III 91–2; committee exhibits 922–923, III 92 (1, 2).

of Labor at a time when the promotion of peace and harmony would have best served the interests of labor and the country.[57]

Chairman Madden himself stated that on several occasions he had asked prominent union officals to testify before the Senate Committee on Education and Labor in opposition to these amendments.[58] A Board memorandum described a meeting of Board Members Madden and Edwin S. Smith with various Board employees for the purpose of considering appropriate witnesses for the hearings before the Senate committee, which was then considering the advisability of amending the National Labor Relations Act.[59]

A suggestion was made by Chairman Madden at a conference with the Board's regional directors that letters sent to congressional representatives by union officials might well be spaced over a period of time, with the evident purpose of deceiving Members of Congress into the belief that the request or comment was spontaneous rather than superinduced or prompted by the Board.[60] Moreover, Mr. Madden said it would save the regional directors "a lot of last-minute solicitation." [61]

According to the testimony of Mr. Rosenberg, a Board employee, the Senate Committee on Education and Labor authorized the Board to produce expert witnesses to testify concerning the proposed amendments to the act.[62] When a certain Dr. Thyson volunteered to testify, however, he was not deemed a suitable witness inasmuch as he favored amending the act to provide for a five-man Board.[63] Moreover, the form of the Board invitation to appear as an expert witness was such as to preclude any testimony in opposition to the act.[64] Also, one prospective witness offered to allow himself to be "coached" along the lines that "you [Chairman Madden] may think desirable." [65]

An example of the methods pursued by the Board in procuring witnesses to testify before the Senate committee is illustrated by the contents of communications between Nathan Witt, secretary of the Board, and a regional director. The regional director advised the Secretary's assistant that an attorney who had represented both American Federation of Labor and Congress of Industrial Organizations' unions would be happy to testify "in the event his business calls him to Washington in the course of the hearings on the amendments." [66] Secretary Witt replied: [67]

> It has occurred to me that Mr. Combs [the attorney] might at the present time have cases awaiting oral argument before the Board. Will you ascertain if such is the case, and if so *we believe that it would be possible to schedule oral argument during the period in which he might be expected to testify before the Committee.* [Italics supplied.]

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[57] It is a matter of common knowledge that at this time the various members of the Congress of Industrial Organizations were actively opposing any amendment to the act. See Report of Hearings before Senate Committee on Education and Labor.

[58] Madden, II 678 (2); committee exhibit 835, II 694 (1, 2); committee exhibit 864, II 700, 701.

[59] Madden, III 7 (1); committee exhibit 874, III 7 (1, 2). The Board employees present at this meeting were Messrs. Madden, Edwin S. Smith, Fahy, Witt, Emerson, Pratt, Ross, Knapp, Dorfman, Rosenberg, and Mrs. Stern. See committee exhibit 1, I 28, for a description of the position held by each of the foregoing.

[60] Committee exhibit 858, II 702 (3).

[61] Idem.

[62] Rosenberg, III 100 (1, 2).

[63] Rosenberg, III 99 (2); committee exhibit 991, III 99 (2).

[64] See, for example, committee exhibits 944, III 95–96; committee exhibit 973, III 98 (2).

[65] Committee exhibit 947; Condon, III 96 (1, 2). In addition to this voluntary offer on the part of the prospective witness, a regional director wrote that he had a witness who would "need quite a bit of coaching on what we want." Committee exhibit 917, III 82 (3).

[66] Committee exhibit 991, III 91 (1), 312 (2).

[67] Committee exhibit 991, III 91 (1), 312 (2).

The obligation on both the Board and the attorney implicit in such an arrangement is obvious.[68]

Throughout the Board's campaign to prevent amendments to the act there were at all times from 8 to 10 attorneys especially assigned by the Board engaged exclusively in these legislative activities.[69] The work of these attorneys extended over a period of several months and their salaries aggregated approximately $2,600 per month throughout these months.[70]

As evidence of the attitude of these "legislative" attorneys toward one union over another, testimony was presented that a telegram had been sent by the secretary of the Board to regional directors asking for information concerning certain cases about which the American Federation of Labor might complain [71] (this at the time the Walsh bill, containing the proposed American Federation of Labor amendments, was before the Senate committee for consideration). The information sent to the secretary in response to this telegraphic request was kept by these "legislative" attorneys in a file folder labeled "Potential A.F.L., Beefs." [72] Another folder was labeled "10 A. F. of L. Squawks." [73]

In view of the Board's intense campaign conducted during the hearings before the Senate Committee on Education and Labor to prevent amendments to the act, it would be interesting to know whether a similar campaign is being conducted at the present time at Government expense to prevent any suggested amendments from being enacted into legislation.

Relative to the lobbying activities set out above, Committee Counsel Toland advised the committee of the provisions of United States Code, title 18, section 201, which makes the direct or indirect use of any part of a congressional appropriation for activities seeking to influence the action of a Member of Congress to favor or oppose any legislation or appropriation of Congress a criminal offense, punishable by mandatory removal from office of the Government employees so engaged in addition to certain criminal penalties. After meeting in executive session, the committee decided to refer the matter to the Attorney General of the United States for his opinion.[74] The Attorney General advised on February 23, 1940, that it was not within his province to render opinions to congressional committees.[75]

In a second letter to the Attorney General, dated February 27, 1940, Chairman Smith stated that this committee is charged only with the duty of investigation and report and that "any further action lies solely in the province of your Department." [76] In reply thereto, the Attorney General, on March 13, 1940, stated that an investigation was being made by the Federal Bureau of Investigation and the determination of a policy would have to await the results of that investigation as

[68] This attorney did not appear as a witness before the Senate committee, but the committee feels that the principle involved is not thereby changed as these communications show the mental attitude of the Board's secretary.

[69] Rosenberg, III 82 (1, 2).

[70] A communication from Mr. Rosenberg, Board attorney in charge of this work, to Committee Chairman Smith on March 2, 1940, set out the yearly salaries of some 9 attorneys who assisted him in this work. Mr. Rosenberg's present salary is $3,600 per annum (Rosenberg, III 81 (2)) and this was added to the salaries of the nine assistants ($27,600). The total was divided by 12 in order to determine the cost per month.

[71] Condon, III 102 (1).

[72] Condon, III 102 (1); committee exhibit 993, III 269 (3) *et seq.*

[73] Condon, III 102 (2); committee exhibit 994–A, III 328 *et seq.*

[74] Madden, III 10 (3).

[75] Committee Exhibit 1085, III 197–198.

[76] Committee Exhibit 1086, III 198.

United States Code, title 28, section 634, gave immunity to testimony given before congressional committees from being used in any criminal proceeding against the witness. The Attorney General then urged that legislation be sought by the committee in order to clarify the exact meaning of United States Code, title 18, section 201." [77]

Chairman Smith, in replying to this letter on March 18, 1940, pointed out that the Attorney General had inaccurately quoted United States Code, title 28, section 634 in that a sentence stating: "But an official paper or record produced by him is not within the said privilege," had been omitted in the Attorney General's letter. Chairman Smith stated that what is needed is not clarification of title 18, section 201, but the enforcement of existing law. At the time of this report, no further answer had been received from the Attorney General. Complete copies of the statutes mentioned and the correspondence entered into between the committee chairman and the Attorney General are attached to this report as appendix B.

The Board's activities in connection with legislation should be interpreted in the light of Chairman Madden's statement that, although aware of these activities and at first in some doubt as to the propriety thereof, he nevertheless resolved all doubts in favor of continuing them.[78] Under existing legislation, the committee feels that no Governmental agency may impede by means of pressure activities congressional attempts to correct abuses or errors that may be present in the statute which that agency is charged to administer, particularly where the legislation enacted might result in the loss of the incumbents' jobs.

2. Appropriations

Pressure activities, far-flung in their scope, which sought to influence congressional legislation with respect to the Board's appropriation, were brought out with considerable emphasis during the appearance of Board Members Madden and Smith and Secretary Witt before the committee.[79] This activity reached a peak during the summer of 1937, when a serious reduction in the Board's requested appropriation was threatened.[80]

It took the form of suggestions and requests by Board employees to friendly unions, prospective litigants before the Board, that telegrams and letters be sent to Congressional representatives protesting against the proposed reduction.[81] As a typical instance of this activity, a telegram from a trial attorney in a regional office to Mr. Charles Fahy, general counsel to the Board, reads: [82]

Have organized all labor organizations and other friends of labor to protest the appropriation rape of the Act Stop Federated Trade Council lukewarm but has promised aid Stop Please wire further instructions. [Italics supplied.]

One example of the misuse of Government time and money for these lobbying activities was a long-distance telephone call (at Government expense) made by Board Member Edwin S. Smith to Regional Direc-

[77] A copy of this letter is in Chairman Smith's possession.
[78] Madden, II 698–9.
[79] Madden, II 693–703, III 1–15; Smith, III 7–15; Witt, III 8–15.
[80] Committee exhibit 860, III 1 (3); committee exhibit 861, III 1 (3); committee exhibit 862, III 2 (1); committee exhibits 863, 864, III 2 (1); committee exhibit 865, III 2 (2, 3); committee exhibit 866, III 3 (2); committee exhibits 867, 868, III 3 (2); committee exhibit 875, III 8 (2, 3); committee exhibit 885, III 10 (1); committee exhibit 879, III 10 (2).
[81] See footnote supra.
[82] Committee exhibit 866, III 3 (2).

tor Charles Hope at the Seattle office.[83] The record also discloses that Edwin A. Elliott, Regional Director at Forth Worth, Tex., in furtherance of the same Board objective sent over 30 telegrams, each of 86 words or more, at Government expense.[84]

Activities seeking to influence Congressional action lead inevitably to a serious and unfortunate obligation [85] on the part of the Board to those unions responsible for blocking adverse legislation where such unions are present or prospective litigants, and where this support has been solicited by the Board or its employees.

D. SOLICITATION OF LITIGATION [86]

A significant matter presented to the committee related to the actions on the part of the Board in soliciting litigation to be brought before it for determination. This solicitation was either for the purpose of establishing a point of law which the Board felt should be established [87] or for the purpose of harassing a company engaged in a dispute with its workers.[88] The committee submits to the Congress for its consideration whether these purposes disclose an apparent desire on the part of the Board to compel American industry and labor to subject themselves to the Board's dictatorship. In view of this practice of soliciting litigation, a full account of the Board's actions is hereinafter set out.

1. The Inland Steel Company case

The *Inland Steel Co. case* furnishes an example of typical Board activity in stimulating and soliciting the presentation of test cases. The actions of the Board in this case were such that the committee feels the Board could be justifiably charged with activities akin to entrapment.[89]

The Board, through Secretary Witt, who acted under its direction and with its knowledge in the *Inland Steel case*, promoted the filing of charges in order to assist the Committee for Industrial Organization and provide a test case for a Board decision that a written contract was essential to establish the good faith of the employer in collective bargaining.[90] The Board is not empowered under the act to take jurisdiction in a case until a charge has been filed; [91] the Board's own regulations interpret this provision of the act as requiring the filing of a formal written charge before cognizance may be taken of a case.[92]

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[83] Smith, III 10 (1, 2). The subject of this telephone call was the proposed cut in the appropriation, and it was on the basis of this call that Regional Director Hope became so active in soliciting union support against the proposed reduction.

[84] Committee exhibits 862–865, III 1–2. These telegrams requested the recipients to send telegrams to Congressional representatives protesting against the proposed appropriation reduction.

[85] See Committee Member Routzohn's questioning, II 698–699.

[86] Characterized as "champerty" by a member of the committee at I 287 (2):

"Q. (By Mr. ROUTZOHN:) But in this instance you were acting not only as an individual but you were acting upon the authority of the Board and keeping in conference with Mr. Smith, a member of the Board, weren't you?

"A. (By Mr. WITT:) Up to this point.

"Q. Up to this point is what I am talking about. I don't know what you did after this at all. As a law student, did you become familiar with the word 'champerty'?

"A. I did.

"Q. The stirring up of strife and lawsuits. Do you think that is written in our Constitution and in the Act which governs the action of this Board?

"A. It seems to me, Congressman Routzohn, that what the Board was trying to do in this case was to bring very serious strife to an end."

[87] *Inland Steel Company case, post.*

[88] *Berkshire Knitting Mills case, post.*

[89] See comments of Committee Member Halleck, Witt, I 285 (2).

[90] Witt, I 282, et seq.

[91] 49 Stat. 449, sec. 10(b).

[92] Art. II, sec. 3 of rules of July 14, 1939. Same as in rules of April 27, 1936.

On June 2, 1937, a conference was held in Pittsburgh, Pa., the purpose of which was to discuss ways and means whereby a quick decision could be obtained from the Board as to the necessity for a written agreement in collective bargaining.[93] This agreement was to embrace the terms of an oral understanding already reached between the C. I. O. union (Steel Workers' Organizing Committee) and the Inland Steel Co.[94] At that time the C. I. O. claimed an 85-percent majority of the company's employees.[95]

Present at the conference were Messrs. Murray and Pressman of the C. I. O. and Mr. Witt,[96] then associate general counsel in charge of the Review Division.[97] Mr. Witt's attendance at this conference was by direction of the entire National Labor Relations Board.[98]

During the course of the discussion in Pittsburgh, Mr. Witt suggested that the C. I. O. union should ask for exclusive bargaining representation (instead of merely bargaining rights for its own members, its original position).[99] This would open the way toward further negotiations leading to demands for a written agreement and the possibilities of a test case.[1] The C. I. O. was reasonably certain that the Inland Steel Co. would refuse this request, in view of a prior refusal, presumably based on the absence in the statute of any requirement of a written agreement.[2] The theory of this procedure, as apparently expressed by Mr. Witt in the memorandum[3] to Mr. Fahy, general counsel to the Board, was to entrap the company into an inadvertent violation of the act,[4] which would form the excuse for the Board to intervene. On the refusal of the company to negotiate with the view of concluding a written labor contract, the C. I. O. union would then be in a position to file a charge under section 8 (5) (refusal to bargain collectively).[5]

Mr. Witt conferred by long-distance telephone with Mr. Edwin S. Smith, Board member, and had his opinion as to the suitability of this extraordinary procedure confirmed by the latter.[6] So far did this confirmation go that, at Mr. Smith's suggestion, Mr. Witt communicated with Mr. Dorfman, regional attorney in Chicago, and directed him to prepare the complaint to be issued as soon as the trap was sprung.[7]

The committee wishes to emphasize that up to that time no written charge had been filed by the C. I. O. with the Board,[8] whereas the Board regulations specifically required such charge to be in writing and properly sworn to before action could be taken thereon by the issuance of a complaint.[9]

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[93] Committee exhibit 280, I 283 (1, 2).
[94] Committee exhibit 280, I 283 (1, 2).
[95] Idem.
[96] Idem.
[97] Witt, I 291 (3). See also I 282 (3).
[98] Witt, I 283 (1), I 286 (2).
[99] Committee exhibit 280, I 283 (1, 2).
[1] Idem.
[2] Idem.
[3] Idem.
[4] Mr. Witt testified that the Board had conceded and recognized that where the exclusive representatives of the employees had met with the management without a written agreement they had not violated sec. 8 (5) of the act if there was a complete understanding of the terms of the agreement (Witt, I 288 (1)). Note also that sec. 8 (5) of the act makes no specific requirement that a written agreement is necessary for collective bargaining.
[5] Committee exhibit 280, I 283 (1, 2).
[6] Idem.
[7] Idem. Mr. Dorfman was also to get the commerce facts re the company. Idem.
[8] Witt, I 284 (1).
[9] Witt, I 284 (2).

One week after the conference in Pittsburgh, the C. I. O. union filed a charge against the Inland Steel Co.[10] A memorandum was written to the Board on the same day in which Mr. Witt stated that the C. I. O. union had followed the indicated procedure, requesting negotiations for the conclusion of a written contract with the company, and that as anticipated the company had refused, stating that it would meet with the union at any time for collective bargaining purposes, "but did not propose to make a signed contract with that [union] and that the National Labor Relations Act does not require the signing of a contract."[11] The memorandum then stated that "* * * the S. W. O. C. [the C. I. O. union] will today file a charge under 8 (5) with the Chicago office."

The memorandum further stated:[12]

> * * * Thus the case is proceeding along the lines indicated in my memorandum of June 3rd.[13] Mr. Dorfman will be ready to issue a complaint immediately upon charge filed and will await word from Washington as to the date of hearing. *This will depend largely on the readiness of Doctor Saposs* [chief of the Board's Division of Economic Research] *to present evidence on the question of a signed agreement.*[14] [Italics supplied.]

The committee points to the curious spectacle of the Board directing Mr. Saposs, chief of its Division of Economic Research, to prepare evidence on the question of a signed agreement and then using that evidence[15] as a basis for its decision that a written agreement is an essential ingredient of collective bargaining.[16]

Without any of that delay so characteristic of other cases,[17] a trial examiner was appointed on June 10 (the day following the filing of the charge); this was even before any complaint had been issued.[18] And within 2 days, on June 12, the complaint was authorized and notice of hearing issued.[19] The committee was not offered any explanation as to why the trial examiner was appointed prior to the authorization of the complaint.[20]

Through all these stages, Mr. Witt made no attempt to contact any of the Inland Steel Co. officials,[21] and the Board files fail to disclose any effort on the part of any Board representatives to interview any of the company's officials.[22] Apparently the company was entirely unaware of the Board's efforts to inject itself into the controversy.

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[10] Witt, I 288 (2), and committee exhibit 281, I 285, 288 (1).
[11] Committee exhibit 281 I 288 (1).
[12] Idem.
[13] Committee exhibits 280, I 282 (1, 2).
[14] Quoting from the memorandum of June 3, 1937 (committee exhibit 280), referred to above, especially relating to Mr. Saposs' connection with the case:
"In the meantime, it would be very helpful if the economic staff began immediately [June 3—charge filed June 9] gathering material on the question of written agreements so that we could have such material ready for the hearing *and for the decision.*
"[Signed] Nathan Witt." [Italics supplied.]
[15] Under the statement of the act that the Board's findings of fact are conclusive (when based upon "substantial" evidence) and that ordinary rules of evidence are not applicable, this is easy for the Board to do.
[16] Mr. Saposs testified as an expert witness at the hearing of the case in June 1937, on the importance of written agreements in collective bargaining and other matters. (Committee exhibit 908, III 67).
[17] See, for example, the Mt. Vernon Car Mfg. Co. case, Harris, II 241 (2).
[18] Witt, I 288 (2).
[19] Idem.
[20] Witt, I 288 (2); Madden, II 514, 515 (1).
[21] Witt, I 287 (1, 2).
[22] Witt, I 288 (2).

In his testimony before the committee, Mr. Madden publicly approved the conduct of Mr. Witt in this case.[23] This presents a contrast to Mr. Madden's testimony before the Senate Committee on Education and Labor on April 18, 1939, which the committee feels necessary to quote verbatim:[24]

> Mr. MADDEN. We certainly do not go out to drum up business. Senator [Mr. Thomas of Utah]. *We proceed only upon charges filed* by people who have or think they have a grievance. What we are doing, I hope, is to intelligently and diligently take care of the cases *that are brought to us.* [Italics supplied.]

This statement of Board policy was confirmed by Board Member Edwin S. Smith before this committee in the following language:[25]

> Mr. HALLECK. * * * Is it your idea, Mr. Smith, that it was within the province of the Board, or within the scope of its authority under the Act, to solicit business for the Board, or to solicit the filing of charges?
> The WITNESS (Edwin S. Smith). *Certainly not.* [Italics supplied.]

The committee finds a contrast to these activities of other Board members in the statement made by Dr. Leiserson before the committee, to the effect that he would never confer with union officials and discuss the selection of a company to be charged with violation of the act in order to test some legal principle under the act.[26]

The committee wishes it distinctly understood that it is not taking a stand with respect to the necessity of reducing a collective labor agreement to written form to satisfy the requirements of collective bargaining. The only purpose the committee has in emphasizing this unusual procedure on the part of Board Members Madden and Smith is to call attention to the discrepancies existing between these Board members' statements as to their understanding of what should be done under the act and the procedure actually followed.

2. The Berkshire Knitting Mills case

In the *Berkshire Knitting Mills case* the Board was guilty of soliciting charges against the Berkshire Co. in order to punish it for its refusal to settle differences concerning wages with its employees.[27] It must be remembered that throughout the period in which Board Member Edwin S. Smith was taking an active interest in this case,[28] at first to mediate and settle the strike and then to assist actively in the promotion of a boycott of the Berkshire Co.'s products, no charges of any kind had been filed with the Board by the union involved, the American Federation of Hosiery Workers (affiliated with the Congress of Industrial Organizations).[29] However, throughout this period the Board manifested its readiness to proceed with charges should charges be filed.[30] Although the union had evidenced its intentions as early as October 1936 of filing charges,[31] no charges had been filed by the end of December 1936.[32] Evidently the Board became impatient at the

[23] Madden, II 514–5.
[24] Part I, p. 127.
[25] Smith, I 213 (2).
[26] Leiserson, I 47 (1, 2).
[27] Robb, I 190–200; Smith, I 200–230–G.
[28] See supra.
[29] Committee exhibit 104, I 193 (3); committee exhibit 106, I 194, 195 (2); committee exhibit 124, I 212–213; Robb, I 96 (2).
[30] Committee exhibit 104, I 193–4; committee exhibit 106, I 194, 195 (2); committee exhibit 107, I 195 (3).
[31] Committee exhibit 106, I 194, 195 (2).
[32] Committee exhibit 124, I 212–213.

delay of the union in filing such charges, because the then Board Secretary, Mr. Benedict Wolf, wrote a memorandum to the regional director of the Philadelphia office which stated:[33]

This Board is interested in finding out whether the situation at the Berkshire Knitting Mills has revealed anything which would be a possible basis for a charge of unfair labor practice. Will you send us a report on the issues which caused the strike and a statement of whether any unfair labor practices were involved? [Italics supplied.]

The next day the Philadelphia regional director replied[34] that, in response to Mr. Wolf's memorandum, the officers of the American Federation of Hosiery Workers had conferred with him and that the president of that union and several of his fellow union officers did not believe at that time, December 31, 1936, that any unfair labor practice had been committed by the Berkshire Co. The reply read in part:[35]

* * * they [the union officials] stated that, while some of the officials of the union thought facts might warrant intervention of the Board, *it was the opinion of President Rieve* [American Federation of Hosiery Workers] *and of themselves that there was no unfair labor practice involved, upon which they could base a charge of violation of the National Labor Relations Act,* nor did they feel it wise to press a charge that there was refusal to meet for the purpose of collective bargaining, since the company would undoubtedly raise the point that they did not represent a majority of the workers, and this was true. [Italics supplied.]

The committee suggests a comparison of the instructions contained in Mr. Wolf's memorandum with the statements of Chairman Madden before the Senate Committee on Education and Labor and that of Board Member Edwin S. Smith before this committee that they did not go out to look for business.

Within a month of these communications, on January 26, 1937,[36] charges of unfair labor practices were filed by the American Federation of Hosiery Workers against the Berkshire Mills. The charges alleged violations of sections 8 (1) and (2) of the act.[37] These charges were later amended to include an allegation of violation of section 8(3).[38]

It is important to note that, although the charges were filed in January 1937, the complaint was not authorized until September 13, 1937,[39] and was not issued until November 6, 1937.[40] The reasons given for the failure to issue this complain until some 9½ months after the filing of the charges are easily understandable upon perusal of the various weekly reports received from the Philadelphia regional office. For instance, in one weekly report, on February 17, 1937, it was stated:[41]

Present status of case: Held in abeyance at request of union pending possibility of general strike.

Another such weekly report, dated February 24, 1937, stated:[42]

[33] Committee exhibit 123, I 212 (2).
[34] Committee exhibit 124, I 212–213.
[35] Committee exhibit 124, I 213 (1).
[36] Committee exhibit 132, I 217 (3).
[37] Idem.
[38] See Board decision, 17 National Labor Relations Board No. 17, p. 2.
[39] Committee exhibit 145, I 219 (1).
[40] See Board decision, 17 N.L.R.B. No. 17, p. 2.
[41] Committee exhibit 137, I 218 (1).
[42] Committee exhibit 139, I 218 (2).

I also went to Reading and conferred with the union officials and talked to John Edelman of the American Federation of Hosiery Workers, who stated that I might quote him as speaking officially when he said that the union requested the Board to hold the charge which it had filed against the company in abeyance for the present. *There is a strong possibility of a general strike developing in Reading over the situation in the Berkshire Mills and the union would like to wait on that for a week or two.*" [Italics supplied.]

The purpose of the National Labor Relations Act was to decrease industrial disputes and disturbances such as strikes. Yet the Board was deliberately aiding and abetting the promotion of industrial strife in this case by its refusal to proceed with the issuance of a complaint and the holding of a hearing because the union felt that "there is a strong possibility of a general strike developing." [43] This attitude of cooperation on the part of the Board with the union in this situation is utterly incompatible with the duties of the Board as impartial quasi-judicial officers.

On February 3, 1938, the Board transferred the case to itself,[44] thus dispensing with the trial examiner's intermediate report.[45] Twenty-one months later, on November 3, 1939, the Board issued its decision, finding the Berkshire Co. guilty of violation of section 8, subsections (1), (2), and (3).[46] Since that time, however, the Board has made no move to enforce its decision.[47] This is very significant, as the Board thereby demonstrates its realization of the weakness of the case it solicited.

E. ADMINISTRATION OF PERSONNEL

Serious criticism from both within [48] and without [49] the Board, have been made from time to time concerning the personnel employed by the Board in the administration of its duties. These criticisms have related not only to the bias and partiality of these employees but also to their incompetence. Since it is the Board's duty as the administering agency of the National Labor Relations Act to employ qualified personnel, the committee feels that complaints concerning employees, especially those complaints that have not been acted upon even though apparently justified, cannot but reflect upon the Board itself.

The committee believes that certain examples of incompetency and partiality on the part of Board employees should be pointed out as indicative of the Board's handling of its personnel. It also believes that a brief statement concerning the development of the unions contained within the Board should be made so that the Congress can appreciate the extent of this movement.

1. Examples of personnel mismanagement

(a) *Former employees.*

(1) *Maurice Howard.*—In August 1939 a field examiner of the Board, Maurice Howard, was asked to resign for his participation in

[43] Idem.
[44] Committee exhibit 149–A, I 220 (1).
[45] Smith, I 220 (1, 2).
[46] See Board decision, 17 N.L.R.B. No. 17, p. 57.
[47] The committee is in receipt of a letter from Mr. Fahy, general counsel of the Board, to Committee Counsel Toland dated March 15, 1940, wherein it is stated that on November 9, 1939, the unaffiliated union petitioned the Circuit Court of Appeals for the Third Circuit to review the decision and order; on November 10, 1939, the Berkshire Co. petitioned the same court to set aside the decision and order; and that on January 1, 1940, the American Federation of Hosiery Workers petitioned to intervene. No action on the part of the Board is therein described.
[48] Leiserson, I 1–72.
[49] See comments contained in report of Senate Committee on Education and Labor (1939).

the incidents that eventually led to the resignation of Dr. Towne Nylander as the regional director of the Los Angeles office of the Board.[50]

As early as December 1936 the Board's attention had been called to Mr. Howard's strong union sympathies by the then secretary of the Board, Mr. Benedict Wolf. In a report on the Board's Seattle office. Mr. Wolf had said: [51]

> I had quite a long talk with Howard and he is very frank in his attitude that the Board's chief value is in actively *helping labor organize, rather than just to protect their right to organize.* He doesn't think the Board is doing enough for labor at the present time and *believes hearings should be held even when the Board obviously has no jurisdiction, if the holding of such hearings will help labor organization.*
>
> He was unwilling to see anything done about the Boilermakers' claim for representation in the Long View Fibre case, because *he thought any such action on the part of the board would hurt the C.I.O. and help the A.F. of L.* [Italics supplied.]

In spite of this report from the then secretary, apparently nothing was done concerning Mr. Howard for some 4 months. Then in April 1937 Chairman Madden drafted a letter to Mr. Howard reprimanding him for his close association with labor leaders and his attendance at union meetings.[52] However, the letter was never sent to Mr. Howard largely because of Board Member Edwin S. Smith's intervention.[53] In this letter Chairman Madden made the startling statement: [54]

> *I suppose that nearly everyone connected with the staff of the Board has some preferences of his own as between the different factions in the current split in the labor movement.* * * * [Italics supplied.]

Having failed to send his original letter as the result of Mr. Smith's intervention, Chairman Madden wrote the next day to reprimand Mr. Howard,[55] but did not make it "as long or as strong" as the previous letter.[56]

Within 2 weeks of this tempered reprimand, Mr. Howard was transferred to the Los Angeles regional office [57] and a month later was given a salary increase.[58] While stationed at the Los Angeles office Mr. Howard received further increases in pay [59] and his services with the Board were not dispensed with until August 1939, when his activities relative to the resignation of Regional Director Nylander were disclosed.[60]

It is to be noted that Mr. Howard remained as a Board employee for almost 3 years after his activities had been called to the Board's attention by Mr. Wolf, the then Board secretary. It was not until after Dr. Leiserson became a member of the Board in June 1939, that a thorough investigation of the Los Angeles regional office was made and Mr. Howard dismissed.[61]

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[50] Leiserson, I 42, 44.
[51] Leiserson, I 61, 62 (1).
[52] Committee exhibit 830, II 687–688.
[53] Madden, II 688 (1).
[54] Committee exhibit 830, II 687–688.
[55] Leiserson, I 62(1).
[56] Madden, II 688(1).
[57] Leiserson, I 62(1).
[58] Leiserson, I 62(2).
[59] Leiserson, I 62(2).
[60] Leiserson, I 42.
[61] Leiserson, I 42(3).

(2) *J. Raymond Walsh.*—One J. Raymond Walsh addressed a letter to Board Member Edwin S. Smith, applying for a position with the Board.[62] This letter was turned over to Chairman Madden, who suggested that Mr. Walsh be used as a trial examiner.[63] Mr. Walsh was then engaged as a per diem trial examiner for the Board.[64]

At the time of his appointment to this position, it was known by both Chairman Madden and Board Member Smith that Mr. Walsh was the author of a book on the C. I. O. and that he was considering a position with the C. I. O.[65] In the letter written to Mr. Smith by Mr. Walsh that Chairman Madden had read,[66] these statements were made: [67]

The book on the C.I.O. has been completed. While waiting for the proofs I have been absorbing some of the sun and water of this step-child of the Union—Maine. For all its political medievalism—its prejudices against Lewis, et al., it is still too beautiful to be offered outright to Canada.

* * * * * * *

This is the first step I have taken about a position, with one exception. Last week, Clinton Golden [regional director for the Steel Workers' Organizing Committee of the C. I. O.] [68] talked with me at length about starting a research section for the S. W. O. C. He, Brophy, Lewis, and a few others decided that it should be done. * * *.

* * * * * * *

A position with the C. I. O. or one with your Board would be far and away the most attractive to me, and constitute the directions in which I could do the best work. * * * [Italics supplied.]

In spite of the evident danger attached to employing as a trial examiner, without further investigation, a man who had displayed an interest in one of the contending factions of organized labor to the extent of writing a book about that faction and seeking a position with it, the Board hired Mr. Walsh and did not discharge him until the contents of the book came to Chairman Madden's attention.[69] The book was entitled, "C. I. O. Industrial Unionism in Action," [70] and was severely critical of the American Federation of Labor and its conduct and high in its praise of the C. I. O.[71] In the meantime, however, Mr. Walsh had heard some five cases as a trial examiner.[72]

The employment of Mr. Walsh as a trial examiner was severely criticized during the hearings before the Senate Committee on Education and Labor.[73] In his appearance before that committee, Chairman Madden defended the appointment by implying that he knew nothing of Mr. Walsh's book at the time of his appointment, but that as soon as he had learned of it he had the book read and then dismissed Mr. Walsh.[74] Chairman Madden's statement before the Senate Committee was: [75]

The charge on page 22 of Senator Burke's statement that the Board appointed a trial examiner "who had written and published a book on the C. I. O. lauding that organization in the most glowing terms" is erroneous. The facts are that the

[62] Committee exhibit 802, II 679–680.
[63] Madden, II 679(1).
[64] Madden, II 678(3).
[65] Madden, II 679(2).
[66] Madden, II 679(1).
[67] Committee exhibit 802, II 679(2, 3).
[68] Madden, II 679(3).
[69] Madden, II 678(3).
[70] Committee exhibit 801, II 679(1).
[71] Madden, II 678(3).
[72] Madden, 678–9.
[73] Madden, II 678(3).
[74] Idem.
[75] Idem.

Board designated Professor J. Raymond Walsh of the Harvard faculty on a temporary per diem basis to hear the *Heinz case.*

After the hearing had been in progress for a few days I saw notices of the publication of the book on the C.I.O. written by him. I had the book read and found that it contained not only high praise of the C. I. O. but severe criticism of the A. F. of L. We checked with the Pittsburgh office and found that everybody concerned seemed highly satisfied with the way the case was proceeding. [Italics supplied.]

Chairman Madden's testimony before the Senate committee was through a prepared statement and was made in answer to charges previously made concerning Mr. Walsh.[76] The evidence before this committee shows that Mr. Madden knew that Mr. Walsh had written a book on the C. I. O.

Mr. Walsh's original appointment was most unwise in view of Chairman Madden's and Board Member Smith's knowledge of Mr. Walsh's authorship of a book on the C.I.O. and his consideration of a position with that organization.

(3) *James G. Ewell.*—A supplicant for a position with the C. I. O. in 1936 and early 1937, James G. Ewell, was employed as a per diem trial examiner by the Board in April 1937.[77] Correspondence found in Mr. Ewell's Board personnel file between him and officials of the C. I. O., including Mr. John L. Lewis, is indicative of the extreme partiality of Mr. Ewell for that organization.[78] For example, in one communication to Mr. John L. Lewis, Mr. Ewell said:[79]

The purpose of this letter is to suggest that I might be of service to you as an organizer in the big mills of this section.

In another letter to John L. Lewis, Mr. Ewell said:[80]

You, I know, do not have to be told that your present struggle with G. M. C. [General Motors Corporation] is the first round in the heavyweight championship fight of this generation in this country. *I want to help you win this and all succeeding rounds.* Victory now will mean the first lesson to predatory wealth in the law that "To whom much is given, much will be required."

Please send for me at once—and pay me whatever you like—now and always. And to prove that my humility is equal to my zeal, I will start in by carrying your brief case, or your bags if you do not use a brief case. This is of the spirit that quickeneth,—not that which wasteth at noonday. [Italics supplied.]

While Chairman Madden denied having knowledge of these letters, nevertheless the then Secretary of the Board, Benedict Wolf, was fully aware of Mr. Ewell's efforts to obtain employment with the C. I. O.[81] On a comunication identified as being in Mr. Wolf's handwriting, the following appeared:[82]

Mr. Ewell—Attempting for a year to get a job as organizer with the C. I. O. "at any price." [Italics supplied.]

(*b*) *Present employees.*

(1) *Philip G. Phillips.*—From the testimony of the present director of the Cincinnati regional office of the Board, Philip G. Phillips, a tale of partisanship, bias, and temperamental unfitness for the position held by that regional director was unfolded through questioning by Committee Member Routzohn. The committee points to this regional

[76] See Report of Hearings before Senate Committee on Education and Labor (1939).
[77] Madden, II 681–684, and exhibits printed thereon.
[78] Madden, II 681–684, committee exhibits 811 through 820, II 682–684.
[79] Committee exhibit 813, II 682–3(1).
[80] Committee exhibit 812, II 682(3).
[81] Madden, II 685(3).
[82] Committee exhibit 823, II 685(3).

director as an example of the Board's failure to properly supervise and control its employees.

While in the position of regional director, Mr. Phillips had communicated with the chief trial examiner and suggested that a "phoney" hearing date be set in one case because he knew that the respondent would move for an adjournment and that with the "phoney" date he would be able to satisfy the respondent.[83] In a second case Mr. Phillips made a similar suggestion, which was concurred in by Secretary Witt, and the "phoney" date was set.[84]

In a telephone conversation, a transcript of which was found in the files of the Board, with the president of a company against which a complaint had been issued, but no hearing held or decision rendered,[85] Mr. Phillips said:[86]

> Well, don't talk to me until you want to, but when you do, I may be hard to see. You can't talk to the Government of the United States that way. *I tell you, Greenfield, I'll get you.* [Italics supplied.]

In a communication to Secretary Witt concerning a proposed news article in a Cincinnati newspaper, Mr. Phillips said:[87]

> The editor got worried about it [the news story] and sent it to the company counsel for examination as a possible libel. The counsel replied, and I saw the memorandum, that it was not libelous, but the difficulty was that he felt it presented too favorable a side of the Labor Board, and might seriously embarrass the company. *The City Editor, who is a swell guy and a dear friend of mine, killed the story.* * * * [Italics supplied.]

In another communication to Secretary Witt concerning another story, Mr. Phillips said:[88]

> * * * *My friends on the desk will do their best to kill it* [the story], and *judging from my past experience with the papers here in that connection, I don't think anything derogatory will come out.* [Italics supplied.]

In a communication to David J. Saposs, director of the Board's Division of Economic Research, dated April 23, 1938, concerning the American Legion, Mr. Phillips stated:[89]

> I attach hereto for your collection, the type of speech which the American Legion is having made in the smaller towns around Cincinnati. So far I have never been able to tie them up with any of the companies. Of course one can see their fine Italian hand in the background.
> *I wonder if there isn't something the Board can do to stop this kind of drivel and drool.* [Italics supplied.]

From the episodes set out briefly above concerning Mr. Phillips' activities as Cincinnati regional director for the Board, it is clear to the committee that Mr. Phillips possessed none of those qualities of fairness and impartiality that would be a requisite for the proper administration of that regional office. Yet Mr. Phillips remains as regional director of that office at a salary of $5,600 per annum.[90]

One of the most striking things connected with Mr. Phillips' administration of his office as regional director at Cincinnati occurred during the *Cincinnati Milling Machine Co. case.* There Mr. Phillips privately

[83] Committee exhibit 183, I 248(2).
[84] Committee exhibit 184, I 249(1, 2).
[85] Phillips, I 243–4.
[86] Committee exhibit 178, I 243(3).
[87] Committee exhibit 179, I 245(1).
[88] Committee exhibit 181, I 246(2).
[89] Committee exhibit 898, III 46(1).
[90] Committee exhibit 1, I 28, 32(2).

directed the trial examiner in that case as to rulings to be made concerning the exclusion of evidence offered by the company of the communistic beliefs of the employee alleged to have been discriminatorily discharged.[91] In giving these directions to the trial examiner, Mr. Phillips was acting under telephonic and telegraphic instructions from Chief Trial Examiner Pratt and Secretary Witt.[92] At the time of giving these instructions, Mr. Phillips was acting also as a trial attorney for the Board in that case.[93]

The Board itself set aside its own decision because of Mr. Phillips' misconduct in this respect.[94] However, although the members of the Board were aware of Mr. Phillips' activities in this case,[95] the Board did not censure him or reprimand him in any way for his misconduct, although he himself admitted in his testimony that he should have been.[96]

(2) *Jack Davis.*—Indicative of a strong C. I. O. bias and an unconscionable effort to build a case were statements made to prospective witnesses by Jack Davis, a field examiner, in connection with the *American Radiator Company case.*[97] These statements, as they appear in the transcript of that hearing, were:[98]

> Of course you know that I am working for the C. I. O. and the C. I. O. will benefit you by back pay.
>
> * * * * * * *
>
> He [Mr. Davis] started out by saying he was here trying to put the men back to work and was impartial, and asked me several questions which he wrote down, and at the end he says: "*Of course you know that I am working for the C. I. O. and the C. I. O. will benefit you by back pay.*" [Italics supplied.]

Other statements were:[99]

> * * * Mr. Davis went ahead and explained the Wagner Labor Bill to us, and we all talked just general talk. I don't remember just what he did say in particular. Then he wanted to know if we would not say it was a lockout. *He asked me if I would not say it was, and I told him I would not, because I didn't have any way to prove it. He said, "By God, you swear it and I will prove it."* [Italics supplied.]
>
> Q. Davis told you that?
>
> A. Yes, sir.

The trial attorney handling the *American Radiator Co. case* was so disturbed by these activities of Mr. Davis that he discussed with Chairman Madden via long-distance telephone the advisability of permitting testimony relative to Mr. Davis' activities to appear in the record,[1] and Chairman Madden agreed that it should.[2]

Although Mr. Davis denied these statements before this committee,[3] testimony of various witnesses was presented at that hearing (see extracts quoted above), which Mr. Davis never appeared to deny at the time.[4]

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[91] Phillips, I 268; Phillips, I 273.
[92] Phillips, I 267–268; committee exhibit 207, I 273, 274.
[93] Phillips, I 269(2).
[94] Phillips, I 272(2).
[95] Committee exhibit 207, I 273–5.
[96] Phillips, I 279(1).
[97] Freeling, I 369(2) and 372(1, 2).
[98] Freeling, I 369(2).
[99] Freeling, I 372(1).
[1] Freeling, I 368–9.
[2] Idem.
[3] Davis, II 325(2).
[4] Freeling, I 369(2).

There is nothing in the record to indicate that the Board in any way disciplined Mr. Davis for his conduct other than to delay a promotion [5] and to transfer him to another regional office; [6] as a matter of fact, Mr. Davis testified that he had never been reprimanded for his conduct.[7] Actually, Mr. Davis' compensation was increased from $3,800 to $4,000 per annum within a year after this episode [8] and he is still an employee of the Board.[9]

In connection with the *Lucas Paint Co. case*, Mr. Davis had been sent to gather the facts relative to the charges of unfair labor practices filed against the company by members of a C. I. O. union.[10] The employees had transferred their membership from a C. I. O. union to an independent union,[11] and had called at the Board's Philadelphia regional office and requested the Board to dismiss the charges as they wished to return to work.[12] Notwithstanding this request for the dismissal of their charges, Mr. Davis traveled from Philadelphia to Gibbsboro, N. J., where he made a speech to the employees of the company [13] in which he pointed out that if a complaint could be established against the company, the Board could order reinstatement with back pay.[14] He said further that "My job is to gather the evidence to warrant the Board in rendering such a decision." [15]

Committee Member Halleck characterized this conduct of Mr. Davis as follows: [16]

* * * You [Mr. Davis] were in the position of a prosecuting attorney representing the Government, you were charged with prosecuting a complaint. After a complaint had been filed, the prosecuting witnesses changed their minds and determined that they wanted to drop the charges. At least the majority of them did. *And you were there pointing out to them why that plan of action should not be taken and why they should proceed with the prosecution of the charges* * * * [Italics supplied.]

In response to this characterization, Mr. Davis said: [17]

Well, I definitely wasn't trying to get anybody to switch their allegiance.

The committee condemns the action of an employee of the Board in seeking to persuade union members that they should proceed with charges against their employer rather than dismiss such charges as the employees desired. The ideal of industrial peace is not to be attained through these tactics.

Clearly illustrative of the fact that the examples mentioned heretofore are merely extremes of a generally prevailing attitude of Board employees is the testimony of a former field examiner.[18]

Q. (By Mr. Toland.) During the period from June 1st to September 1st, while you were connected with the office of the Board in Washington, what if anything, did you observe concerning the C. I. O. and the A. F. L.?

[5] Watts, III 212–213.
[6] Idem.
[7] Davis, II 311(2, 3).
[8] Davis, II 312(1); Freeling, I 372(2).
[9] Committee exhibit 1, I 28–32(1).
[10] Davis, II 314–315, 318(1).
[11] Davis, II 314(2, 3), 316(1), 317(3).
[12] Davis, II 314(2, 3), 316(1), 317(3), 318(2).
[13] Committee exhibit 763, II 315–316; Davis, 316(2).
[14] Committee exhibit 763, II 315(3).
[15] Idem. During his appearance before the committee, Mr. Davis denied that he attempted by means of these remarks to persuade the employees who had left the C.I.O. union to rejoin that union. Davis, II 316–318.
[16] Davis, II 317(3).
[17] Idem.
[18] Freter, I 363(1, 2).

A. (By Mr. Freter.) The most striking thing was that every time a summary of elections between the A. F. L. and the C. I. O., or whatever the contending unions were, in representation cases, came out, or a report of an election, when the C. I. O. won the election, there was always a great deal of rejoicing on the part of the personnel there. Such remarks were made as, "We beat them two to one," or whatever the score was, and when the A. F. L. won a case it was, "They beat us." "They was always the A. F. L. and "we" always referred to the C. I. O. I was very much astounded when I noticed that.

2. Internal Unionism

Permeating the entire structure of the Board is a vertical or industrial union. The National Labor Relations Board Union, composed of clerks, stenographers, economists, and other non-legal workers (formerly affiliated with the American Federation of Labor), merged with the Lawyers' Union, a union of attorneys employed at the Board.[19] This merged union subsequently amalgamated with the Field Examiners' Union,[20] so that at the present time there is one union, known as the National Labor Relations Board Union, which includes in its membership nearly all of the employees of the Board in Washington and in the field, with the exception of the trial examiners. The trial examiners have a separate union known as the Trial Examiners' Association.[21]

The Labor Board Union is a party to two signed agreements with the Board relating to promotions and transfers, which are in full force and effect.[22] However, it appears that these agreements, if violated, would not be legally enforceable.[23]

Testimony adduced at the hearing brought out the fact that the Labor Board Union holds meetings in the Board hearing room,[24] has made use of Board duplicating machines,[25] has made use of bulletin boards on the premises,[26] has transacted union business during working hours,[27] has met with the Board on Government time,[28] and in the conduct of its affairs has made use of Government stationery.[29] Such practices have invariably been the basis for dissolution of so-called company unions by the Board.[30]

On at least two occasions the National Labor Relations Board Union made contributions to affiliates of the C.I.O.[31]

Indicative of the interests of this group is the following excerpt from the minutes of a regular meeting of the Labor Board Union: [32]

Murray Weisz, delegate to the Washington Friends of Spanish Democracy, reported that about $300 had been collected around the Board for the W.F.S.D.

[19] Condon, III 103 (2, 3).
[20] Idem.
[21] Dudley, II 22(3).
[22] Condon, III 104(1); committee exhibits 997 and 998, III 104, 155–156.
[23] Condon, III 104(3).
[24] Condon, III 143(2).
[25] Committee exhibit 1000, III 157(2).
[26] Condon, III 144(1); committee exhibit 1000, III 157(2).
[27] Committee exhibit 999, III 156(2).
[28] Condon, III 105(1); committee exhibit 1000, III 157(1).
[29] For example, committee exhibits 999 and 1000, III 156 (2, 3).
[30] All of these practices have been held from time to time in Board decisions to constitute evidence of violation of sec. 8(2) of the act. See cases cited in Third Annual Report of the N.L.R.B. The committee is, of course, cognizant of the fact that the act has no application to Federal agencies.
[31] Committee exhibits 1004 and 1006, III 142(3).
[32] Condon, III 145(2).

Part II.—Performance of Duties by Board Employees

A. EXECUTIVE OFFICE

1. The secretary

"Irregularities" [1] of a serious character were revealed by the testimony concerning the operations of the secretary's office of the National Labor Relations Board. Consequently, the committee is of the opinion that these irregularities justify separate treatment.

The secretary's office performs the functions of a clearing house [2] for the Board.

Its personnel includes Nathan Witt, the secretary; Mrs. Stern, the assistant secretary; and Robert M. Gates and Fred G. Krivonos, special examiners.[3]

Severe criticism was directed to the activities of Nathan Witt by Dr. William M. Leiserson, most recent Board member, before the committee.[4] Dr. Leiserson was unsparing in his criticism of the incumbent of a position which had become one of the most important in the Board.[5]

Supporting Dr. Leiserson's criticism, the evidence is logically grouped under four principal headings:

(1) Irregularities in procedure.[6]

(2) Incompetency.[7]

(3) Bias and partiality.[8]

(4) Failure to seek instructions from the Board on important matters.[9]

Procedural irregularities.—In a memorandum introduced before this committee, it appeared that Dr. Leiserson refused to participate in the decision of a case because it was "too old, and there are the usual irregularities of procedure characteristic of the Secretary's office." [10]

These "usual irregularities" were explained, in answer to a request contained in a memorandum from Mr. Madden,[11] by the submission by Dr. Leiserson of a list of cases in which procedural irregularities

[1] So characterized by Board Member Lieserson, Committee exhibit 4, I 7(3).

[2] See the following statement from the Board's Third Annual Report, p. 9 (I 172), 3)): "As will be seen by the accompanying chart, the following major divisions in the Washington office have been established by the Board: Administrative, legal, trial-examining, economic research, and publications. The administrative division under the general supervision of the secretary is responsible for the coordination of all of the divisions of the Board, and also for the administrative activities of the Board, both in Washington and the regional offices. The clerical and fiscal work is under the direct supervision of a chief clerk, who is responsible for the following sections: Accounts, Personnel Dockets, Files and Mails, Purchase and Supply, Duplicating and Stenographic. The secretary, together with the assistant secretary and an administrative staff, directs and supervises all case development in the field to the point where hearings are held, and specializes in the labor problem phases of these problems, as well as the more formal procedure under the act. The executive office conducts liaison activities with other Government agencies and establishments in matters germane to the handling of the Board's cases."

[3] Working under the immediate supervision of the secretary are the attorneys who were assigned to conduct on behalf of the Board the lobbying activities referred to above and known as "legal assistants." Rosenberg, III 82(1).

[4] Leiserson, I 2–72.

[5] See footnote 2 supra.

[6] Committee exhibits 4, 5, 6, 7, 8, 9, 11, 14, and 26.

[7] Committee exhibits 8, 13, 16, 19, 20, 23, 27, 29, 30, 32, 33, 35, 37, and 49.

[8] Committee exhibits 8 and 49.

[9] Committee exhibits 5, 10, and 18.

[10] Committee exhibit 4, I 7(3).

[11] Board exhibit 81, II 407(1).

had occurred.[12] Mr. Madden requested a specification of these irregularities,[13] whereupon Dr. Leiserson applied: [14]

I leave nothing to add to my memorandum of July 26 [1939], except to say that I agree with your statement at the conference Wednesday afternoon that the *Universal Pictures* case "smelled."

I think it is time we look around for a Secretary *who understands the administrative duties of the job and sticks to them.* [Italics supplied.]

From further memoranda resulting from Dr. Leiserson's increasing acquaintance [15] with the unusual procedure of the secretary's office, the committee was able to derive a more accurate picture of the actual state of affairs within the family circle of the Board.[16] The tenor of these is revealed by the following excerpts:

I do not want my name attached to this complaint until I have checked the files carefully for irregularities in handling, and until I hear from the men who went out to arrange for reopening the hearing.[17]

* * * * * * *

If you think immediate action is needed on this you can leave me out of the case entirely. I would rather not participate in it. I think this is another one of those cases in which the Secretary has put his fingers and balled it up, and I suspect that this telegram from Brackett was inspired.[18]

* * * * * * *

* * * In addition there is the changing of the order for a separate hearing in the Plymouth case at the request of the Secretary without a report or recommendation from the regional director, and I found nothing in the file to indicate that there was any need for rushing the matter on the basis of a telephone conversation, as you seemed to suggest.[19]

Incompetency.—In one of a series of memoranda calling attention to the gross inefficiency and incompetency of the secretary's office, Dr. Leiserson refers to: [20]

* * * the partial and unintelligible oral recitations of the Secretary and his assistants. They didn't know the facts in the cases, and their conversations showed that they would not understand the significance of the facts if they did know them. I think you make the mistake of acting on incomplete information or misinformation supplied by the Secretary's office. That is what balls up the cases. * * *

They [the General Electric and the I. A. T. S. E. cases] are already in a mess because you persist in acting on the advice of the Secretary and his amateur detectives. * * * I have explained repeatedly that it is necessary to remove the Secretary and his assistant amateurs from the top management of the Board's work, and to replace them with people who are competent * * *.

In another memorandum, dated August 17, 1939, Dr. Leiserson commented: [21]

* * * I find that the Secretary gave us quite an inadequate report, yesterday, of the facts in the case. I do not see how any intelligent action could be taken on such an oral report. * * *

Indicative of the general atmosphere of incompetency charged by Dr. Lieserson is a further excerpt from this memorandum: [22]

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[12] Committee exhibit 5, I 8(3).
[13] Committee exhibit 6, I 9(1–2).
[14] Committee exhibit 6, I 9(2).
[15] The committee points out that Dr. Leiserson did not become a member of the Board until June 1, 1939, and within 2 months began to criticize severely Mr. Witt and his assistants. Leiserson, I 2(1). See memoranda quoted.
[16] For example, committee exhibit 8, I 10(1) (discussed infra.)
[17] Committee exhibit 7, I 9(3), 10(1).
[18] Committee exhibit 9, I 10(2).
[19] Committee exhibit 10, I 10(2).
[20] Committee exhibit 13, I 11(3).
[21] Committee exhibit 16, I 13(2).
[22] Idem.

Three different people, Witt, B Stern, and Krivonos, have handled the case here at various times and have written to the regional office about it. None of them apparently was able to study the documents carefully enough really to know what was involved in the case.

That Dr. Leiserson was not alone in his reaction to the intolerable incompetency and professional inadequacy of the Secretary and his assistants is demonstrated by the memorandum of August 22, 1939:[23]

* * * Not only Bowen [Detroit regional director] but half a dozen regional directors with whom I have talked have stressed the same need for better administration and closer cooperation from Washington. When this is the situation, it strikes me as paradoxical to hear the Secretary and his special examiners [Gates and Krivonos][24] criticizing the people out in the field and indicating their lack of confidence in them. The vital fact is that the field staff has no confidence in those with executive authority here in Washington to pass judgment on the work in the field. *And they are right*, for as I see the organization for administering the work of the Board, *our administrative captains know less and are less competent people* than the field force whose work they direct and pass judgment on. [Italics supplied.]

A few days before, on August 19, 1939, Dr. Leiserson made some unequivocal statements about the technical work of the Secretary and his assistants.[25] Quoting from Dr. Leiserson's memorandum:[26]

The Secretary's recommendation in the attached memorandum is as ill-considered and without knowledge of the facts in the case as his original recommendation that a complaint be issued without attacking the contract. I think the Board neglects its duty when it acts on reckless recommendations of this kind without having someone who understands the significance of the issue that may be involved report on all the facts.

In many respects it is more important that we get the facts straight and fully before us before the authorization is issued than it is when the review attorneys report. Not until we get some competent people to handle authorizations and appeals will we get rid of our confused cases that cause so much delay and criticism.

Dr. Leiserson eventually prevailed upon the other members of the Board to authorize an investigation of that office by four regional directors, following which he moved the dismissal of Mr. Witt at a meeting of the Board.[27] The excerpt of the minutes follows:

* * * He [Dr. Leiserson] also thought that the report of the four regional directors who investigated the work of the Secretary's office showed plainly that Mr. Witt did not have ability and imagination enough to analyze the mass of work that came to the Secretary's office, *or to organize and manage it on an efficient basis.* [Italics supplied.]

Bias and partiality.—Significant of the incompetency and inefficiency of the Secretary are the accusations of his bias and partiality made within the Board, particularly in the minutes of the Board meetings at which Dr. Leiserson formally moved that Mr. Witt be relieved of his duties as Secretary.[28] Quoting from these minutes:

* * * Mr. Leiserson also stated that Mr. Witt's manner of handling certain cases made it impossible for him to have confidence in Mr. Witt's ability to perform his duties impartially as between various parties who appear in cases before the Board.

In answer to certain question by committee members concerning from various incidents that Mr. Witt did not have "the mental attitude to be in the position that he was in"[29] and that he was proceeding this motion, Dr. Leiserson stated that he had gained the impression

[23] Committee exhibit 21, I 16(1).
[24] See supra.
[25] Committee exhibit 19, I 15(2)(3).
[26] Idem.
[27] Committee exhibit 49, 45(3).
[28] Committee exhibit 8, I 10(1).
[29] Leiserson, I 47(1).

in the manner of an attorney acting for a client "somewhat more than I expected for a person who is an executive officer of a board which has judicial or semijudicial functions." [30]

Failure to seek instructions.—In the administration of his office the Secretary ignored the existence of a directing personnel, namely, the Board members themselves. Dr. Leiserson brings this out forcibly in memorandum form:

> In regard to the Block & Company case Witt did not mention when he reported the case to us that the regional director had recommended that this case be consolidated with the Park Drug Company case, R–1453.
>
> * * * It may well be that it was his ignorance of the cases that led the Secretary to see only one reason for not consolidating them. I do not know whether the cases should have been consolidated or not. *But apparently the Secretary has been consolidating cases or refusing to consolidate them according to his own notions* and regardless of the recommendation of regional directors. Why the Board lets him exercise this authority I cannot understand. It is plain, however, why we have difficulty in deciding so many cases because of their mishandling and why the regional directors complain so much about the Secretary's office.[31]
>
> The last cases (General Electric) involved the reopening of records of hearings in two cases that were definitely closed and the consolidation of cases, the same as in the Chrysler cases. *The minutes of the Board meeting where this consolidation was ordered do not indicate that the Board approved the issuing of instructions to ask for the local unions in all the cities where the plants are located* against which the pattern makers and mechinists protest, and which have now been rescinded.[32] [Italics supplied.]

Mr. Madden, testifying, reviewed various of the Leiserson memoranda that had been placed in evidence [33] and alleged that insufficient proof was offered to convince him of the irregularities indicated above.[34] Mr. Madden, according to his own testimony, instructed Mr. Fahy, General Counsel of the Board, to investigate the procedural irregularities alleged by Dr. Leiserson to have been found in the list of cases prepared by Dr. Leiserson in response to Mr. Madden's request of July 26, 1939.[35]

There was a lapse of 4½ months from the time of the submission of this list of cases by Dr. Leiserson [36] to the date of Mr. Fahy's report on the alleged irregularities. The Fahy report was not rendered until the day that Dr. Leiserson took the stand before this committee and testified about these irregularities.[37]

The testimony adduced in the early stage of the committee's hearings apparently had no effect whatsoever upon the attitude of the majority of the Board members toward the work of the Secretary and his assistants, as revealed by a memorandum from Dr. Leiserson to Mr. Madden under date of December 16, 1939, prepared in answer to an opinion by the Board's General Counsel as to Dr. Leiserson's duty to participate in all cases before the Board.[38] Dr. Leiserson wrote: [39]

> My position is that I will not sign any decision I consider improperly handled by the Secretary's office. I have asked for changes in personnel in this office because I do not consider the Secretary and Krivonos competent and reliable.

[30] Idem.
[31] Committee exhibit 18, I 15(2).
[32] Committee exhibit 5, I 8(3).
[33] Madden, II 407–419.
[34] Madden, II 417.
[35] Madden, II 408(2).
[36] July 26, 1939; Committee exhibit 5 (re-read at Madden II, 407(2)).
[37] December 11, 1930; Board exhibit 84, II 408(3).
[38] Committee exhibit 796, II 418(3).
[39] Committee exhibit 796, II 419(2).

Those who insist on keeping these men in their jobs must assume responsibility for their work. I will not share it. [Italics supplied.]

An example of bias and partiality is evidenced by the record in the case of a memorandum [40] addressed to all regional directors, industrial union councils and local industrial unions affiliated with the C.I.O.[41] which memorandum was transmitted to all regional directors of the National Labor Relations Board with a covering memorandum by Mr. Witt.[42]

The C.I.O. memorandum reads in part as follows: [43]

(3) Bring cases only against the more important employers in your industry, in the expectation that if the dominant corporations can be brought into line, the smaller employers will give up without a fight.

And the Witt memorandum with which two copies of the C.I.O. memorandum were enclosed, contains the following significant statement: [44]

* * * One copy is for your use and the other is for the Regional Attorney. In view of the nature of this circular you should use this for your own information only.

The Board is, of course, sympathetic with the policy expressed in this circular and is sure that it should be helpful in your relations with representatives of the C.I.O. N. W. [Italics supplied.]

The dates of these respective memoranda are September 20 and September 30, 1938.[45]

These memoranda point to the lack of understanding of the Board of its duty to protect the interests of all employees. The Board concentrated on the larger and more important employers, as revealed in a memorandum marked "Very confidential," sent by Mr. Witt to all regional directors under date of August 8, 1938 saying in part: [46]

As part of this policy you should adopt a more rigid policy concerning cases in the early stages than has been true in the past. Since the Board will be reluctant to authorize hearings in small and unimportant cases, you should do everything possible to adjust such cases or if the merits and jurisdictional features are very weak and adjustment fails, to secure withdrawal of the charge. Failing that, you should dismiss the charge. * * *

A significant criticism of the set-up and operations of the Secretary's office is contained in the report made to the Board by a committee composed of four of its regional directors.[47] This report, prepared by members of the Board's staff who are still employees, and written in October 1939, contains a comprehensive indictment of the overcentralization of power in the office of the Secretary and recommends the reorganization of the administrative division for more definite delegation of responsibility.

In view of the fact that this study was made by Board employees who, in the language of the report, "are sympathetic to the problems faced by the entire organization and therefore sympathetic to the problems which we are studying," the findings and conclusions are peculiarly important:

1. The administrative division is insufficiently organized.

[40] Committee exhibit 833. II 691(3), 692(1).
[41] Uow the Congress of Industrial Organizations.
[42] Committee exhibit 833, II 692.
[43] Id. at II 692(3).
[44] Id. at II 692(1).
[45] Idem.
[46] Committee exhibit 834. II 693(2), 705(2, 3).
[47] G. L. Patterson, A. Howard Myers, W. M. Aleher, and Edwin A. Elliott.

2. By reason of lack of organization the administrative process has suffered in effectiveness.

3. Too many functions are centralized in the Secretary's office and there is too little delegation of responsibility.

4. As a result of overcentralization the Secretary's office is overburdened with work.

5. There is too little coordination between various Washington divisions.

6. There is too much isolation and too little coordination between Washington and Regional Offices.

7. A definite personnel policy is lacking.

8. The Board is participating in too many administrative details.

9. These findings constitute some of the major causes of the delays which have provoked criticism.

The report concludes with a series of suggested changes pointing to the removal of some of the functions now performed by the Secretary and attempting a closer coordination in the Washington office and between the Board and the regional offices. These suggestions have been largely ignored in spite of the final recommendation of that committee which states:

Finally, in the interest of averting the effects of inadequate organization and the resulting criticism we cannot urge too strongly a prompt consideration of the problems outlined above and prompt adoption of corrective measures either along the lines recommended herein or along other constructive lines.

2. Special Examiners

Messrs. Robert M. Gates and Fred G. Krivonos, being a part of the Secretary's staff, were assigned by the Board to investigating functions over all field employees. Their mission was characterized in the following manner:[48]

Effective immediately, Robert M. Gates and Fred G. Krivonos will be attached to the Secretary's office as special examiners. In this capacity, they will act as the representatives of the Board advising with you concerning your problems, in carrying out special assignments in Washington and in the field, and in assisting the Secretary. In the performance of their duties they will from time to time make routine visits to the regional offices.

On such visits, it will not only be their duty to review the work of your office and your problems with you and give you and your staff whatever assistance they can, but also to act as liaison officers between you and this office. They will also bring you the benefits of the experience of other offices and keep you in close touch with the poyicies of the Board.

I know you will welcome the closer relationship with this office which the visits of Mr. Gates and Mr. Krivonos will establish, and that you will receive advice and assistance from them in handling the many and difficult problems which you are called upon to meet. For our part, the task of coordinating the activities of the regional offices will be made more certain by their work.

These sleuthing activities arounsed resentment of the most serious nature on the part of the regional officers.[49] The principal office of the Board suffered a serious decrease in efficiency as a result of their visit. Mrs. Elinore M. Herrick, Director of the New York Regional Office, complained on February 21, 1939, to Mr. Madden in the following terms:[51]

This investigation has been conducted virtually behind locked doors, in secrecy and in such a thoroughly objectionable manner that, far from being conducive to improved administration, the investigation has caused a deplorable slump in the morale of the Board's largest and most important field office * * *.

It is the procedure one might expect from the O.G.P.U., but not from fellow administrators of an agency of the American Government. * * *

[48] Board exhibit 116, II 509(3).
[49] Committee exhibit 14, I 12(1); Miller I 230–J–230–M; Herrick, I 347–349.
[51] Committee exhibit 14, I 12(1).

Mrs. Herrick was not alone in her protests, for Mr. James P. Miller, a former regional director, also objected to the actions of Mr. Gates in his investigation of Mr. Miller which ultimately led to the latter's dismissal.[52]

Significant in this connection is the following memorandum prepared by Dr. Leiserson for presentation at a Board meeting.[53]

> Mr. Leiserson raised the question as to whether anything was to be done about the administrative officials in Washington who shared responsibility for the condition that developed in the Los Angeles Regional Office. He stated that he was impressed by the remark of Mr. Pomerance, one of the field examiners who was transferred from Los Angeles, that it was not fair to discipline the field staff when the Washington office was in a large part responsible. It was Mr. Leiserson's opinion that the Secretary of the Board and Mr. Krivonos, Special Examiner who investigated the charges against the Los Angeles Regional Director, merited severe discipline for their methods of handling the problems that arose in the Los Angeles office. He felt that Mr. Krivonos' investigation and report on Los Angeles was badly one-sided and confirmed the lack of qualifications for his responsible position which Mr. Leiserson had previously called to the attention of the Board. Mr. Leiserson then moved that Mr. Krivonos be removed from his duties as Special Examiner and transferred to the legal division.
>
> * * * He (Dr. Leiserson), felt that the instructions given by the Secretary to Mr. Krivonos in connection with the charges against Mr. Nylander, Regional Director at Los Angeles, and the Secretary's handling of the problems in Los Angeles were inexcusable. * * *

Dr. Leiserson, in another memorandum, referring to Messrs. Gates and Krivonos, states: [54]

> I think they haven't done the job and they don't know how to do it. When they review the work of the offices they are supported to catch things like this, but they don't even know how to catch it when the reports are sent in here.

It will be noted that Dr. Leiserson's criticisms are directed not only at Mr. Witt but include Mr. Witt's assistants as well.[55]

Illustrative of the regard in which both of these emissaries of the Board were held by the regional offices is the usual appellation by which they were known among the regional directors, namely, "the goon squad." [56]

These "amateur detectives" [57] appeared to have unlimited authority as is evidenced by the testimony of Mr. Miller concerning the visit of Mr. Krivonos to the Cleveland office of the Board in December 1938.

During this visit, Mr. Krivonos instructed Mr. Miller to make employers fear him [58] and to place petitions of independent unions "in the ice box and forget them." [59] He also criticized Mr. Miller for failing to obtain from union leaders in the vicinity of Cleveland charges of company domination of independent unions whenever an independent union filed a petition for certification.[60]

After Miller's services with the Board had terminated, Krivonos wrote a special memorandum denying these allegations.[61]

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[52] Miller, I 230–Z.
[53] Committee exhibit 49, I 45(3).
[54] Committee exhibit 23, I 17(3).
[55] Committee exhibit 19, I 15 (2, 3); committee exhibit 20, I 15(3), 16(1).
[56] Miller, I 230–J(3).
[57] Committee exhibit 13, I 11(3).
[58] Miller, I 230–K(1) "* * * and finally he [Krivonos] said to me, 'What is your position here in the region? Does the industry fear you and fear the Board?' I said, 'No, by gosh, they respect us out here. He said, 'Well, that's the wrong position to be in. You should make them fear you and fear the Board.' And I said, 'Fred, nuts.' "
[59] Miller, I 230–K(1).
[60] Miller, I 230–J(3).
[61] Miller, I 230–L(2).

The investigation which Gates and Krivonos made of the Los Angeles Regional Office [62] met with vehement protests by Dr. Leiserson.[63] A supplementary investigation was decided upon and Pratt and Van Arkel of the home office were entrusted with what might be characterized as "an investigation of an investigation." [64] The methods employed by Gates and Krivonos were the subject of severe criticism in the report rendered by Pratt and Van Arkel to the Board.[65] Subsequently, Gates and Krivonos submitted a memorandum answer to this criticism of their work.[66]

But Krivonos' zeal was not limited to the investigation of personnel matters. Having been requested to prepare instructions to regional offices on the procedure for certification by the Board on stipulation for consent elections, his efforts in that direction were characterized by Dr. Leiserson as follows: [67]

> *This is stupid nonsense.* We should not waste any more time in issuing elaborate instructions like this which merely serve to confuse and burden the regional offices. *The rules and regulations relating to 9(c) cases need to be revised completely by people who know the problems* that are involved in handling representation disputes. [Italics supplied.]

B. DIVISION OF ECONOMIC RESEARCH

Carrying on certain nonlegal investigations is the Division of Economic Research under the direction of David J. Saposs. The Division's work consists in: [68]

1. The preparation of statistical data for the use of the Board in its annual reports, Congressional investigations,[69] etc., and
2. Supplying economic material for use in the development of Board cases.

This Division may be called on for information in the preparation of Board cases at any one of four stages:

1. During the preliminary investigation; [70]
2. During the hearing before the trial examiner; [71]
3. During analysis by the review attorney; [72]
4. When the Board is undertaking the enforcement of its order.[73]

The record discloses that Saposs is employed to hold himself in readiness to supply, through himself or his staff, so-called expert testimony on any subject, at any time and in any case which the Board feels needs bolstering.[74] It will thus be seen that the United States circuit court of appeals in the *Inland Steel case*,[75] when it condemned the Board, as "prosecutor, judge, jury, and executioner," neglected to mention that the Board through Saposs and his assistants also acts as its own "witness" in producing evidence upon which it bases its findings, which are conclusive and not subject to judicial review.

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[62] Leiserson I 40(1); committee exhibit 45, I 41(1).
[63] Committee exhibit 49, I 46(3).
[64] Committee exhibit 46, I 42(2), 60(3).
[65] Idem.
[66] Committee exhibit 45, I 41(1).
[67] Committee exhibit 25, I 18(1).
[68] Saposs, III 49(2), 50(1).
[69] The Board's statistical exhibits in this investigation were the result of this function of the Division. Mr. Madden read into the record comments prepared by this Division. (Senate Committee on Education and Labor, pp. 119–126), II 371, 380.
[70] Saposs, III 49(2), (3).
[71] Saposs, III, 49 (3).
[72] Saposs, III 51(2).
[73] Saposs, III 52(1).
[74] Committee exhibit 908, III 66.
[75] 109 F. (2d) 9, 19.

Saposs admitted to the committee that the material presented to the Review Attorneys was sometimes obtained from off-the-record sources (i.e., from sources other than the official transcript and pleadings),[76] and without the knowledge of respondents.

The use of this material in reviewing cases prior to presentation to the Board or prior to the issuance of the Board's order was testified to by review attorneys.[77]

The committee was deeply concerned with the manifestations of a strangely exaggerated social consciousness that Saposs brought to his work. From his testimony, the committee learned that Mr. Saposs was born in Russia, came to the United States as a child of 9,[78] later attended the University of Wisconsin, where he was a member of the Socialist Party.[79] Subsequent to his leaving Wisconsin University he was active as an economist and carried on special studies abroad on grants of various philanthropic foundations.[80]

Saposs testified that he was a member of the Conference for Progressive Labor Action until 1931 when, according to his testimony, he resigned,[81] although he could produce no letter or copy of a letter of resignation. As late as January 1933, Saposs' name was included in the editorial board of Labor Age, the official organ of the Conference for Progressive Labor Action, and also on the stationery of this body was a member of the board of directors.[82]

Saposs alleged that he resigned in 1931 in protest because of certain provisions contained in the preamble of the conference's revised constitution,[83] the first two paragraphs of which read:[84]

> Planless, profiteering, war-provoking, imperialistic capitalism must be abolished. It cannot be reformed. Sham political democracy, which has been the tool of capitalist business and finance, must also go. We must have a workers' republic and a planned economic order under which the masses will labor to create plenty, security, leisure and freedom for themselves, not profits, privilege and arbitrary power for a few.
>
> The job of abolishing capitalism and building a new social order must be done by the workers—industrial, agricultural, clerical, technical, professional—who stand to gain materially and spiritually by the change. We, the workers, must ourselves provide the revolutionary will, the courage and the intelligence for the task.

The committee also ascertained that Saposs was a member of the faculty of the Brookwood Labor College when that institution was characterized by the American Federation of Labor as a "Communist school."[85]

As individual committee members expressed a great interest in Saposs' radical views, certain of his writings were considered worthy of inclusion in the record. Chairman Smith deemed one passage published in the December, 1931, issue of "Labor Age" especially noteworthy:[86]

> As for democracy, the opposition also wants to safeguard it. But bourgeois democracy is a sham. When it is evident that Socialism is the only remedy it is not worth saving a democracy in which socialist parties only collaborate with capitalism.

[76] Saposs, III 51(2).
[77] Freund, II 181(1)(2); Landy, I 612 (2).
[78] Saposs, III 26(3).
[79] Saposs, III 27(3).
[80] Idem.
[81] Saposs, III 29(3), 32(3).
[82] Saposs, III 33(1).
[83] Saposs, III 32(2).
[84] Committee exhibit 911; III 70(1).
[85] Saposs, III 45 (1, 2).
[86] Saposs, III 30(3). Quoted in its entirety in the verbatim record.

Saposs claimed that this quotation was taken from his report of the International Socialist Labor Congress held in Vienna in 1931 and that the views expressed therein were merely reported by him.[87] The following are further quotations from the same article:[88]

In similar terms the minority attacked the attitude of the majority on war and disarmament. It asserted that the dangers of war were greater now than at any time since the peace treaties were signed.

* * * * * * *

If in the attempt to carry out such a program political action fails, then the workers must unhesitatingly resort to organized force. The International must take the position that if another war occurs the workers will destroy capitalism. With that end in view the workers must be prepared to stretch arms across the frontiers in case of war and definitely win power for themselves.

Notwithstanding Saposs' disclaimer of the sentiments exposed in the foregoing article, the following excerpts are from an essay written by him in 1935 expressing his own views and philosophy:[89]

A specter is haunting the world—the specter of fascism. The foregoing observation is more than a mere paraphrasing of the historic and prophetic opening sentence of the Communist Manifesto, written by those profound social diagnosticians—Karl Marx and Frederick Engels. * * *

* * * * * * *

* * * Unless such a movement [of middle class and workers] is brought into being, capitalism will go marching on, with its poverty, misery, and economic insecurity. The time is ripe; have the middle class and workers the will to rise to the occasion?

By a comparison of the diction and sentiments contained in the two above-quoted writings, the reader may draw his own conclusion.

"Anti-Labor Activities," a pamphlet first released as a confidential publication by the National Labor Relations Board, later was published by the League for Industrial Democracy, the authors of which were Saposs and Elizabeth T. Bliss, both employees of the Board's Division of Economic Research.[90]

Another contribution of similar nature entitled "Left Wing Unionism" was published for Saposs by International Publishers, Inc., of New York City, which Saposs admitted to have been described as the official Soviet Union publishing house in the United States.[91]

A review of some of the Saposs correspondence develops his leaning and tendencies more clearly than his own testimony before the committee. Mr. Saposs here appears in the guise of an intermediary and fount of information regarding the "right people" in European radical circles.[92]

Indicative of the atmosphere of social convictions to be found in the Division of Economic Research are the following extracts from correspondence found in Saposs' files, written by members of his staff:

* * * Have you heard of the news event of last week—about Wolf L.—who received his visa to Russia and is at the present moment on the high seas? I die of envy.[93]

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[87] Idem.
[88] Saposs, III 31(1).
[89] From an article entitled "The Role of the Middle Class in Social Development," by David J. Saposs, found in the volume entitled "Economic Essays in Honor of Wesley Clair Mitchell," published 1935; III 34(1)–40(3). Committee exhibit 891. The complete article is contained in the verbatim record.
[90] Committee exhibit 894, 45(2).
[91] Saposs, III 29(3).
[92] Committee exhibit 895, III 45(3), III 47 (1); committee exhibit 901, III 46(2) III 49(1). See also committee exhibit 896, III 47 (2, 3).
[93] Committee exhibit 897, III 47(3).

* * * I saw the N.Y. World's Fair—the last orgasm of capitalism.[94]

These and the foregoing statements are sufficiently self-revelatory to require no further comment.

That a person of such definite socialistic leanings as Saposs had demonstrated himself to be in his writings and affiliations should occupy a policy-making position of trust and importance in a government committed to the preservation of the capitalist system of private enterprise apepars but another exemplification of indiscreet personnel management by the Board as well as furnishing another strong indication that the Board's policies are tinged with a philosophical view of an employer-employee relationship as a class struggle, something foreign to the proper American concept of industrial relations. Saposs testified that he was never consulted by the Board with regard to matters of policy other than the internal policies of his particular Division.[95] However, the classification sheet delineating the duties of the chief industrial economist contains the following: [96]

> To conduct and direct research and to furnish the Board with full data and recommendations concerning proper policy to be followed in cases arising under section 9(b) of the National Labor Relations Act.

From this it becomes evident that the Board policy in the determination of the appropriate bargaining unit is influenced to a very considerable degree by Saposs.

Upon consideration of the evidence concerning the function of this division, the committee questions whether its very existence is not in contravention of that section of the Wagner Act [Section 4(a)] which provides:

> Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (*or for statistical work*), where such service may be obtained from the Department of Labor. [Italics supplied.]

Especially is this apparent from the testimony of Dr. Lubin, Commissioner of Labor Statistics of the Department of Labor, a witness called by the Board, who testified that there are at least 20 economists out of a total number in excess of 200 employees in the Department of Labor engaged in activities similar to those performed by the Division of Economic Research of the National Labor Relations Board.[97] Moreover, Chairman Madden testified that the Board had not applied to the Department of Labor to ascertain whether that Department could supply the Board with all the economic data that it needed.[98] Dr. Lubin testified that the Bureau of Labor Statistics had received many requests from the Board for statistical work and had never refused such requests except where the staff was inadequate or the Board had wanted such work in too short a time.[99]

In view of the unwarranted and unnecessary activities of this Division, the Committee recommends that the Division of Economic Research be abolished. The abolition of this Division will save an annual expenditure of $73,360 in salaries exclusive of the added expense incident to supplying space and materials.[1]

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[94] Committee exhibit 897, III 48(1).
[95] Saposs, III 53(3).
[96] Committee exhibit 912, III 54(3)—III 70(3).
[97] Lubin, III 228.
[98] Madden, III 210(1).
[99] Lubin, III 228(2).
[1] Committee exhibit 916, III 138. Mr. Saposs and 16 other economists account for $51,100 of this annual salary expenditure.

C. TRIAL EXAMINERS DIVISION

1. Trial Examiners

The Trial Examiners Division consists of some 36 trial examiners,[2] under the direction of a chief trial examiner and his assistant, and employed at salaries ranging from $3,800 to $5,600 a year.[3] The trial examiner conducts hearings at such times and places as the Board may direct.[4] As to the nature of the duties of the trial examiner, the decision of the United States Circuit Court of Appeals, Eighth Circuit, in *Montgomery Ward and Company* v. *National Labor Relations Board*[5] is enlightening:

> We do not mean that an examiner is not free to and should interrogate witnesses when necessary to elicit or clarify testimony. What we do mean is that, *when he does interrogate, he should do so as an impartial participant* and not as an advocate endeavoring to establish one side or the other of the controversy before him. [Italics supplied.]

The functions of the trial examiner include weighing evidence, determining the credibility of witnesses, summarizing, analyzing, and digesting testimony, and preparing the findings of fact, conclusions of law, and recommendations for appropriate action of the Board.[6] The findings and conclusions are incorporated into what is known as the intermediate report.[7]

The position of trial examiner is one of serious responsibility, requiring sound legal training, mature judgment, and scrupulous impartiality.

While the preponderant majority of the trial examiners was found by the committee to have some legal training, nevertheless at least three had no previous legal education.[8] One member of this group of three testified that he had served as chief petty officer in the Navy, as editor of a weekly business magazine, as a sales manager for a commercial company, as publisher of a small newspaper, as advertising consultant, free-lance writer, and publicity director for various agencies and publications.[9]

This trial examiner stated that he had acquired some knowledge of the rules of evidence through a reading of one textbook and part of another dealing with the subject.[10]

This same witness, in a letter to the chief trial examiner (Mr. Pratt) dated May 30, 1938, from Jackson, Mich., makes the following observations:[11]

> Being human, no examiner has an impartial mind. * * *
> Just between ourselves, Judge Hamilton's opinion [in the *Thompson Products, Inc., case*], while perhaps legally tenable, smacks too much, it seems to me, of the ether in which dwell those who are chemically, biologically, mentally, and by prehistoric prejudice lacking of sympathy for the man who holds a job by grace of his employer.

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[2] Committee exhibit 3, I 642. Material in this section is based on the testimony of 6 trial examiners, the chief trial examiner, and other evidence received before the committee. The frequency of irregularities raises an interesting question as to disclosures to be expected in the further investigation by the committee.
[3] Committee exhibit 1, I 28.
[4] Dudley, II 13(1).
[5] 103 F. (2d) 147.
[6] Dudley, II 13; Raphael, II 55(1).
[7] Dudley, II 13(1, 2).
[8] Madden, II 405(2).
[9] Whittemore, II 77(1).
[10] Whittemore, II 89(1).
[11] Committee exhibit 537, II 90(1).

The committee has pointed out [12] an example of the appointment of a trial examiner known to have strong pro-C. I. O. sympathies, revealed in a book which came to the attention of the Board. A comparable example is furnished by the case of another trial examiner whom the Board knew had repeatedly sought employment with the C. I. O., and had expressed his extreme partiality for that organization prior to accepting his appointment with the National Labor Relations Board.[13]

By what means of selection or for what purposes persons totally unqualified for any legal position were selected to perform an important judicial function was never satisfactorily explained.

Conduct.—A trial examiner stated to the committee that he had not conferred with the secretary's office relative to a case over which he was presiding as trial examiner; [14] nevertheless, a memorandum, made a part of the record,[15] showed that he had discussed with the secretary the evidentiary value of certain material which a regional director had discovered after the close of a hearing. The high plane upon which this trial examiner conceived his duty of impartiality to lie is indicated by the following excerpt: [16]

* * * it would be opportune for discussing the hearing here and how far I can go towards shortening it *without providing ammunition for the Senate investigation.* [Italics supplied.]

Conduct unbecoming a judicial official of a government agency toward counsel of a respondent is disclosed by the testimony of another trial examiner.[17] During the course of a hearing, this trial examiner permitted himself the effrontery of characterizing a statement of counsel as a lie,[18] of describing counsel as making a fool of himself,[19] characterizing counsel's argument as an idiotic discussion,[20] and threatening to exclude this attorney from the proceeding.[21] This trial examiner subsequently wrote a letter to the chief trial examiner wherein he characterized respondent's counsel and the so-called company union as "frequently guilty of conduct that was vile and contemptible." [22]

This trial examiner was subsequently assigned to review the intermediate reports of other trial examiners.[23]

One trial examiner, when questioned by the committee, admitted writing a memorandum to the chief trial examiner stating that he feared the respondents intended to call a regional director (Dorothea de Schweinitz) to the stand during the course of a hearing to establish her bias in favor of the C. I. O. This communication stated that—

it will be difficult for her to withstand the hammerings of Mr. Bartlett [respondent's attorney], particularly if you make it impossible for me to protect her by ruling this to be admissible.[24]

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[12] Supra. J. Raymond Walsh.
[13] Supra. James G. Ewell.
[14] Dudley, II 11(3).
[15] Committee exhibit 466, II 14.
[16] Committee exhibit 467, II 15(1).
[17] Seagle, II 40–48.
[18] Seagle, II 40(3).
[19] Seagle, II 41(2).
[20] Seagle, II 41(1).
[21] Seagle, II 41(2).
[22] Committee exhibit 477, I 42(1).
[23] Seagle, II 48(1).
[24] Dudley, II 27(2).

In an interview prior to appointment, one former trial examiner told Mrs. B. M. Stern, assistant secretary, that he was "pro-C. I. O." [25] None the less, this man was appointed a per diem trial examiner and presided over several hearings [26] until he was dismissed, not for partiality or bias but for very obvious incompetency.[27]

Another trial examiner had written in an article: [28]

> The United States is the one country already supposed to have democratic institutions which could actually profit immensely with a bourgeois revolution, so anachronistic are its political institutions.

In an article entitled "The Clown as Lawmaker," which the same witness admitted writing, the following statement appears: [29]

> It is time to revise the common conception of the American state legislatures. Scientifically regarded, they have become simply so many auxiliary grand lodges of the tin-pot fraternal orders.

The same trial examiner, in an article criticizing the United States Department of Justice, declared: [30]

> A federal police force would be enlisted subject to restraint, but the United States Department of Justice itself has a sorry record as an agent of law enforcement. Its illegal practices in the war and post-war periods became the subject of a governmental investigation which resulted in a highly condemnatory report by a group of law professors which included Roscoe Pound, Felix Frankfurter, Zachariah Chafee, Jr., and Ernest Freund.

and concerning J. Edgar Hoover, he wrote: [31]

> Indeed, the present head of the Division of Investigations of the Department of Justice, J. Edgar Hoover, was an agent in the Department in the heyday of the Palmer Red-baiting era, who even after the Red scare had somewhat abated, devotedly spent a good deal of his time in shadowing harmless souls in the National Capital.

In referreing to the activities of the State police system he commented: [32]

> The state police, as the result of their activities against labor and radical groups, have become known as the "American Cossacks."

In a communication to the chief trial examiner, another trial examiner described a case heard before him as follows: [33]

> Under the surface, this is probably the most vicious case of unfair labor practice now before the Board *The recent discharges complained of are routine*, but this community of Redwood Lumber companies has a history of antiunionism that runs red with murder and bloodshed committed by paid thugs wearing deputy sheriff's badges and in the hire of the respondent.
>
> * * * * * * *
>
> I've been waiting for [Senator] Nelson [respondent's counsel—characterized by the trial examiner as "a rabid anti-New Dealer"] to break loose, but he evidently senses what is in store if he does. For up to yesterday he has been uniformly mild and polite with all of the Board's witnesses. And if the Senator has a proper regard for his own well being, he will continue to be * * *

In the same memorandum this trial examiner said: [34]

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[25] Eugene P. Lacy. Fortas, I 454(1).
[26] Fortas, I 456(2).
[27] Committee exhibit 374, I 454, I 455.
[28] Seagle, II 47(1).
[29] Seagle, II 47(3).
[30] Seagle, II 46(3).
[31] Seagle, II 46(3).
[32] Seagle, II 46(3).
[33] Committee exhibit 508, II 57(2).
[34] Committee exhibit 508, II 57(2).

As far as the merits go, if I have my way this respondent is going to be given the "business" or the "works" as others may call it. The situation is damnable and a disgrace to a free country.

The case referred to is the *Hammond Redwood case*, to which this trial examiner referred in a letter to the chief trial examiner as of the utmost significance: [35]

Before I left the West Coast, Mrs. Rosseter [regional director of the San Francisco office] told me that this case is all important to labor in the entire lumber industry on the Pacific. The Hammonds have been the leaders in an antiunion conspiracy, and *if they are defeated, the other companies are not apt to keep on fighting.* So I must be particularly careful. [Italics supplied.]

The committee deems it essential to point out that the foregoing passages and the excerpts quoted above appear in letters written prior to the preparation of the intermediate report.[36]

In another instance, this same trial examiner admitted to the committee that he had written to the chief trial examiner stating prior to the introduction of any testimony by respondent, that "the case is in the bag." [37]

As a further example of the absence of a properly judicial frame of mind, we have this statement from a memorandum of February 8, relative to the Hammond Lumber Co. hearings: [38]

Last night I heard indirectly that this *Hammond case* involves violence by vigilantes, and it may be difficult to handle. If that proves to be the fact, I shall speed up matters with night hearings. There is nothing like a 12-hour session every day to take the starch out of *tough guys.*

In direct contradiction of the scrupulous impartiality always to be preserved by such officers, as stated by Circuit Judge Stone in the *Montgomery Ward case*,[39] the same trial examiner wrote that he had told the attorney for an intervening American Federation of Labor union that—

he could call as many witnesses as he pleased, but that I [the "impartial" trial examiner] would regard it as the vilest sort of obstructionism, *and that he would find out that fact later.*[40]

Considerable light is thrown upon the trial examiner's sentiments toward the intervening American Federation of Labor union, quoted above, when compared with a statement made 2 days later in which the same trial examiner writes: [41]

Without the transcript of exhibits, but with the aid of notes I spent some time in the library here working on the legal point involved in one of the Smith Wood Products case[s]. It is a nice question but can be decided, I think, in favor of the C. I. O. union. * * *

In a report to the chief trial examiner, the same witness gave the committee a further indication of his judicial temperament in the following language: [42]

Over and over again I have found that what both sides in labor cases need is a liberal dose of polite but unqualified hell from somebody in authority. *And they invariably get it from me.* [Italics supplied.]

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[35] Committee exhibit 513, II 59(2).
[36] See committee exhibit 517, II 60(2).
[37] Committee exhibit 509, II 58(1).
[38] Committee exhibit 510, II 58(2).
[39] Montgomery Ward & Co., Inc. v. N.L.R.B., 103 F. (2d) 147 (C.C.A. 8th, 1939).
[40] Committee exhibit 512, II 59(1).
[41] Committee exhibit 510, II 58(2).
[42] Committee exhibit 516, II 60(2).

In one case the trial examiner and the trial attorney were able to conclude that the Board hearing would have a definite effect on the employees: [43]

> It may stimulate their courage, nourish their self-confidence, permit them to dare vision a time when they can demand social justice for and by themselves.

In his intermediate report this trial examiner cited a newspaper article dealing with the rates of homicide and illiteracy in the county where the hearing was held.[44] In his eagerness to obtain what has been frequently characterized as "background" material (outside of the record), this trial examiner requested the Division of Economic Research to furnish him with illiteracy statistics in the State of South Carolina.[45]

In another case the Board was compelled to set aside an entire record and direct that a rehearing be held because of the bungling activities of the trial examiner.[46]

Referring to the *Inland Steel case, tried by the same trial examiner*, the chief trial examiner testified that he agreed with the opinion of the Circuit Court of Appeals for the Seventh Circuit that the conduct of the trial examiner was not fair and impartial.[47]

In some instances the trial examiners were not satisfied merely to overrule objections in the normal manner, but overruled anticipated objections before any opportunity was given counsel for respondent to state them and sustained objections of Board counsel before they could be uttered.[48]

2. Office of the chief trial examiner

The extraordinary importance of the work of the National Labor Relations Board which has been given to the chief trial examiner, both in the personnel management of the trial examiners and in the supervision of the quasi-judicial duties of these officers, has induced the committee to devote a separate section to a consideration of the irregularities of too frequent recurrence in the practical operation of this office.

The background of George O. Pratt, the chief trial examiner, is of real significance in a consideration of his frame of mind prior to appointment to an office judicial in nature.

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[43] Committee exhibit 530, II 78(3)–79(1).

[44] Whittemore, II 82(3). Incidentally, this was the same trial examiner who stated "not guilty" of legal education and who stated he had read McKelvey on Evidence and part of Wigmore on Evidence.

[45] Committee exhibits 532, 533, II 81(3), II 82(1).

[46] Charles Wood. Pratt, II 122(3)–123(1).

[47] Pratt, II 122(3).

[48] Committee exhibit 572, II 121(3)–122(1)(2). It appeared that during the course of a hearing presided over by Trial Examiner William Seagle, the respondent's attorney objected to a line of questioning employed by the Board attorney, declaring that it was all leading to one question which the Board attorney was preparing to ask, and registering objection to that. The Board attorney objected that respondent's attorney was reading in his mind a question he had not yet considered. The attorney for the respondent declared that he excelled at "mind reading," whereupon the trial examiner declared that he himself was a mind reader, could tell in advance what the objection of respondent's counsel was going to be, and stated he would overrule it in advance. Upon being advised of this by-play, the chief trial examiner commented: "I suggest that they [the trial examiners] should take the course in mind reading that you refer to and that probably we could decide cases in advance without taking any testimony at all."

Pratt, II 122(3). In the Bercut-Richards Co. hearing, the attorney for the respondent had asked a witness a question. The Board attorney arose, but before he said anything Trial Examiner Charles Wood remarked: "The objection which I see you are about to make, Mr. McTernan [Board attorney], is sustained inasmuch as it assumes testimony which this witness has not given us." Upon the respondent's attorney commenting that "* * * you must have some faculty of knowing what the objection is going to be before it is made," Mr. Wood answered, "It is perfectly apparent in the question stated. I shall have it read if you wish."

Pratt was formerly regional director of the Kansas City office of the Board. In a letter which he received while regional director, from one of the other regional directors, this statement appears.[49]

> Eagen [regional attorney] and I [Charles Hope, regional director] often discuss the fact that you are the judge, prosecutor, and jury in your region and get a big kick out of your activities.

Pratt's answer is revealing:[50]

> Being judge, jury, and prosecutor in this region, as you say, does made for the efficient dispatch of business, but it has its drawbacks to a certain extent in that there are times when some of the parties feel that their cases are prejudged.

Perhaps a not altogether unwarranted feeling!

Pratt testified, by way of explanation, that when these statements were made he had no regional attorney or field examiner.[51] No explanation was offered of the Board's failure to provide a regional attorney and field examiner.

His own testimony disclosed the fact that while still regional director, he conducted investigations in a number of cases before any written charges were filed.[52] Pratt also testified that he thought he had said that he had "two strikes on the respondent in every case that starts," in the presence of a group of trial examiners.[53] His explanation was that he never asked the Board to issue complaints unless he "sincerely thought that the respondent had committed a violation of the law."[54] However, further testimony indicates that, while he may have had this scrupulous regard during his incumbency as regional director, he was not above the use of a questionable device when he became chief trial examiner (to which post he was appointed on November 15, 1937, after having served almost two and a half years in a regional office[55]).

In response to a request from a regional director, Pratt set a fictitious hearing date in order that an anticipated request of the respondent for an adjournment might be granted without having an *actual* adjournment.[56] The same regional director had suggested to the Board that he "be permitted to issue a complaint with a 'phoney' hearing date"[57]; the Secretary of the Board (Mr. Witt) commended the suggestion and directed that it be tried.[58] It must be understood that the chief trial examiner sets all hearing dates.[58a]

In another instance, Mr. Pratt, replying to a letter from Mr. Seagle (trial examiner), said:[59]

> Rather than have the Trial Examiners wear beards I suggest they should take the course in mind-reading you refer to and that probably *we could decide cases in advance without taking any testimony at all.* [Italics supplied.]

When questioned about this by the committee, Mr. Pratt said:[60]

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[49] Committee exhibit 568, II 118(2).
[50] Committee exhibit 569, II 118(2).
[51] Pratt, II 118(3).
[52] Pratt, II 106(2).
[53] Pratt, II 115(1).
[54] Pratt, II 115(2).
[55] Pratt, II 105(3).
[56] Committee exhibit 183, I 248(2, 3).
[57] Committee exhibit 184, I 249(1).
[58] Committee exhibit 184, I 249(2). Quoting from an interoffice communication transmitted with copies of the complaint and notice of hearing:
"I am issuing this complaint as per Mr. Witt's recent memorandum. The hearing date is a 'phoney.' The case will be settled."
[58a] Phillips, I 249(3).
[59] Committee exhibit 572, II 122(2).
[60] Pratt, II 122(2).

That was an attempt at a facetious answer to a very amusing explanation.

Exemplifying the attitude allowed to flourish in the Board's employees is the correspondence in the *Eagle-Picher Mining Co. case* [61] between Mr. William Avrutis, the Board's trial attorney, and the Chief Trial Examiner. Two excerpts set the tone of this correspondence:

> Well, Geo. [George Pratt], the preparation of the EP [Eagle-Picher] case goes on apace, and *with gleeful malice*. Harry and I will do you proud, I promise. Our card index of facts is nearly complete, and it's nothing short of deadly: there was never anything like it, and thanks to it, we'll be able to try the case in five different directions, varying the theme whenever the melody begins to pall. We can go ahead on a straight factual basis or *fry one malefactor at a time* by arranging our witnesses accordingly—due to the facility accorded us by the index. In certain matters I shall try the case backwards; do you get the idea? [62]
>
> * * * * * * *
>
> So Woods [trial examiner] won't be here. Well, I know you will do your best by me and the situation. Can you tell me when he's due here and where he will stay? I should like to put into his hands beforehand the set of marked pleadings *I've cooked up for him*. (By he I meant Mr. William Ringer.) [63] [Italics supplied.]

The committee regrets that space limitations made it impossible to set forth these communications in full, for they aid greatly in a real appreciation of the bias characterizing this Board employee.

In his testimony concerning the Avrutis correspondence, Mr. Madden stated: [64]

> I think further some of the correspondence from Mr. Avrutis, the Board Trial Attorney, in the *Eagle-Picher case*, I realize perfectly well that the advocate in a lawsuit, whether he be an advocate of the Government or an advocate for a private person, becomes very much partisan, and it may well be that cases can't be adequately tried unless there is something of that spirit of fight and win in the trial of it.
>
> I think, however, that the superiors of Mr. Avrutis could gather from those rather intimate disclosures what was going on in Mr. Avrutis' mind out there, that perhaps he had more enthusiasm and zeal, not only to adequately and properly try this case but to bring about further reforms which aren't any of our business, so that I think his superior officers ought to check up rather carefully upon what kind of lawyer he is and how he conducts himself generally.

Pratt discussed the *Eagle-Picher* case with Malcolm Ross during the time when that case was before the Board.[65] The result of this discussion is contained in a book written by Ross entitled "Death of a Yale Man," which appeared prior to any final decision and discussed the merits of the case in a vein prejudicial to the respondent.[66] Ross is director of the Division of Information of the National Labor Relations Board.

As chief trial examiner, Pratt's duties consist of assigning trial examiners to the hearing of cases, instructing them as to their conduct, making rulings on inquiries, reading trial examiners' reports on hearings, making recommendations to the Board, drafting instructions, and interviewing all applicants for the position of trial examiner.[67] Pratt thus exercises a general supervision of the work of

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[61] Committee exhibits 563 and 564, II 112–113, 115–116. This was the case in which Mr. Pratt recommended issuance of a complaint during his regime as regional director of the Kansas City office.
[62] Committee exhibit 563, II 112–113.
[63] Committee exhibit 564, II 115–116.
[64] Madden, II 566(3).
[65] Pratt, II 123(3).
[66] Idem.
[67] Pratt, II 124(1, 2).

all trial examiners, being responsible for keeping their decisions in line with Board policy, even to the extent of modifying these as to conclusions of fact and law, without having participated in the hearings.[68]

Discretionary power vested in the Board to remove cases from the trial examiners' jurisdiction to itself, has been used in cases of the incompetency of trial examiners and in case of delay, according to Board Member Edwin S. Smith's testimony.[69] However, consideration of certain of these case raises a justifiable doubt that these are the only reasons motivating the Board in such decision.

In Pratt's capacity as chief trial examiner, he participated in this removal procedure, characterized by Board employees generally as "snatching" (Pratt himself testifying, "We all use that word." [70]).

The practical effect of this "snatching" procedure is to eliminate the trial examiner's intermediate report, in some cases even after this report has been received by the chief trial examiner and prior to service,[71] although when asked by a member of the committee whether this practice of "snatching" was not "a case of the administrative interfering with the judicial," [72] Pratt replied, Well, I think it is hardly that." [73]

The chief trial examiner testified that there had been some 30 or 40 cases transferred to the Board by this process in the past 2 years.[74] In several instances of this practice presented for the consideration of the committee, interference with the judicial function of the trial examiner was revealed.[75]

Examination of numerous telegrams sent and received by the office of the Chief Trial Examiner reveals an almost complete dependence by the trial examiners upon the instructions of the head of this Division, even as to the most minute points of substantive law and evidence.[76]

The conclusion is inescapable that either the trial examiners have been considered entirely inadequate to perform the simplest functions of their office or there has been unwarranted intervention of the administrative into the judicial function by the office of the Chief Trial Examiner, acting as a super-review authority.[77]

Interviews with and appointments of candidates for the position of trial examiner were accomplished by Mr. Pratt, who testified as to the qualifications he deemed desirable for this position. In addition to the technical prerequisites, Mr. Pratt was deeply interested in determining whether these applicants had the "right viewpoint." [78] What the "right viewpoint" is, can best be determined from an examination of the numerous unreproved irregular activities of the trial examiners so selected.[79]

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[68] Post.
[69] Supra.
[70] Pratt, II 149(3).
[71] Killefer Manufacturing Co., Pratt, II 160(1, 2).
[72] Mr. Routzohn. Pratt, II 162(1).
[73] Idem.
[74] Pratt, II 154 (1).
[75] Stromberg Carlson Telephone Manufacturing Co., Seagle, II 45(1) : committee exhibit 485, II 64(1). Killefer Manufacturing Co., Pratt, II 161(3). Washougal Woolen Mills, Pratt II 155(3).
[76] Committee exhibits 580, 581, II 141(2).
[77] The telegrams referred to contain requests for advice and instructions on such points as rulings on motions to dismiss, rulings on interventions, relevancy of proposed testimony, stipulations, service of informal report, application for subpenas, and trial rights of participants.
[78] Pratt, II 139(2).
[79] Supra.

Statements of being "judge, jury, and prosecutor," [80] "the respondent has two strikes on him," [81] and the suggested desirability of writing decisions without the formality of hearings [82] are all indicative of the attitude of the directing head of the judicial body of trial examiners.

The last decade has witnessed a mushroom growth of administrative agencies, rule-making bodies so complex that the average citizen is lost in the maze of their regulations. Realizing how intricate this regulatory process has become, and how necessary the development of this field, the committee is all the more certain that to prevent injustice, a certain circumscription of powers is vitally essential if the proper regard is to be had for individual rights.

The committee is cognizant of the fact that the National Labor Relations Board is not the only example of these complicated agencies, but it feels certain that, when a great volume of testimony has pointed so clearly to the infringement of fundamental doctrine by such an agency, the process of self-reform so inherent a part of the democratic function should not be delayed by any concern lest one group seemingly be chosen as a deterrent example to many. The committee emphasizes that it is charged by Congress with the duty of recommending changes, the necessity for which has been revealed by testimony adduced before it, relating to this agency only. It is not the concern of this committee to introduce legislation affecting other administrative bodies or the system of quasi-judicial agencies in general, no matter what similarities have been claimed to exist.

The manner in which the National Labor Relations Board acts as prosecutor, judge, and jury is that the Board conducts the investigation, initiates the complaint, hears the evidence upon the complaint, and then renders its decision. The coexistence of these functions in the same body makes it possible for this administrative agency to overlook the separation requirement that is so deeply ingrained in our political pattern.

Division of the personnel of the National Labor Relations Board into review, trial examiners, litigation, regional directors, regional attorneys, trial attorneys, and field examiners has failed utterly to bring about a proper separation of the judicial and administrative functions.

Indicative of this failure are instances of conferences between trial examiners and review attorneys.[83] Trial examiners were also found to be conferring with trial attorneys [84] and regional directors [85] on the substantive merits of cases before them, on rulings to be made on issues presented to the trial examiners, and on rules of evidence applicable.

Typical examples of the break-down of the quasi-judicial function, in the failure to separate the trial examiners from the other Board functionaries, are developed in the testimony of Messrs. Dudley,[86] Whittemore,[87] Seagle,[88] Davidson,[89] and Raphael.[90]

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[80] **Committee exhibits 568 and 569, II 118(2).**
[81] Pratt, II 115(1).
[82] Supra, p. 91.
[83] Porter, I 435(2) ; Fortas, I 459(2) ; Boyls, I 465(2) ; Freund, II 181(2).
[84] Committee exhibit 530, II 79(2) ; committee exhibit 539, II 93(3).
[85] **Committee exhibit 496, II 51(1) ; committee exhibit 602, II 150(1).**
[86] Conferring with Secretary of the Board relative to evidence in a pending case. Dudley, **II 14(2).**
[87] Communicating with Division of Economic Research and regional director during course of hearing. Whittemore, II 81(2) ; committee exhibits 532 and 533, II 81(2) ; II 85(2).
[88] Conduct characterized by assistant general counsel as "nonjudicial." Committee exhibit 489, II 48(2).
[89] **Consultation with Board attorney during hearing. Committee exhibit 514, II 59(3).**
[90] **Consultation with regional director during hearing. Raphael, II 51(1).**

The language of Judge Major, a former Member of Congress, in delivering the opinion of the United States Circuit Court of Appeals for the Seventh Circuit in *Inland Steel Company* v. *National Labor Relations Board*,[91] aptly characterizes the findings of this committee as to the Board's failure to observe the fundamental and traditional separation of powers. The court speaks of one instance in that case as illustrating in a minor fashion "what this period as a whole, convincingly discloses—that is, the danger of imposing upon a single agency the multiple duties of prosecutor, judge, jury, and executioner."

D. REVIEW DIVISION

The Review Division [92] of the National Labor Relations Board, under the direction of an associate general counsel, and comprising some 105 attorneys,[93] is charged with reporting to the Board orally a summary of the evidence in each case to be decided by the Board.[94] Supposedly, this summary is the result of an examination of the pleadings, transcript of testimony, exhibits, trial examiner's findings, exceptions to these findings, and briefs.[95] Furthermore, "review attorneys" actually write the decisions of the Board.[96]

The committee's inquiry as to the necessity for such a division was answered by assertions to the effect that the number of cases presented to the Board renders it physically impossible for the members of the Board to read the entire record in each case.[97]

The committee, not entirely sure of the truly judicial atmosphere prevailing in the Review Division, examined in some detail the actual operation in practice of these reviewing authorities.

All of these review attorneys are now members of the bar,[98] but the amount of actual trial experience prior to their employment with the Board has been exceedingly limited. Very few of them had had any substantial court experience prior to appointment.[99] The majority had no trial experience. There was a palpable lack of any kind of experience that would constitute a qualification for competent review of legal problems arising from labor relations under the Act.[1]

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[91] 109 F (2d) 9 (C.C.A. 7th, 1940).

[92] Chairman Madden, describing the functions of the Review Division said:

"* * * The Review Section, as it is called, is independent of the Litigation Section, the Trial Examiners' Division, and of all of the sections within the Board. In fact, the review attorney is under instructions not to confer with the trial attorney in any case which he is reviewing, so as to eliminate any possibility of bias in his work on the case with the Board.

"* * * This review attorney acts as a confidential secretary to the Board. * * *" Committee exhibit 355, I 438, 440.

[93] Madden, II 594(1). The material in this section is based upon the testimony of 19 review attorneys and other evidence received by the committee. The frequency of irregularities in this partial examination indicates the urgent need for a change of the system which has made them possible.

[94] Committee exhibit 355, I 438, 440.

[95] Idem.

[96] Madden, II 562(1, 2).

[97] Madden, II 558(2).

[98] At least one such attorney, however, was employed by the Board prior to formal admission to the bar. Farmer, I 531, 532.

[99] Harris, II 265; Thorrens, II 273; Boyls, I 464.

[1] Freeling, I 368; Fortas, I 451; Farmer, I 531; Landy, I 611; Sellery, II 192–3; Hoban, II 290; Harrington, II 293–4; Strong, II 298; Rosenberg, III 81.

Criteria of employment

The committee was much impressed with certain of the recommendations found in the personnel files of the Board. Thus, one witness was recommended as being "unusually able, with a liberal point of view (I should say turned left)." [2]

Another witness' recommendation declared that he had "the temperament and background which have given him strong social consciousness," [3] and that "he would make a swell fellow because he has the right instinct." [4]

In the case of one review attorney who appeared before the committee, the preliminary personnel investigation disclosed nothing favorable in the way of competence or experience. Thus, his first interview created the following unhappy impression: [5]

(1) * * * he is inexperienced in all matters relative to labor or labor problems; (2) his legal training outside of his law school courses has been limited almost entirely to minor office matters, with very little court practice; (3) [his] viewpoints are apparently liberal without any very positive convictions relative to labor matters. (The absence of conviction is no doubt largely due to the complete absence of knowledge of labor matters.)

(4) My personal impression is that [he] does not possess sufficiently outstanding qualities to warrant the Board taking him on and putting him through the intensive training period that will be required. I believe that before he would be fitted to hold down a regional attorney's job he would need anywhere from six to eight months in the Washington office, as I certainly wouldn't like to turn him loose on even our simplest case at the present time.

[He] will start for $2,400.00 a year and may possibly develop, but at the present time, in my opinion, he would not be worth much more than what he has been earning during the last year which is approximately $50.00 a month.

TOWNE NYLANDER, *Director.*

The second interview, this time by a field attorney in the Los Angeles office did not improve the candidate's chances but suggested that much development under Mr. Witt would be necessary before he could be tried out in the field: [6]

* * * Given six months under Nat Witt in Washington, I think he would make a good assistant attorney.

Apparently, however, Mr. Witt did not share the same enthusiasm, for his characterization of the applicant was "not at all impressive." [7]

In spite of the unanimously unfavorable comment, a penciled notation by the Board's general counsel to the effect that the candidate was a relative of a prominent government official was followed by the appointment of the applicant as a review attorney at $2,600 per year.[8]

Reflecting on the competence of one review attorney is the statement made of him by the regional director when this review attorney was serving as trial attorney under the regional director, who wrote to the Board: [9]

Your office assigned [him] to this region as an attorney absolutely inexperienced in our line of work and with little, if any, experience in private practice behind him.

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[2] Committee exhibit 362, I 434(2).
[3] Committee exhibit 696, II 241 (1, 2).
[4] Committee exhibit 732, II 267(1).
[5] Bernard Freund, Committee exhibit 626, II 179–180.
[6] Committee exhibit 627, II 180(1).
[7] Committee exhibit 628, II 180(2).
[8] Freund, II 180(1).
[9] Solaman G. Lippman, II 227(3); committee exhibit 691

In testifying before the committee, the fact was developed that his total experience consisted of one uncontested divorce case. This virtually complete lack of trial experience undoubtedly contributed to his gross misconduct of a case, of which the regional director wrote: [10]

> * * * by his acts and insulting manner of interrupting respondent's Counsel and side remarks, immediately antagonized Trial Examiner Batten and respondent's counsel. The Trial Examiner, to avoid embarrassment and prevent discrediting of the Board's prestige, immediately called a recess, and after consulting with Attorney Rissman both agreed to call Washington and ask for a postponement of the hearing and proceed with the Falk case.

In commenting upon the conduct of this review attorney when he was acting as a trial attorney, another Board employee said: [11]

> Several instances of obvious or impertinent questions are noticed * * *; on the other hand, unresponsive answers given by witnesses were allowed to go unchecked. A particularly unhappy incident was created when the attorney attempted to uncover the genesis of the company union. To a witness who repeatedly evaded his questions on this point, he remarked that the company union must have been the result of "an immaculate conception."

The witness himself characterized his conduct in that case as follows: [12]

> I recognize that I overstepped my mark in my handling of the Harnischfeger case. My approach was that of a prosecutor who is anxious to convict because I was convinced of the overwhelming righteousness of our cause. Now, however, that the case is at an end, I feel that I have been properly baptized.

In spite of the foregoing criticism of this attorney's activities, he was speedily transferred to the position of review attorney, at no change in salary,[13] and his compensation has since been raised to $3,000 per annum.[14]

Misconduct of review attorneys

Review attorneys testified that they used both the "informal" as well as formal files of cases which they had under consideration. This practice was discontinued on March 30, 1939, under instruction from the Board. Although the review attorneys summoned before the committee testified that they did not have any informal files in their possession after that date, nevertheless documents identified as taken from these informal files, with various of the review attorneys' names written thereon, were produced in evidence.[15] "Informal" files contain material which is not a part of the formal record of the case, such as reports of regional directors, trial attorneys, trial examiners, communications from litigants, complaints concerning delay and similar "off-the-record" material. Frequently, the attitude of litigants or their attorneys was indicated by this material.[16]

Where such documents displayed the handwriting of review attorney witnesses, they admitted having seen them, *even after the prohibitory instruction of the Board had been issued.*[17]

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[10] Committee exhibit 691, II 227, 228(1).
[11] Committee exhibit 692, II 228(3).
[12] Committee exhibit 690, II 227(2).
[13] Lippman, II 229(2).
[14] Idem.
[15] See, for example, committee exhibit 399, I 524(2); committee exhibit 447, I 613(2).
[16] Freeling, I 387–388.
[17] See Boyls, I 524(3).

From the sum total of the evidence presented the committee can reach only one conclusion—namely, that the review attorneys continued using the informal files after March 30, 1939, as before.

The great danger of the use of the informal files is most strongly evidenced by the argumentative material, showing clear bias and prejudice, all too frequently found contained therein. The committee cities as examples the cases of the Inland Steel Co.[18] and the Mount Vernon Car Manufacturing Co.[19] It is difficult to conceive of anyone maintaining any degree of impartiality, in a position where that quality is an absolute prerequisite to effective discharge of official duties, in the light of the material disclosed by these informal files.

The review attorneys did not consider themselves bound by the formal record, desirable as such a limitation might have been.[20] Frequently the Division of Economic Research was called upon for supplementary, nonlegal material.[21] In at least one instance the "off-the-record" material was decisive in determining the issue in the case.[22] In another instance where comparable material might have been used in advising the Board of the possibility of reopening the hearings for the submission of further evidence, this was not done.[23]

In spite of the avowed policy of maintaining the review division on a plane of aloofness in noncommunication with other Board functions,[24] the testimony disclosed very clearly that review attorneys unhesitatingly discussed cases with trial attorneys,[25] general counsel,[26] litigation division,[27] and regional directors.[28] In several instances, the review attorneys admitted having discussed cases with trial examiners[29] who had heard the cases which were being reviewed. This may have been a current and usual practice, and in one instance such a discussion went to the length of including issues that had not been presented in the record. It was explained, however, that this was done to form a basis for conference with the Board to determine whether the hearing should be reopened.[30]

There is at least one instance where a review attorney, having received instructions from the Board as to the draft of a tentative decision, voluntarily departed from these instructions and drafted the decision in a different manner. In this case the explanation was that other evidence had been discovered in the record which changed the nature of the original analysis made to the Board, whereupon the review attorney proceeded to substitute her own independent judgment for that of the Board. She felt it appropriate, however, to advise her supervisor of this proceeding.[31]

Finally, one review attorney not merely went outside of the official record, but solicited information as to what a witness at a hearing

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[18] Witt, I 288–292.
[19] Harris, II 242–250.
[20] Hoban, II 290; Harrington, II 294; Strong, II 296; Compton, II 301; Gill, II 328.
[21] Freund, II 181 (1) and (2); Landy, I 612 (2).
[22] Hoban, II 291(1); Boyls, I 526.
[23] Farmer, I 535.
[24] Compare with Mr. Madden's statement; Committee exhibit 355, I 438, 440.
[25] Fortas, I 459(3); Farmer, I 532(3).
[26] Hoban, II 290(2).
[27] Boyls, I 525(1, 2); Knapp, III 199(1).
[28] Fortas, I 459(3); Boyls, I 522(3); Harrington, II 294(1, 2).
[29] Porter, I 435; Agger, I 459; Boyls, I 465; Freund, II 181.
[30] Porter, *Lady Ester case,* I 435.
[31] Porter, I 450(1).

would have testified to had he been permitted to testify—and received this information.[32]

Subsequently an attempt was made to explain this procedure by suggesting that the reason prompting this inquiry was a desire to ascertain the nature of the offer of the testimony to determine the validity of its exclusion;[33] but the committee does not understand that this altered the fact that the actual testimony came to the attention of the review attorney in the preparation of the draft decision, in spite of Mr. Madden's denial that it influenced the Board's decision.[34]

Challenged ballots

In a representation case, a review attorney found that the decision as to the results of an election would depend upon the consideration of certain challenged ballots.[35] The informal report on the election (submitted by the regional director) recommended that 6 out of 13 challenged ballots should be counted.[36] By following the regional director's suggestion, the Board found that it was unnecessary to open the challenged ballots and count them. The unchallenged ballots together with one ballot previously declared void but now ordered to be counted, *gave the C. I. O. union a majority of one;* so, although the six challenged ballots were added to the total of uncontested ballots for the purpose of deciding the total number of ballots cast, none of the challenged ballots were examined for their effect on the majority.[37]

Although the witness testified that she did not have the challenged ballots in her possession and had not opened them to determine how the votes would be cast,[38] nevertheless, her rough penciled notes showed before the name of each challenged voter the words "Union against" (the C. I. O. union) or "Opposed for."[39]

The witness sought to explain these penciled notations by stating that they indicated the union which had filed the challenge and did not represent which union was to receive the vote.[40] The committee is unable to understand why this information was considered important enough to be placed with the review attorney's notes unless the witness was interested in determining how the balloting ran for each union. The discovery of computations appearing in the penciled notes revealing an effort to determine the precise point at which the C. I. O. union had a majority, strongly indicates an unjudicial interest on the part of the review attorney in the success of a favored union.[41]

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[32] Fortas, I 459–460. In the *Talladega Cotton Factory case,* a memorandum written by the review attorney and initialed "B.M.S." by the Assistant Secretary of the Board, Mrs. Stern, reads in part as follows (committee exhibit 386, I 459–460):

"In reviewing the *Talladega Cotton Factory case,* C–430, a question has arisen concerning certain testimony which was excluded by the trial examiner, George Melton [the witness] was questioned about statements made to him by Mr. Carroll and Mr. Davis concerning discharges (transcript, p. 620–624), but he was not permitted to answer. Will you kindly inform me *what Mr. Melton would have testified to* had he been permitted to answer." [Italics supplied.]

[33] Fortas, I 460(3).

[34] Madden, III 208–209

[35] Committee exhibit 439, I 540(2, 3).

[36] Committee exhibit 437, I 539, 586–588.

[37] Farmer, I 540–541.

[38] Farmer, I 540(3).

[39] Committee exhibit 440, I 540, 591.

[40] Farmer, I 540(3).

[41] See committee exhibit 440, I 540, 591.

Preparation of cases for presentation to the board

The approved method of preparing cases for the Board would seem to require the consideration of all the documents in the record, and no others.

Several review attorneys reduced this labor by merely considering the pleadings and transcript of testimony and exhibits, failing to consider exceptions to the trial examiner's report or the briefs of the parties.[42] And certain of the witnesses failed to testify that they used the trial examiner's report. [43] This should be considered in the light of Mr. Madden's testimony that he did not consider the trial examiner's report except as brought to his attention during the oral presentation of the case by the review attorney.[44]

Answers by the review attorneys to the question of their precise procedure in preparing a case for Board presentation were far from uniform, the confusion in methods thus becoming obvious.

The failure of the review attorneys to utilize all property available materials (aside from the question of going outside of the record) is especially important in view of the testimony that two members of the Board (Messrs. Madden and Smith) rely upon the review attorney's presentation for an adequate knowledge of the case.[45]

In most instances, the review attorney is the only person who reads the entire record,[46] and of necessity his comments before the Board have a certain conclusiveness based upon his exclusive knowledge of the transcript to which the views of an inexperienced person might not be entitled in the decisions of an agency charged with the determination of nationally important issues. The fact that Dr. Leiserson, the member of the Board possessing the greatest experience in deciding the delicate situations arising from labor disputes, has refused to utilize this method in reaching his decisions is a powerful indictment of the system.[47]

While a majority of the review attorneys testified that they did not prepare tentative decisions until after receiving instructions from the Board, others testified to the contrary.[48]

PRESENTATION OF CASES TO THE BOARD

Review attorneys in their conferences with the Board express opinions as to the credibility witnesses and the weight and materiality of the evidence, at the request of the Board.[49]

In at least one case, memorandum notes of the opinion of the review attorney as to the credibility of witnesses and the materiality of the evidence were prepared in advance of the presentation of the case to the Board.[50]

In another instance, a review attorney expressed an opinion as to the dilatory tactics of the respondent in advance of respondent's motions, which were then denied by the Board.[51]

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[42] Porter, I 437 ; Boyls, I 520 ; Thorrens, II 273.
[43] Boyls, I 520 ; Strong, II 299 ; Thorrens, II 273.
[44] Madden, II 564(1).
[45] Madden, II 558(2, 3).
[46] Madden, II 559.
[47] Madden, II 558(1), 561–562.
[48] See, for example, Harrington, II 294(2).
[49] See, for example, Porter, I 437, 447(1). See also Madden, II 559(1).
[50] Thorrens, II 274(3) ; committee exhibit 734, II 274(2).
[51] Committee exhibit 436, I 539 ; Farmer, I 539(3) ; committee exhibit 439, I 540, 590.

A criticism that the committee deems justifiable in the light of the testimony is that the work of the Review Division exemplifies a form of duplication constituting in some measure at least an unnecessary and burdensome expense to the taxpayers.[52] The 1940 budget of the National Labor Relations Board, as read into the record by the General Counsel, reveals that the Trial Examining Division is allotted only $200,100 while the Review Division accounts for an annual expenditure of $312,609.[53]

E. REGIONAL OFFICE EMPLOYEES

Regional directors

In the 22 regional offices of the Board, at the head of each of which is a regional director, are found the regional attorneys, trial attorneys, and field examiners.

The functions of the regional offices are considered by the Board to be:

(1) To investigate charges or petitions for certification, filed either by unions or individual employees, and to adjust or settle such cases where possible;[54]

(2) Where the charges or petitions are well founded, to obtain authorization from the Secretary's office in Washington for the issuance of a complaint or a notice of hearing;[55]

(3) When such authorization is received, to prepare and present evidence before the trial examiner in the unfair labor practice cases, and to establish jurisdictional powers and assist the unions insofar as possible in representation cases;[56]

(4) To secure compliance with the Board's decisions and to conduct consent elections and other elections as ordered by the Board.[57]

Regional office employees

The function of the regional director is to supervise and coordinate the work of the subordinate personnel;[58] to obtain the settlement or adjustment of problems arising under the act between employers and employees when presented;[59] and to secure compliance with Board orders and decisions where hearings have been held.[60]

A former regional director once stated that he considered his duties as regional director to be "judge, jury, and prosecutor."[61] Whenever a complaint was issued by him, he stated that he was thoroughly convinced of the guilt of the respondent,[62] even before he heard any part of the employer's side of the case. This man now holds the key position of Chief Trial Examiner.

The Board has established a policy that disputes between employers and employees arising under the act should be adjusted and settled rather than brought to hearing.[63] This was considered desirable as a

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[52] Pratt, II 124–125.
[53] Madden, II 594(1).
[54] Phillips, I 241(1).
[55] Phillips, I 241(1).
[56] Phillips, I 257(2).
[57] Leiserson, I 18(1), (2).
[58] Phillips, I 241(1).
[59] Phillips, I 241(1).
[60] Committee exhibit 834, II 705(3).
[61] Pratt, II 110(3); committee exhibit 569, II 118(2).
[62] Pratt, 115(1)(2).
[63] Phillips, I 241(1).

means of getting the act "generally accepted," in view of the case load in the Review Section and the resistance Board cases were encountering in the United States circuit courts of appeals.[64] In 49.8 percent of the cases, according to the Board's statistics, adjustments or settlements of cases were achieved.[65] Testimony revealed that on occasion they were obtained where the case against the employer was not adequate.[66] One regional director pointed out to employers the expense attached to going to hearing, in order to induce a settlement of the case.[67] Frequent complaints of this practice have been made to the committee.

During the testimony of Regional Director Phillips, an exhibit was introduced indicating that where one employer refused to comply with the act in accordance with the manner in which this regional director thought would be proper, the regional director threatened to "get him."[68] This threat was made before any hearing was held on the merits of the case.[69]

In at least one instance, the same regional director participated in a hearing before the trial examiner and during the course of the hearing received instructions from the Chief Trial Examiner after Mr. Pratt had conferred with Nathan Witt, the Secretary of the Board, concerning a ruling the trial examiner was to make on a certain issue.[70] In that case the regional director appeared as counsel for the Board.[71]

The Board set aside its order and decision because of the irregularity of this procedure, but the regional director was not reprimanded for his conduct,[72] and was still at the time of his appearance before the committee director of one of the most important regional offices.

Lobbying

The field offices took an active part in the lobbying done by the Board.[73] One regional director reported that all persons whom he had interviewed with respect to testifying before the Senate Committee on Education and Labor, had amendments in mind, and therefore he did not think they would be useful.[74]

A former Board secretary, Benedict Wolf, after leaving the service of the Board wrote identical letters to all regional directors, except one, asking them to stimulate sentiment of local American Federation of Labor unions against amendments proposed by the executive council of the American Federation of Labor.[75] The one regional director was carefully omitted because Wolf feared the "A. F. of L. friends" of that individual.[76]

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[64] Committee exhibit 834, II 705.
[65] In its statistics the Board considers every charge and petition filed as a case, regardless of whether or not action is taken thereafter. Board exhibit 14, Madden II 356(3).
[66] Committee exhibit 36, Leiserson, I 26(3).
[67] Phillips, I 242(1).
[68] Committee exhibit 178, I 243(3).
[69] Phillips, I 244(2).
[70] Phillips, I 258(2), (3).
[71] Phillips, I 269(1).
[72] Phillips, I 279(1).
[73] Supra.
[74] Committee exhibit 852, II 697(3).
[75] Committee exhibit 839, II 695(2); committee exhibit 840, II 706(1); committee exhibit 841, II 706(2); committee exhibits 1014–1078, III 148–150.
[76] Committee exhibit 838, II 694(3).

Another regional director replied:

* * * Am wholeheartedly in agreement with what you say, and for the past month have been following a somewhat similar campaign with the union in my vicinity.[77]

Notice to employers

Three regional directors testified before the committee that they did not send copies of charges to respondents upon the filing of such charge.[78] One director explained that he did not do so because frequently the charges contained language that would be regarded as libelous.[79]

In some instances the policy was brought out that every method was to be used to prevent employers from knowing that they were being investigated.[80] The committee notes that it has become a fixed policy of the Board never to notify employers that cases against them have been closed,[81] but by means of form letters to advise them only "that further action * * * is not contemplated by this office at this time.[82]

Elections

The Board requires the regional director to submit what is known as an "Intermediate report on secret ballot" following elections conducted by the regional office.[83] Therein, the regional director reports the results of the election, any incidents occurring during the election, and a statement relative to ballots challenged or voided during the election.[84] The Board then decides upon the disposition to be made of challenged or void ballots.[85]

In such a report by a regional director following an election, the union having preferred charges against the company and against the other union, the regional director declared these charges to be unfounded.[86] But 6 months later another report was submitted by the same regional director dealing with the same election, and this time, following a strange metamorphosis, the regional director discovered that the charge of the complaining union were well founded.[87] The later report was characterized by Dr. Leiserson.[88]

After many months of inexcusable delay, the final report on these cases is now in. This report puts the Regional Office in the ridiculous situation of making charges against itself. At the same time it contains evidence of partisanship in submitting information on which the Board is asked to take action. I think the San Francisco Office needs to be investigated immediately to get rid of the partisanship, and a certification should be promptly issued in these cases to keep the Board from becoming mixed up in the partisanship.

Dismissal of certain regional directors

A remarkable contrast in Board policy is afforded by a consideration of the circumstances surrounding the dismissal of regional directors and the appointment and retention of certain other employees referred to above.[89]

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[77] Committee exhibit 842, II 695(3).
[78] Phillips, I 241(3); Herrick, I 345(3); Cowdrill, II 660(1).
[79] Phillips, I 241(3). There is testimony in the record that the assistance of employees of a regional office was often used by unions in drafting charges.
[80] Freter, I 861(2).
[81] Herrick, I 342(2).
[82] Committee exhibit 297, I 351(3).
[83] Farmer, I 540(1), 541(1).
[84] Committee exhibit 437, Farmer, I 586(3).
[85] Farmer, I 541(1, 2).
[86] F. E. Booth Co.; Leiserson, I 22–26, committee exhibit 51; Leiserson, I 54(1).
[87] Committee exhibit 51; Leiserson, I 49(2).
[88] Committee exhibit 31; Leiserson, I 22(1).
[89] Vide supra.

James P. Miller, formerly regional director in Cleveland, testified that his resignation had been requested by the Board ostensibly for his attendance at a dinner held in a region other than his own, but really for the reason that he "insisted this act be enforced and administered impartially," especially in the treatment of independent unions.[90]

Chairman Madden, however, stated to the committee that Mr. Miller's attitude toward independent unions had nothing to do with this resignation, but that the real reason was that there were circumstances attendant upon Miller's trip to New York had been defrayed by an attorney representing clients with cases pending before Miller.[91] This was denied by Miller, who admitted, however, that he had accompanied the attorney in question to the dinner at the latter's invitation.[92]

But Miller was not the only regional director present at this repast, for it appears from the record that the regional director of the most important office (New York), Mrs. Elinore M. Herrick, was there and liked it. Indeed, Mrs. Herrick testified that she thought the dinner was a good idea.[93] Mrs. Herrick escaped with a reprimand from the Chairman of the Board for her indiscretion in the matter.[94]

This dinner was in the nature of a "victory celebration" induced by the successful settlement of a case (wherein the respondent who gave the dinner, was represented by the attorney who invited Miller to attend).[94]

The Los Angeles incident

This chapter in the history of irregularity has been somewhat developed under the experiences of Gates and Krivonos.[95] However, to complete the record it is necessary to review the part that the "improper" [96] activities of Dr. Towne J. Nylander, regional director, played in his dismissal.

It will be recalled that three distinct investigations were made of the Los Angeles office—by (1) Gates, (2) Krivonos, and (3) Pratt and Van Arkel,[97] all together extending over a period of approximately a year and a half. While Krivonos and Gates contented themselves with giving oral reports to the Board,[98] Pratt and Van Arkel furnished the members with a long account of their findings.[99] Sifting the wheat from the chaff, the upshot of these reports endeavored to show that Dr. Nylander did not conduct his office properly and that he was unfit by temperament and personality to retain the position of regional director.[1]

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[90] Miller, I 230–W(2).
[91] Madden, II 511(3).
[92] Miller, I 230–S; committee exhibit 164, I 230–T(3).
[93] "* * * I used it [reference to the dinner] as radio publicity and passed it on to the Board, because I thought it was just a cute story to illustrate the change in attitude of employers today." Herrick, I 359(2).
[94] Madden, II 512(2).
[95] Vide Supra.
[96] So considered by Messrs. Pratt and Van Arkel in their report: "It is concluded that Nylander has been unjustly accused of certain conduct of which he was not guilty, and that he did nothing, deliberately, to sabotage the work of the Board, or to favor one group of labor organizations over another. On the other hand, our investigation convinces us that his handling of the office was such as to prevent its functioning efficiently and that by temperament and personality he is unsuited to hold the position. In view of the conditions for reinstatement which he laid down: The right to make such speeches as he wished on the subject of labor relations and the dismissal from the Los Angeles office of all of the field examiners except McKay it is recommended that no offer to restore him be tendered." Committee exhibit 46, I 64(3).
[97] Committee exhibit 46, I 42(2).
[98] Leiserson, I 40(2).
[99] Committee exhibit 46; Leiserson I 42(2).
[1] Committee exhibit 46; Leiserson I 64–66.

But there were other causes of dissatisfaction (perhaps best described as "off-the-record" causes), such as (1) the opposition of Harry Bridges (former [2]) west coast director of the C.I.O.; and (2), charges of favoritism [3] toward American Federation of Labor unions and employers.

Field examiners

During the testimony of one of the trial examiners,[4] testimony and exhibits were introduced relative to the activities of Grant Cannon, a field examiner in the St. Louis regional office.[5] An effort was made by several employees to testify regarding statements made by Cannon showing his C. I. O. bias during the *Ford Motor Company of St. Louis case*.[6] After a conference between the trial examiner, regional director, regional attorney, and trial attorney, it was decided that these statements would not be admitted.[7] The trial examiner thereupon excluded them.[8] But the Board reversed this ruling and ordered the testimony admitted.[9]

When Cannon appeared at the hearing in that case, he could not recall having made the statements testified to by the employees, although the testimony was that the incident occurred within the year.[10]

A former field examiner [11] who had been assigned to the Board's Indiananapolis office on the usual 3 months' probation (which had been renewed),[12] testified before the committee that he had received instructions not to furnish copies of charges to employers but had been directed to prevent the accused employer from seeing the charges at any time.[13] He stated that in some instances the field staff was instructed not to contact employers after the charge had been filed but before the complaint had issued, and in others the employer was not contacted until "at the very end of the investigation after we had exhausted all other contacts with the employees individually and with the unions and the union officials, and so forth." [14]

After 8 months with the regional office, failure to make this field examiner's appointment permanent terminated his connection with the Board. When he inquired of Mrs. Stern, the assistant secretary, the reason for his dismissal, according to this testimony he was told: [15]

> The Board felt that your family background is not such as would fit you for this sort of work.

The witness testified that the remark was meaningless.[16]

The statement of his superior (the regional attorney) in the Cincinnati office declared that this man was "an intelligent examiner and careful in his work," complained that he was not "quite as stable as a

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[2] Leiserson, I 42–43.
[3] Committee exhibit 46, I 43.
[4] Tilford E. Dudley.
[5] Committee exhibit 468, II 17(1, 2); committee exhibit 469, II 18(1, 2); committee exhibit 470, II 19(1, 2); committee exhibit 471, II 20, II 21(1); committee exhibit 472, II 21(2); committee exhibit 473, II 21(3), II 22(1, 2).
[6] Committee exhibit 471, II 20.
[7] Committee exhibit 471, II 20(1).
[8] Dudley, II 25(1).
[9] Idem.
[10] Dudley, II 25(2).
[11] Theodore H. Freter.
[12] Freter, I 361(2).
[13] Idem.
[14] Idem.
[15] Freter, I 362(2).
[16] Idem.

field examiner should be," but recommended him for consideration for the Review Division.[17]

The regional director wrote to Witt,[18] secretary of the Board, saying that he understood that this man was to be transferred to the Review Divison and asking—

* * * if you have one or two bright *labor-minded men* from whom I can choose to fill this probable vacancy will you please refer them to me? [Italics supplied.]

This incident was of particular interest to the committee since it represented another effort to drop those members of the personnel not deemed suited for field work into the Review Division, where they could advise Board members as to evidence in cases and write the opinions of the Board.[19]

Part III.—Board Policies and Interpretations of the Act

A. Invention of Remedies

In drafting the Wagner Act, the Congress believed that its unfair labor practice definitions, as contained in section 8, were quite specific and that neither the Board nor the courts should be allowed to impute to Congress any ambiguities or omissions for which they might invent remedies. The Senate report reads: [1]

The unfair labor practices * * * are strictly limited to those enumerated in Section 8. Unlike the Federal Trade Commission Act * * * this bill is specific in its terms. Neither the Board nor the Courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed unfair.

During the course of the testimony of the members of the Board and its personnel, certain practices were brought out which apparently go beyond the language, scope, and intent of the act.

These practices consisted in the invention of "remedies" not provided for by the act. These "remedies" will be discussed under the following headings:

(1) "Reinstatement" of Men Never Employed.
(2) Reinstatement of Employees Guilty of Violence.
(3) Back Pay Ordered Where No Allegation of Discriminatory Discharge.
(4) Run-Off Elections.

1. "Reinstatement" of men never employed

An example of one of these practices is furnished by the *Waumbec Mills case*.[2] There the Board developed the policy of ordering respondents to hire men never before in their employ and to give them back pay from the time of refusal of such employment to the date of such hiring.[3] Committee Chairman Smith questioned Board Member Edwin S. Smith very closely regarding the Board's policy in this matter,[4] and asked the witness whether the Board had considered

[17] Freter, I 365(1, 2).
[18] Freter, I 365 (2).
[19] See Review Division, supra.
[1] S. Rept. 573, 74th Cong., 1st sess. (1935).
[2] Also used in the *International Casket Company* and *Hummer Manufacturing Company cases*. See Smith, II 613(1).
[3] Smith, II 612(2, 3).
[4] Smith, II 612–615(1).

section 10(c) [5] of the act as to reinstatement of employees in determining the application of the appropriate remedy. To this the witness replied: [6]

> We did consider that very carefully, Mr. Chairman, and *we did not conclude that the Board was bound by the language there* [Section 10(c)] *referring to its latitude in making remedies*, that the Board was bound not to extend the *time* [kind] of remedy which it did in that case. In other words, we felt that we had authority under the statute to require the hiring of these two men and payment of back pay to them. [Italics supplied.]

While firmly believing that the Board had the power to invent"[7] remedies not specifically provided for by the act in order to effectuate what the Board considered to be the purposes of the act, Board Member Edwin S. Smith expressed the opinion that if no power existed in fact to order back pay where the worker had never been an employee of the respondent, then the act should be amended to give the Board that power.[8]

Following Mr. Smith's testimony concerning the *Waumbec Mills case*, Mr. Madden at his own request took the stand and sought to defend the policy of the Board in that case.[9] In his reply to the chairman's questions, Mr. Madden made the following statement: [10]

> Q. (By CHAIRMAN SMITH.) You were present when I asked Mr. Smith a question, and through his answer that brought you to the stand, and you haven't yet approached the question that I was asking him, namely, to point out to this Committee in the statute any authority that this Board has to reinstate persons who have never enjoyed the status of employer and employee.
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> A. (By Mr. MADDEN.) I would say two things about that, Mr. Chairman. One is that I think that the way in which that language appears, that the Board shall impose a remedy—I have forgotten the exact language of it—including reinstatement with or without back pay, is, on the face of it, not intended to be an exclusive statement of what the remedy may be. It is nothing more than a suggestion. We don't have to give back pay, and in many cases for one reason or another we haven't given back pay.
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> Q. May I interpose right there? When, in the absence of that language about reinstatement—if there was no such language there—do wou think you would have the power of reinstatement with back pay?
>
> A. I should think so.
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> Q. Do you mean to tell this Committee that in the absence of any specific authority for back pay that you think that power is inherent in the Board?
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> A. It is not inherent in the Board. I think it is inherent in an effective remedy for the evils of this statute. You will recall that there are none of the usual sanctions which go with violations of law at all. There are no fines, there are no imprisonments, there are none of these things, and certainly the Board, which has the power to administer the statute, is given such power, such remedial power, as to make people whole who are victims of the violation of it.
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> Q. And you know that in the criminal act—and you referred to a criminal act—if the legislature leaves a defect in the law, such as not paying any penalty, then the law becomes inoperative?
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> A. Yes, of course.
>
> Q. Doesn't the same thing apply to any other law?
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> A. No, I should say by no means, Congressman.
>
> Q. How do you get the idea that you can write something in the law that Congress forgot to put in there?

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[5] Section 10(c) of the act provides in part:
"If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, *including reinstatement of employees with or without back pay*, as will effectuate the policies of this act." [Italics supplied.]

[6] Smith, II 612(2).

[7] So characterized by Board Chairman Madden at II 616(3).

[8] Smith, II 613(1).

[9] Madden, II 615(2)–618.

[10] Madden, II 615(3)–616(1).

A. That isn't the idea at all. I think that the analogy for this kind of a civil remedy is what a court of equity may do.

Q. Supposing instead of saying, "You shall reinstate him with back pay for the year," you had said, "Well, we will just fine you $10,000." What is the difference?

A. Of course we couldn't do anything of the kind.

Q. Why, under the law, if you can do one, can't you do the other?

A. Because it wouldn't be the normal kind of remedy, which, say a court of equity dealing with this situation could put into effect to remedy the evil. It would be outside of what would be usual or proper; it would fall outside any analogy in similar fields of the law.[11]

Questioning by Committee Member Routzohn developed the fact that Mr. Madden was of the opinion that it was altogether permissable for the Board to "invent" remedies where none were provided within the express terms of the act, so long as such remedies were within the purview of the statute and not unreasonable or arbitrary. To what length such invention might go and still be deemed reasonable and not arbitrary was not indicated. The colloquy between Representative Routzohn and Mr. Madden follows: [12]

Q. (By Mr. ROUTZOHN.) I was wondering, Mr. Madden—there is one question which I would like to ask you. Is it your contention that the National Labor Relations Board has power and authority other than that expressly granted by Congress?

A. (By Mr. MADDEN.) None whatever.

Q. In other words, your limitations must be contained in the Act?

A. Yes, but I mean that you have problems of statutory interpretation, just as you do in the case of any other statute.

Q. You are permitted to put constructions upon the Act in order to determine your powers, but you have no inherent powers as a Board?

A. None whatever.

Q. What about courts of equity? You compared the Board awhile ago, and the authority of the Board, with the power that courts of equity have. Courts of equity have powers that are inherent isn't that true?

A. Yes, and they do invent remedies.

Q. And the limitations in that instance are in the inverse order, and that is, where Congress wishes to limit the power of the court, it must expressly do so?

A. I think that would be true.

Q. That is the distinction between a Board such as yours and the power and authority of the court of equity or of law?

A. Yes, but you will remember, Congressman—

Q. (Interposing.) Is that correct?

A. Yes, that is correct, but you will remember that our statute, in giving us the power to order a person to cease and desist and to take such affimative action as will effectuate the policies of the Act does give us pretty broad power.

Q. And it gives you the right to construe it as you see fit, except as some court may later on come along and say that you might have been mistaken.

A. Yes. What we would invent by way of remedy I take it would have to be a reasonable and not an arbitrary device or remedy for the situation.

2. Reinstatement of employees guilty of violence

A serious situation has arisen through the Board's conception of its remedial functions under the Wagner Act as permitting the reinstatement of employees who were guilty of acts of violence. The now famous *Fansteel case* [13] points unmistakably to the philosophy of those charged

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[11] In a further discussion with Chairman Smith, Mr. Madden said:

Q. (By Chairman SMITH.) Then you don't think that the Congress, by using the word "reinstate," confined your remedies to employees rather than to persons who had never been employed?

A. (By Mr. MADDEN.) I meant to speak of that as a matter of statutory interpretation. It seems to me that when you look a the whole spirit and purpose of this act, and when you look at the evil of black-lists, which as I say it is inconceivable that the Congress intended should be without remedy—when you look at all those things, it seems to me that little prefix "re"-instatement is too slight and too accidental a matter of verbiage to control the whole spirit and purpose of this statute. Madden, II 616(2).

[12] Madden, II 616(3).

[13] *N.L.R.B.* v. *Fansteel Metallurgical Corp.* (306 U.S. 240 (1939)).

with administering the Wagner Act in the public interest. There the Board contended that it had the power to order the reinstatement of employees who were guilty of acts of trespass and forcible seizure of the property of their employers. The Supreme Court, however, rejected the Board's contention and in strong language reversed the Board's position, saying: [14]

> We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work.

But the severe criticism of the Supreme Court did not affect the determination of the Board in its insistence that it had the power to order reinstatement of employees guilty of acts of violence. For instance, in the *McNeely & Price case*,[15] the Board issued an order similar to that issued in the *Fansteel case*, requiring the reinstatement of sit-down strikers. While this case was before the circuit court of appeals upon the petition of the respondent, the *Fansteel case* was in the process of being decided by the Supreme Court. Counsel for the Board stipulated that the decision of the Supreme Court in the *Fansteel case* would determine the issue in the *McNeely & Price case*. However, after the Fansteel decision and before the circuit court had rendered its decision in the *McNeely & Price case*, the Board filed a supplemental memorandum attempting to distinguish the latter case from the Fansteel situation.

In its decision the circuit court critized the Board for attempting to make such a differentiation, particularly in view of its stipulation:

> At the argument for the Board admitted that the case would be governed by the ultimate decision of *Fansteel Metallurgical Corp.* v. *National Labor Relations Board* * * * then argued, but undecided, in the Supreme Court. In spite of this concession, after the handing down of the opinion * * * counsel for the Board has filed a supplemental memorandum attempting to distinguish the case at bar. The futility of relying on differences rather than distinctions is possibly "caviare to the general" but is certainly hornbook to the barrister. * * *
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> * * * * * * *
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> By the same token, we think the insistence upon this appeal is a disservice to the best interests of the "labor movement" and so a disservice to the national life of which it is such a vital part.

Prior to the *Fansteel case* the Board in the *Standard Lime & Stone Company case* [16] ordered the reinstatement of employees who had committed assault and battery and, while on strike, had conspired to dynamite the employer's power lines. Exemplifying the philosophy which the Board has consistently followed in its administration of the Wagner Act is the Board's statement of its position in this case by the Court: [17]

> In explanation of its order directing the company to reinstate the 8 men who had confessed participation in the conspiracy to blow up the power lines or the commission of assaults upon workers at the plant, the Board had this to say: "With the exception of the 8 men who pleaded guilty to the commission of a felony * * *, we cannot concur in the respondent's contention that these individuals have disqualified themselves from reemployment. The Board's power to order the reinstatement of employees is equitable in nature, to be exercised in the light of all of the circumstances of the case. Here the respondent itself has

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[14] Idem.
[15] *McNeely & Price* v. *N.L.R.B.*, 106 F. (2d), 878, 879.
[16] 97 F. (2d), 531.
[17] Id. at 536.

violated the law of the land. Under all the circumstances and without condoning the illegal acts of the strikers, we feel that such acts should not be a bar to the reinstatement of any except the 8 mentioned above."

We find nothing in the Act to support this assertion of power on the part of the Board, and we perceive no equitable circumstance to justify its exercise in this case. [Italics supplied.]

3. Back pay ordered where no allegation of discriminatory discharge

In one case the Board ordered the payment of back pay to certain employees without making a finding that such employees had been discharged discriminatorily under section 8(3) of the act.[18] This is important in view of the fact that the only violation alleged in the charge was an unfair labor practice under section 8 (1), namely, interference, restraint, and coercion.[19] This raises at least a reasonable doubt as to whether the respondent was put on sufficient notice that there was a possibility of a back-pay order resulting from the finding of the violation of section 8(1), in view of the Board's customary procedure of ordering back pay only in cases of violation of section 8 (3)—discriminatory discharge—violations.[20]

4. Run-off elections

In an election in a representation case, where the first ballot fails to indicate a majority for one of the contending unions, where that union obtaining the plurality so requests, all unions except the plurality union are eliminated.[21] The employees are then given only the opportunity of casting their ballots for the plurality union or no union at all.[22] Since no express authority exists in the act for this, which has been termed the "run-off election," the Board has invented this procedure.[23]

Board Member Leiserson is also of the opinion that such procedure is without authority under the act. He states:[24]

I am not convinced that the law gives us authority to order run-off elections. If we may order such elections, if we have authority to do this, we would also have authority to order voting on the basis of proportional representation, such as is used in Cincinnati and New York, or we could order some other form of preferential voting. I think the Board goes beyond its powers in this decision * * *.

In connection with Dr. Leiserson's position as stated above, the committee points to his testimony concerning this matter, which is as follows:[25]

Dr. LEISERSON. The present practice of the Board results in this situation: Every ballot has on it a place for the organizaton that presents some authority from employees to represent them in the form of petitions or cards, and they get on the ballot. Now, if there is only one organization in the picture, the name of that organization is placed on the ballot, and then there is another place for voting against that organization. There will be "For" and "Against." If there are two organizations on the ballot, then there is a third place to vote for neither.

That results in this situation: if you have a substantial number of votes for neither and you have on there two organizations, one may have very many more

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[18] *Indianapolis Glove Co.* case Boyls, I 530(1), and committee exhibits 416 and 417, I 579(3), and I 580(1).

[19] "SEC. 8. It shall be an unfair labor practice for an employer (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

[20] See, for example, the *Mount Vernon Car Manufacturing Co.* case, supra.

[21] Leiserson, I 68(1, 2); Madden, II 554(2, 3).

[22] Idem.

[23] Board Chairman Madden said of this:

"* * * It seems to me that it is the problem that you have in any multiple candidate election where the statute requires a majority to elect, that you have got to invent some kind of an elimination device, and if you invent it and then operate it regardless of consequences, why of course each party has the same opportunity to get a plurality in the first election and thereby be the candidate which gets a second chance." Madden, II 554(3).

[24] Committee exhibit 60, I 68(1).

[25] Leiserson, I 68(2, 3).

votes than the other, but will not have a majority of the total vote cast. Now, the policy of the Board has been in that case, first, if none of the organizations ask for a run-off election, then none is held—that is it is left until a later date, when a new petition is filed. I would do that in all cases, but if one organization, the one that had the highest number of votes, asks for a run-off election, then the Board will put the one that has the highest number of votes on, leave off the organization that has the next highest, and merely vote the one that has the highest, and then a place for and against that one. Now, there is some difference of opinion among the members of the Board as to whether it would not be better to drop the word "Neither" from the second ballot, if you did have a second ballot, and that is what the Board suggests in the *Consumers Power case*, and then just vote for the two highest.

That illustrates what I mean by saying that there are different ways of running run-off elections. You can run a run-off election, using the highest only, and then provide a place for and against that; or you can use a run-off election where you use the two highest and drop the "Neither." Different people will have different ideas on that subject, and therefore I don't think the Board ought to just take it upon itself to adopt one or the other, because it is a vital matter.

In connection with the matter of run-off elections, the committee was impressed by testimony given by members of the A. F. of L. affiliate which complained of the Board's policy in this respect in the case of the Consumers Power Co.[26] In this case in the original election there were cast 2,806 votes out of a total number of 2,977 employees.[27] Of these, 1,072 voted for the A. F. of L. affiliate and 1,164 voted for the C. I. O. affiliate.[28] The run-off election ordered by the Board [29] will, under the present policy, result in the deprivation of an opportunity for the American Federation of Labor to be on the ballot.

B. APPROPRIATE BARGAINING UNIT

1. Application in general

One of the most troublesome provisions of the National Labor Relations Act is section 9(a) and (b) relating to the determination of the appropriate bargaining unit. It is most essential to eliminate inequalities in bargaining power that have become altogether too manifest under the Act.

Certain specific situations have developed which illustrate the dangers lurking in the discretionary power which the Board has so freely and often-times unfortunately exercised in the determination of the appropriate bargaining unit. These are:

(1) Where conflict has developed between a craft unit and an industrial unit in a single plant.[30]

(2) Where a union claims to represent a majority of the employees in one or more plants of a single employer and another union claims to represent a majority of the employees in a larger unit which includes all the plants under the same ownership.[31]

(3) Where one union seeks to represent a majority of the employees in one or more plants of an employer, while another union claims to represent a majority of the employees of a unit of an employer association which includes the plant or plants of the first-named employer.[32]

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[26] Gill, III 166–167; Allen, III 178(1); Rice, III 178(2); Byle, III 178–179.
[27] Gill, III 170(1).
[28] Idem.
[29] Gill, III 167(2); III 168(2).
[30] *Chicago Malleable Casting Co.* case: Leiserson, I 19(3).
[31] *Pittsburgh Plate Glass case;* committee exhibit 65, I 70(1).
[32] *Alston Coal Co. case;* Ozanic, I 111(3).

(4) Where the representation by a union involves a majority of the employees in one or more geographical areas and another union claims to represent a majority of employees in a larger region which includes the territory claimed by the first-mention union.[33]

Where the theory of an appropriate bargaining unit favoring the larger or industrial union in a single unit was espoused in various instances by a majority of the members of the Board, it has been possible for a minority union to be absorbed contrary to its desires by the larger union.[34] Dr. Leiserson stated to the committee that this holding had caused employees to lose fundamental liberties which they had enjoyed prior to the passage of the National Labor Relations Act (July 5, 1935), stating that: [35]

> * * * the law does not authorize that sort of thing. There is nothing in the law making it necessary we should do it.

The same witness testified that he believed the majority of the Board was exercising a greater authority than was written into the law by Congress, in the rulings by the majority which favor a collective bargaining unit composed of all employees of all plants of a single employer over the unit composed of employees of a single plant.[36] In one instance, one of these plants was not in the same State as the others owned by the same employer, and this situation was characterized by Dr. Leiserson as "thoroughly impractical." [37]

Where the unit embraces an entire association of employers in place of a single plant or single ownership, the effect has been to deprive some employees of any opportunity for active affiliation with the labor organization of their choice, and in case of closed-shop agreements, compel them to join another union not of their own choosing in order to retain ther jobs. In such cases, employees who refused to join the more comprehensive unit favored by Board policy were discharged.[38]

Destructive in its effect upon certain unions is the arbitrary discretion exercised by the Board in its "gerrymandering" of geographical districts in determining the proper unit for collective bargaining.[39] This decision of the Board has resulted in bitter criticism for, instead of promoting freedom of choice in, the selection of their own unions, workingmen are obliged to accept the representation of a superimposed labor collectivity which they actively oppose.[40] Such a ruling can only result in intensification of the acrimonious hostility characterized by violence and bloodshed.

As the Supreme Court of the United States has sustained the United States Court of Appeals for the District of Columbia in *American Federation of Labor* v. *National Labor Relations Board*,[41] which denied judicial review of this arbitrary discretionary act of the Board, no alternative is left but to alter the act.

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[33] *Longshoremen's case;* Leiserson, I 20(1).
[34] Leiserson, I 20(1).
[35] Leiserson, I 20(2).
[36] Leiserson, I 71(1), I 71(3).
[37] Leiserson, I 71(1).
[38] Ozanic, I 118(3); Enke, I 170(1); Arnold Smith, I 173(2); McAllister, I 173(3).
[39] Leiserson, I 71(1).
[40] Ozanic, I 118(2); Crouch, I 171, 172; Hagler, I 173; Hunter, I 174; Shepherd, I 174.
[41] 103 F.(2d) 933.

The courts have emphasized their inability to correct this evil in the face of the plain language of the act.[42]

Significant as to the attitude of the older bodies representing organized labor, Mr. William Green, president of the American Federation of Labor, appearing before the committee, charged the National Labor Relations Board with having committed "all the crimes in the calendar in its interpretation of what constitutes the appropriate bargaining unit." [43]

According to the testimony of the witness, the Board's action in the *Pacific Longshoremen's case* was in direct contravention of the collective-labor agreement between the American Federation of Labor and the employers and had the effect of abrogating valid labor contracts.[44] He testified that the effect of the decision was to destroy these West Coast Federation unions as collective-bargaining agents, and by an unwarranted compulsion to bring about an absorption of its membership by a rival and competing union.[45]

Testimony by Mr. Green emphasizes the keen disappointment of his organization in the act, and his belief that amendments must be adopted to curb the continual deprivation of labor's rights.[46]

Q. (by the CHAIRMAN.) Now we have in this Act Section 9, which is a section providing for giving the Board the power to determine the unit of representation. Now that has really been one of the worst bones of contention that you have had, hasn't it?

A. Yes.

Q. And through the exercise of that power your orgaization has suffered great injury.

A. That is right.

Q. Do you regard that as a necessary part of the Act, that the Board should have that power?

A. No, I do not. *I think the Board should be deprived of the exercise of that discretionary power because that is purely administrative, and let the workers themselves, in this free democratic country, decide in a free democratic way what they seek to utilize as their collective bargaining unit.* [Italics supplied.]

* * * * * * *

Q. (By Mr. HALLECK.) Mr. Green, it sometimes is suggested that if the personnel of the Board were changed, any amendments, even limited to administrative amendments, might be altogether unnecessary. Possibly it isn't a fair question, but what is your advice or opinion to this committee in respect to that matter? That is, should we, having this under consideration, consider the administrative amendments, or should we rely upon a change in personnel which might be made?

A. I thnk that the administrative amendments offered should be considered and acted upon favorably simultaneously with the consideration and action on the change of the personnel of the Board. * * *

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[42] Quoting from the language of the United States Court of Appeals for the District of Columbia:

"Accepting, as we must, this restrictive definition and applying it to the case at hand, we hold that, though the decision here was required by the Act to be made and to be made on the evidence and argument after judicial hearing, and though it was definitive, adversary, binding, final, and in this case *struck at the very roots of Petitioner's union and destroyed its effectiveness in a large geographical area of the Nation,* it was not an order because the Act did not require it to be made in the language of command * * *." [Italics supplied.]

[43] Green, II 285(2).

[44] Green, II 286(1).

[45] Green, II 285(3).

[46] Green, II 288(3)–289(1).

Q. But as I get it, your view is that it might be better to clarify some of these matters in the law and to depend upon the law rather than the personal attitudes of the administrators who might happen at any particular time to be charged with its administration.

A. That is right, Congressman.

Mr. Green declared that Senator Wagner, largely responsible for this statute, had assured the American Federation of Labor that the principle of "free choice of representatives whether the workers are what are commonly understood to be craft workers or so-called general production workers" was "completely and perfectly protected." [47]

A letter from the Senator (Wagner) to a vice president of the American Federation of Labor, Mr. Daniel J. Tobin, which was introduced in evidence, reads in part: [48]

As the author of the legislation I can say very definitely that it was never intended to permit the Labor Board to interfere in the internal affairs of Labor organizations, and do not believe there are any words in the Act conferring such power.

So-called jurisdictional questions raised within different labor organizations are matters for them and their highest court of labor to decide and *are not matters for governmental decisions.* [Italics supplied.]

The Board's ruling on the appropriate bargaining unit in certain coal cases prevented the employees from severing their connection with the union in spite of the prevalent feeling of many of the employees that they are in bondage, according to the same witness' testimony.[49] Some 85,000 members of the American Federation of Labor were thus deprived of their collective-bargaining rights.[50]

Mr. Green stated that in cases similar to that of the American Can Co., where the decision favored the industrial union, the effect was to remove "even the little protection afforded craft unions by the Globe doctrine." [51]

* * * where a craft union obtains an exclusive bargaining contract, the industrial union may nevertheless, by taking away the membership of the craft union, merge the craft union with the industrial unit.

* * * The effect is therefore to crystallize the industrial form of organization and prevent the craft employees from ever thereafter changing their minds.[52]

That the Board has used its influence to assist those who believe in the industrial form of organization to overcome the voluntary form of organization which had existed theretofore, establishing a condition where labor is no longer at liberty to use the type of organization it wants, but must accept a form imposed upon it, was the belief of John P. Frey, vice president of the American Federation of Labor.[53]

The same witness testified that the American Federation of Labor feels that the controversy relative to the bargaining unit is so fundamental as to go to the very root of the problem of whether an administrative agency can be established which, through its methods of oper-

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[47] Green, II 282(1, 2).
[48] Committee exhibit 743, Green, II 282(2).
[49] Green, II 286(2).
[50] Idem.
[51] Green, II 286(3). For a discussion of the "Globe doctrine" see infra.
[52] Green, II 286(3)–287(1), quoting Mr. Madden's statement regarding the decision in the *American Can Co. case.*
[53] Frey, I 186(3).

ation and decisions, shall have the inherent power to determine the structure of American labor.[54]

The Board's precedent in the *Alston Coal Company case* was followed in dismissing the petitions of the Progressive Mine Workers of America (affiliated with the American Federation of Labor) in West Virginia, Pennsylvania, and Oklahoma.[55] And this ruling, directly contrary to the congressional intent of permitting workers to be represented by unions of their own choosing, resulted in exactly the opposite; that is, the employers were accorded the privilege of selecting the representatives they chose to bargain with.[56]

2. The Globe Doctrine

In explaining the "Globe doctrine," as decided by the Board, Mr. Madden testified: [57]

A Globe election is a local option device under which the smaller claimed unit is given an opportunity to vote itself into or out of the industrial unit, depending upon whether a majority within the smaller unit desires to remain out or to go into the larger unit.

The Board decision in the original *Globe Machinery and Stamping Company case*,[58] reads in part:

In such a case where the considerations are so evenly balanced, the determining factor is the desire of the men themselves [as between a craft union and an industrial union].

Testifying, the two other members said on the same subject: [59]

Q. (By Mr. Halleck:) Am I correct * * * that, generally speaking, you favor the industrial type of organization against the craft type?

A. (By Mr. Smith:) My holding has been when there have been claims put before us for both types of organizations in the same case that I would favor the setting up of the industrial unit *without consulting the wishes of the craft unless there has been a previous bargaining history on the part of the craft.* When there has been a previous bargaining history I do not think that we should impose on the craftsmen who have enjoyed that type of bargaining a new form of bargaining. [Italics supplied.]

Dr. Leiserson's view of the Globe doctrine introduces a further modification, which was stated by the Board Chairman: [60]

The formula was modified only in this respect, that Dr. Leiserson's view is that if the parties have any self-organization and their own voluntary arrangements made usually before the contesting faction arrived on the scene at all, if by such arrangement of contract the entire plant, say, or all of the employer's plants, have been bargained for as a single unit, if, for example, the workers inside a craft within that plant or within that employer's business should all change their desires and wish to go to join a craft union and to bargain separately as a craft, Dr. Leiserson's view is that they are foreclosed from doing that, that the status which was set up by their former action and contract is a permanent status, and that the small group could not be released from that status unless the whole group, the larger group, should voluntarily release them.

Mr. Madden also testified, in answer to a question by a member of the committee, that the views of the Board members differed, "so

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[54] Frey, I 187(1).
[55] Ozanic, I 110–169.
[56] Inasmuch as the employers in the coal industry have trade associations which negotiate collective labor agreements with the Nation-wide unions, the individual employer is left free to enter the association and thereby adopt the collective labor agreement so negotiated, or to withdraw from such association and negotiate an individual agreement with the union of his employees' own choosing.
[57] Madden, II 382(1).
[58] 3 N.L.R.B. 294 (1937).
[59] Smith, II 602(2).
[60] Madden, II 550(2).

that one can't say that there hasn't been some experimentation in an attempt to reach a satisfactory formula, but I must confess that the experimentation has not succeeded in finding a satisfactory formula." [61]

To sum up the net effect of the application of the Globe doctrine in one of the forms—in which two of the Board members agree partially [62]—it results in creating a situation wherein an industrial union may drive out a craft union and establish itself without fear of dislocation.[63]

Where the employer association was designated by the Board as the appropriate unit for collective bargaining, the president of an international labor union [64] testified that his organization had the policy of protecting the right of all employees to join labor organizations of their own chosing without incurring danger of discharge or other reprisals which followed the Board's ruling.[65]

The policy of the American Federation of Labor was declared by its president [66] to include the protection of the rights of all workers and to afford them the opportunity to determine the form of organization best suited to their own needs.[67] He also stated that it was his organization's belief that this was the original purpose of the act, but that the Board had demonstrated by its decisions that it favors one form of labor organization, the industrial union, as against the other, the craft union.[68]

To show the lengths to which an overly sympathetic attitude toward one or another form of unionism may go, where the administrative discretion is virtually unlimited, reference is made to a memorandum addressed to Mr. Edwin S. Smith, a member of the Board, by David J. Saposs, Chief of the Board's Division of Economic Research, under date of March 30, 1937.[69] Mr. Saposs wrote: [70]

> I question the wisdom of a Member of the Board taking sides in the C. I. O.–A. F. L. controversy at the present time, particularly in a written speech. Although my sympathies are well known, I think it is not good policy for an agency like our Board to *publicly* place itself on record as endorsing the position of one side or another. In that connection I have the following suggestions to make:
>
> If you began your talk with paragraph three on page one, you would not at the outset be placing yourself in a position of criticizing or condemning craft unionism. [Italics supplied.]

That the Congress of the United States felt certain misgivings and no little apprehension as to the administration of section 9 of the National Labor Relations Act, as proposed, is revealed by certain remarks made during debate on that measure in the House. Representative Taber characterized section 9 as "the worst section of the whole bill," [71] saying: [72]

> Where the man does not belong to a union, he can have his job rated at almost nothing by the union promoters.

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[61] Madden, II 550(3).
[62] Supra, Smith and Leiserson.
[63] Green, II 286(3).
[64] Mr. Joseph Ozanic, International Union, Progressive Mine Workers of America.
[65] Ozanic, I 114(2).
[66] Mr. William Green.
[67] Green, II 287(2).
[68] Idem.
[69] Committee exhibit 156–A, I 230–C(2), I 230–FF.
[70] Idem. Smith, I 230–C–(3). Although efforts were made to obtain a copy of the rough draft of the speech which Mr. Smith apparently submitted to Mr. Saposs, Mr. Smith testified that he believed this rough draft to have been destroyed.
[71] I 109(3) ; 79 Congressional Record, p. 9705, 74th Cong., 1st sess. (1935).
[72] Idem.

Appreciating the possibilities of administrative exploitation of the act, Representative Lord said: [73]

> The workers in our factories want to decide for themselves and not have some board to do it for them.

Representative Ramspeck proposed an amendment to section 9 (b) of the act reading, "That no unit shall include the employees of more than one employer." [74] However, it was feared that this limitation would "preclude the power and authority of the National Labor Relations Board to have anything to do with designating a larger unit than one employer's unit." [75]

But Representative Ramspeck replied by stating that this modification would only operate to set up a unit "in which the representatives of the employees are to be selected." [76]

This amendment was adopted by a vote of 127 to 87, and thereafter a compromise was worked out by the conference committee resulting in the present section 9 (b).[77]

Decisive upon the question of alleged administrative disregard of legislative intent is the testimony of Mr. Edwin S. Smith [78] and his attitude as revealed in the criticisms by Mr. Saposs of a proposed speech, as exhibited to this committee.[79]

Emphasizing that this is distinctly a legislative problem is the testimony of Dean Lloyd K. Garrison, former chairman of the old National Labor Relations Board which administered section 7 (a) of the National Recovery Act under Joint Resolution No. 44. Testifying as a witness for the present National Labor Relations Board, he said that no formula which the Board could lay down for the settlement of representation cases would satisfy the proponents of the rival systems.[80] In his opinion, no action that the Board could take in such cases would avoid a barrage of criticism.[81]

As a solution Dean Garrison proposed that the power of the Board to determine the appropriate bargaining unit be removed entirely in cases where there is dispute as to such unit between rival factions. Under his plan, the Board would be prohibited from ordering an election until the contending groups reached an agreement as to the unit appropriate.

The terms of the amendment proposed by Dean Garrison are as follows: [82]

> [Added to Section 9(b)] Provided, however, that where there exists a substantial dispute as to the appropriate unit or units between two or more labor organizations not dominated, interfered with, or assisted in the manner specified in Section 8 (2), having members among the employees concerned, no decision as to units shall be made except in accordance with an agreement between the respective organizations.

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[73] I 110(1) ; op. cit.
[74] Op. cit., p. 9710.
[75] Representative Woods, op. cit.
[76] Op. cit.
[77] I 110(1) ; 79 Congressional Record, p. 9710, 74th Cong., 1 sess. (1935).
[78] Supra, p. —.
[79] Supra, p. —.
[80] Garrison, II 498(3).
[81] Garrison, II 499(1).
[82] II 499(1).

C. DELAY

Frequent criticisms have been made of the great delays that have occurred during the Board's handling of its cases. In view of the serious consequences attendant upon delay in respect to the rights of both workers and employers in all types of cases coming before the Board, it is important that the Congress be informed of the actions of the Board in some of the cases where the criticisms have been especially bitter.

Evidencing the generally prevalent feeling that the Board has permitted too much delay in the handling of its cases is the statement of Board Member Leiserson: [83]

> The greatest weakness in the work of the Board is the delay in handling cases. All the members of the Board are of one mind in believing that the complaints on this account are justified. * * *

1. Representation and consolidated cases

In respect to the delays in cases involving petitions for certification as the bargaining representative (especially where combined with charges of unfair labor practices), the record is replete with instances of vociferous complaints from all parties, unions, respondents, their respective counsel, and interested regional directors [84] (sometimes because the regional director was in favor of the petitioning union).[85]

A statement (October-November 1937) by the regional director of the most important field office of the Board is most emphatic in its condemnation of these dilatory tactics of the Board: [86]

> (1) We have tried an experiment in the New York Region in the past seven weeks. By assigning one Trial Examiner and one attorney exclusively to representation cases we have cleaned up 23 cases and now in most of these we wait for an order of election or for certification following the election.
>
> (2) *There seems to me no adequate explanation for the wait that has ensued* for example since the elections held on October 12th in the Acme Scaling, Huron Stevedoring, and Grace Line elections among the shore gang. It seems to me that a certification is a simple matter of filling in a form which a stenographer could do. Strikes threaten to break loose on the piers because of this delay. *Surely more prompt action on a certification could be given.* Why must we wait 15 days—and more—for so simple a detail. [Italics supplied.]

And in the same vein, this same regional director said (in a memorandum of November 8, 1937, referring to the *General Leather Products case*): [87]

> This hearing was held on Sept. 24, 1937. Apparently some of your new lawyers got around to reading the record only very recently, for although I have been yelling for an order of election, on November 3rd I get a request for information that is either already in the record or else is not involved in the question before us.
>
> *Honestly, if we can't speed up our whole R procedure* [representation proceedings], *both in the field and in Washington, we might better go out of business.* This is a perfectly simple case—no A. F. L. vs. C. I. O. complications—but just a stubborn and pigheaded employer—yet we wait, wait, wait for a simple little election order and apparently we are going to wait some more. 44 days have elapsed since the hearing! [Italics supplied.]

[83] Leiserson, I 6(3). Dr. Leiserson also had this to say about delay: "I think instructions ought to go out that representation cases should not be delayed for the purpose of getting consent agreements. We are in a position now to handle such cases here quickly, and delay like that in the present case can be avoided if the case is submitted here as soon as the first effort to get a consent arrangement fails." Committee exhibit 42, I 39(2).

[84] See, for example, Leiserson, I 23(2); Ozanic, I 135(1, 2); committee exhibit 428, I 536(3); committee exhibit 399, I 524(2).

[85] Committee exhibit 429 I 537(2).

[86] Committee exhibit 289, I 338(3).

[87] Committee exhibit 405, I 526(2).

That this was a source of real concern to certain representatives of organized labor is revealed in the testimony of William Green, president of the American Federation of Labor, before the committee.[88] He characterized this procedure of the Board as calculated to injure and destroy the American Federation of Labor unions,[89] and supported his contention with the citation and discussion of the following cases:

Johns-Manville Co.[90]—The C. I. O. petitioned for certification in January 1938, and the American Federation of Labor followed suit in February 1938. These cases were consolidated for hearing, the Board issued a direction of election, and the election was held in July 1938. *One day prior to the election*, the C. I. O. filed a second amended charge of unfair labor practices against the employer, and the complaint was issued in July and hearings on the case begun. In August 1938, the representation case was consolidated with the complaint case, thereby forestalling the certification. No intermediate report was submitted by the trial examiner until more than a year after the original petition for certification. On April 10, 1939, dismissal of the allegations in the complaint was recommended, and the Board did not dismiss the charges until November 1939 when the A. F. of L. union was finally recognized as the exclusive bargaining agent.[91]

The Electric Vacuum Cleaner Co.[92]—This case began on April 22, 1937, with a petition and charge. In July 1938, some 15 months later, the Board rendered its original decision, holding that the closed shop contract between the company and an American Federation of Labor union was not to be enforced and directing that an election should be held at some unspecified future date which the Board was to designate. The company and the A. F. of L. union petitioned the circuit court of appeals to obtain a review of the Board's order some 7 months after the Board's decision, during which period no enforcement of its order had been sought of the circuit court of appeals by the Board.

During the pendency of this appeal, the Board (April 1939) vacated its original order. Some 2 months later (June 1939) the Board issued its proposed order and direction of election, which stated that the Board would hear more testimony on the appropriate bargaining unit if this was requested by the American Federation of Labor union, and directed an election to be held at some time (not designated) in the future. In December 1939, 33 months after the original petition was filed, the Board got around to taking final action, which included the invalidation of the closed-shop contract and the dismissal of the petition as to the appropriate bargaining unit and time of election. The decision then

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[88] Green, II 281–289.
[89] Green, II 282(2).
[90] Green, II 282(3)–283(2).
[91] To rebut the charges made by Mr. Green, Mr. Madden made a statement endeavoring to justify the delay in the *Johns-Manville Co. case*. The principal point in Mr. Madden's testimony seems to be that "the record was about 3,000 pages long. The case involved, among other things, allegations of discrimination in some 30 individual cases." Committee exhibit 1012, III 159(2, 3).
However, a review attorney testified that in a case where the transcript was of about the same length (Hobbs-Wall), after spending approximately forty-five minutes with the members of the Board explaining the 3,000-page record, he was instructed to prepare a draft decision for the Board. Strong, II 300(1).
[92] Green, II 283(3)–284(1).

invited the filing of a new petition to determine the appropriate bargaining unit,[93] after the case had been pending nearly 3 years.

Bishop & Co.[94]—In this case an election was held in December 1937,[95] which was won by the American Federation of Labor. The C. I. O. filed charges of unfair labor practices in March 1938, and an intermediate report recommending the dismissal of the complaint was issued a year later. The Board did not issue its decision certifying the A. F. of L. union until June 10, 1939.[96]

Consumers Power Co.[97]—The petition for representation and certification was filed in January 1938 by an A. F. of L. union. On February 2, a C. I. O. union filed charges of company domination against an independent union that also filed a petition. Two months later, on April 4, 1938, the Governor of Michigan wrote that the Detroit regional director of the National Labor Relations Board had promised him an election would be held within 60 days and that the Washington office had promised prompt hearing on the C. I. O. charges. The controversy had a background of C. I. O. sit-down striking activity and was therefore considered unusually urgent. The hearing on the complaint issued on the C. I. O. union's charges began on May 12, 1938, almost 3½ months after such charges were filed, and extended to July 28, 1938. Thus, the total time between the filing of the charges and the close of the hearing was about 6 months. The process of review by review attorneys then began, and on November 8, 1938, some 9¾ months after the petition was filed, the Board's order directing an election to be held within 45 days was issued. Two subsequent amendments to that order extended that time 20 additional days. The election finally took place on January 10, 1939, with the C. I. O. receiving a plurality of the votes cast. Although a runoff election has been directed by the Board, it has not as yet been held.[98]

The American-France Line Co.[99]—This case involved a petition for certification filed by an A. F. of L. union in June 1937. A C. I. O. union filed charges of unfair labor practices in September 1937. Elections were held in October 1937, but the Board refused to count the ballots because of the existing unfair labor-practice charges. (Why the election

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[93] In his statement concerning this case, Mr. Madden agreed that the dates given by Mr. Green were substantially correct. Mr. Madden evidently considers Mr. Green an ingrate for mentioning this case, as in the course of his statement he said :

"* * * Mr. Green is in the position of claiming that the Board's delay in disposing of the case has resulted in discrimination against the A.F.L. even though the very delay has permitted the A.F.L. to continue to receive the benefits of a contract which the Board has found was illegally entered into." Committee exhibit 1012, III 161(3).

[94] Green, III 284(1, 2).

[95] There is no indication as to when the petition for election was filed, and Mr. Madden did not deem it necessary to indicate that date in his attempted explanation of delay before the committee. Committee exhibit 1012, III 160(1, 2).

[96] In this case, the Board did not follow its own policy laid down in the *Bamberger-Reinthal case* and the *American-France Line case* (Madden, III 208(2)), which was followed in the *Godchaux Sugars, Inc., case* where the interval was 18 months from the date of filing of petition to its final dismissal. Agger, I 452(3), and committee exhibit 382, I 458(3).

Mr. Madden's statement concerning this case dealt principally with a misstatement of a date on the part of Mr. Green. Accepting the correction, it still took from December 1937 to June 1939—about 18 months—for the A.F. of L. union to receive its certification as bargaining representative. Committee exhibit 1012, III 160(1, 2).

[97] Green, II 284(2). Mr. Madden's statement concerning this case was principally to the effect that in view of the circumstances, the petition and subsequent charges had been handled with unusual expedition. Committee exhibit 1012, III 160(3)–161(2).

[98] Gill, III 168(2).

[99] Green, II 284(3).

was held if the ballots were not to be counted, does not appear.) Fourteen months after the filing of the charges of unfair labor practices, the regional director declined to issue a complaint on those charges. On January 16, 1939, the Board dismissed the A. F. of L. petition, because the time elapsed since it was filed made the results of the election worthless.[1]

To quote one of the members of the Board itself,[2] Dr. Leiserson, in regard to delay in ordering an election in a consolidated representation case that had been pending for almost 2 years at the time of his statement, in a memorandum dated September 18, 1939:[3]

Ansley Radio Corp., C–535, R–798

I will participate in this case only to the extent of ordering a dismissal.

The draft decision shows utter confusion, and the reason for this is that the whole case was improperly analyzed at the beginning. Had an election been held in October 1937, when the petition was filed, it would have been possible to settle all the real issues in dispute. *At this late date* [almost two years] *an election is impossible*, as the draft decision points out, and the reinstatement of the two men becomes absurd because of our belated discovery that the contract provided for a closed shop. [Italics supplied.]

In connection with the delay situation in representation cases, Mr. Madden made the following comment:[4]

* * * at the present time there is no serious problem of delay in representation cases. In other words they are handled substantially currently, and are turned out promptly and as rapidly as they come in. * * *

At the request of Chairman Smith of the committee, Mr. Fahy, general counsel of the Board, submitted a letter[5] stating that approxi-

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[1] Mr. Madden's statement concerning this case pointed out that Mr. Green had made an error in his statement of a date. No explanation is given as to why the election was held in October 1937, when the ballots were not counted because of the pending charges. The reason given for the delay of the regional director in refusing to issue a complaint on the C.I.O. charges was that hearings before the Commerce Department would have a bearing on the question of eligibility to vote. This explanation is interesting in view of the fact that an election had been held without such questions being decided. Further, the connection between questions of eligibility of voters and charges of unfair labor practices against the respondent is difficult to see. Committee exhibit 1012 III 160(2, 3).

[2] Committee exhibit 33, I 26(1, 2).

[3] This same Board member, Dr. Leiserson, reiterated his objections to this characteristic and unnecessary delay in representation cases in a memorandum dated October 14, 1939:

"Isthmian Steamship Co., R–847

"This case is almost 2 years old. The hearing was held in June 1938. *I do not think we ought to order an election without knowing what the situation is now with respect to representation.* If the case was held up because of a pending complaint, we should know whether the complaint case has been finally settled." [Italics supplied.] Committee exhibit 34, I 26(2).

Also in another memorandum dated August 19, 1939:

"Burroughs Adding Machine Co., R–1343

"Why should it take until August 19 to get this decision out when the oral argument was held June 2 and we decided what to do shortly thereafter?

"Two months' unnecessary delay in an election case." Committee exhibit 37, I 27(2).

Here Dr. Leiserson complains about an unnecessary delay of 2 months; the committee hates to think of his state of mind had he been on the Board during the pendency of the cases mentioned above.

[4] Madden, II 545(3).

[5] The letter—committee exhibit 1011, III 146(1, 2)—follows:

FEBRUARY 12, 1940.

Hon. HOWARD W. SMITH,
Chairman, Special Committee to Investigate the National Labor Relations Board, House Office Building, Washington, D.C.

MY DEAR CONGRESSMAN SMITH: In response to your request, I am giving you herewith the data as to the number of cases pending before the Board and its regional offices on January 1, 1940.

On January 1, 1940, there were pending before the Board and its regional offices,

mately one-third of the complaint cases and one-fourth of the representation cases now in course of determination had been before the Board for more than a year. It is quite understandable that unions, employers, and regional directors have been bitterly critical of this delay, which has made the promotion of industrial peace much more difficult than would otherwise have been the case.

The committee is convinced that the determination of a representation dispute that has been pending for too long a period of time by any decision except dismissal does not recognize the fact that the labor situation involved may have so changed as to render any other determination worthless. Indeed, the Board itself has recognized this to a certain degree by generally dismissing representation cases that have been pending 18 months of more.[6] It is the committee's belief that a final determination of representation disputes should be had within a reasonable time [7] from the filing of the petition for certification as the collective bargaining representaive, if workers are to receive the benefits of the act as intended by the Congress.

2. Complaint cases

Mr. Green called attention to a series of complaint cases illustrative of delay:

National Casket Co.[8]—Charges were filed in October 1935 but the final decision was not rendered until April 1939. Judge Swann, speaking for the Third Circuit Court of Appeals of the United States, could not refrain from commenting on "the astonishingly long time that has elapsed between the charges * * * and the presentation of the case in court." [9]

Moore-Lowry Flour Mills.[10]—After a delay of 2½ years, the secretrary of a local union wrote to President Green, under date of January 15, 1940, pointing out that the case had been before the Board during this entire period. To date, the case has not been decided.

3,010 cases.[a] Of these 3,010 cases, 2,161 involved charges of unfair labor practices ("C" cases), and 849 involved petitions for certification of representatives ("R" cases).
Of the 2,161 "C" cases pending 763 were pending for 1 year or more.[b]
Of the 849 "R" cases pending, 212 were pending for 1 year or more.[b]

Yours sincerely,

CHARLES FAHY, *General Counsel.*

CC: Hon. Arthur D. Healey.
Hon. Abe Murdock.
Hon. Charles A. Halleck.
Hon. Harry N. Routzohn.
Edmund M. Toland, Esq.

[a] This figure does not include 425 cases in which decisions and orders have been issued but compliance has not yet been secured, and 159 cases in which decisions and directions of elections have been issued but certifications are awaiting the election results.

[b] A large number of these cases are in the various stages of formal proceedings before the Board.

[6] See Madden, III 208(2).

[7] See Amendments, 9(c).

[8] Mr. Madden attempted to explain the long delay in part by stating: "The long interval there was occasioned by the fact that the Board was awaiting the Supreme Court rulings on constitutionality of the Act, which came in April 1937." Madden, III 159(2).

[9] Green, II 282(3).

[10] Green, II 283(2).
Quoting Mr. Madden: "This is simply one of the many cases in which regrettable delay has occurred." Committee exhibit 1012, III 159(3).

Lansing Co.[11]—This case was presented July 13, 1937, and an intermediate report was issued by the trial examiner in November 1938; but the Board had taken no acton by January 16, 1940.[12]

Mount Vernon Car Manufacturng Co.[13]—Charges were filed May 21, 1937, hearings were held from October 18 to December 18, 1937, and on December 22, 1937, a "snatching" order was issued removing the case to the Board. Final order of the Board was entered February 21, 1939.

D. RULES OF EVIDENCE

Criticism has been directed to the last part of section 10(b) of the National Labor Relations Act, which provides: [14]

> In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling. * * *

and that part of section 10(4) which states:

> The findings of the Board as to the facts, if supported by evidence, shall be conclusive.

Board Chairman Madden testified that he saw no need for any amendment that would change section 10(b).[15] He pointed out that eminent authorities on the rules of evidence were of the opinion that such rules, which relate ordinarily to the exclusion of evidence, should be relaxed rather than tightened, especially where the trier of facts is a body of experts in a particular field (as an administrative agency).[16] Mr. Madden agreed, though, that it took a great degree of experience, ability, and learning in the law, plus a great detachment and a marked ability to dissociate irrelevant material from the issues in order to be free from the dangers of allowing the introduction of prejudical material.[17]

However, Mr. Madden testified that, during the Board hearings, some trial examiners endeavored to adhere to the strict rules of evidence, while others showed a much wider latitude in the admissibility of evidence. Such divergence of methods and inequality in treatment ill comports with a fair and impartial administration of the act.

In regard to hearsay evidence, Mr. Madden testified that while he did not believe pure hearsay should be admissible, hearsay should be admitted where it is corroborated by "other testimony." [18] The committee was not informed whether this "other testimony" would have to be legally competent.[19]

The following statements by appellate courts concerning certain of the cases decided by the Board reveal the unpleasant consequences attendant upon the Board's interpretation of these provisions.

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[11] Green, II 284(1).
Quoting Mr. Madden: "It, of course, makes no difference to the Board whether a case is of a C.I.O. or A.F. of L. case." Committee exhibit 1012, III 159(3)–160(1).
[12] According to a letter addressed tot the president of the American Federation of Labor by the secretary-treasurer of the Michigan State Federation of Labor. Green, II 284(1).
[13] Harris, II 241–II 249(1).
[14] 49 Stat. 449 (1935).
[15] Madden, II 402–403.
[16] Madden, II 403(1, 2).
[17] Madden, II 405(3).
[18] Madden, II 404(2, 3).
[19] Idem.
[20] 306 U.S. 332 (1939).

1. N. L. R. B. v. Sands Manufacturing Co.[20]

The Supreme Court of the United States, in setting aside the Board's order in its entirety, said:

We think the conclusion has no support in the evidence and is contrary to the entire and uncontradicted evidence of record.

* * * Save for one item of evidence, this is all the record disclosed to indicate that the discharge and replacement of the men arose from a discrimination against them for union actviities and the exercise of the right of collective bargaining. Manifestly it is not only insufficient to sustain any such conclusion but definitely refutes it.

2. N. L. R. B. v. Columbian Enameling & Stamping Co.[21]

The Supreme Court of the United States in this case also set aside the Board's order, stating:

Judged by these tests or any of them we cannot say that there was substantial evidence * * *, or that there is support in the evidence for the Board's conclusion that on or about July 23, 1935, respondent refused to bargain collectively with the Union.

3. N. L. R. B. v. Empire Furniture Co.[22]

The Court said:

We understand fully that the Board is not bound strictly by technical rules of evidence. We do not understand that this is a caveat to arbitrarily substitute surmise, suspicion, and guess for proof.[23]

4. N. L. R. B. v. Idaho-Maryland Mines Corporation [24]

A similar statement was made by the court:

The finding is not supported by evidence * * *.

* * * * * * *

On the basis of these unproved and, we think, unprovable assertions, the Board asks us to hold the National Labor Relations Act applicable to respondent. This we decline to do so.

5. Standard Lime & Stone Co. v. N. L. R. B.[25]

The Court remarked:

We find no substantial evidence in the record to show that the Standard Lime & Stone Company violated the rights conferred upon employees or failed to perform the obligations imposed upon employers by the National Labor Relations Act.

6. N.L.R.B. v. Thompson Products Co.[26]

The Court declared:

To hold that Casterline was discharged because of his union activities is to give weight to an inference in the teeth of uncontradicted evidence to the contrary. * * * There is a scintilla of evidence in this case that the union activities of the three employees were factors in their discharge but, from their own

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[21] 306 U.S. 292 (1939).
[22] 107 F. (2d) 92 (C.C.A. 6th, 1939).
[23] The Court went on, in the same case:
"The petition of the board for enforcement of its order must be denied because its findings of unfair labor practices are unsupported by substantial evidence. Sensible of the great social purpose of the National Labor Relations Act, courts have gone far to uphold rulings of the administrative agency charged with its enforcement, doubtless in the belief that over-zealousness must in time yield to expertness in weighing evidence and that time and responsibility must develop a judicial approach to disputed issues in a tribunal which, though administrative, exercises to such large extent the high judicial function. It may not be amiss—indeed, it may be in the highest public interest tot observe that the beneficent purposes of the Act will not be effectuated by decisions such as that presently reviewed."
[24] 98 F. (2d) 129 (C.C.A. 9th, 1938).
[25] 97 F. (2d) 531 (C.C.A. 4th, 1938).
[26] 97 F. (2d) 13 (C.C.A. 6th, 1938).

testimony, the employer would have been justified in discharging them had there been no effort to organize its employees in a Union. The Board's finding in this case tends to destroy the purpose of the Labor Relations Act and to promote discord between employer and employee instead of harmonious and joint discussion of their difficulties, and is not sustained by substantial evidence.

After the Board's decision in this latter case had been set aside by the Sixth Circuit Court of Appeals, the assistant general counsel in charge of the Enforcement Division for the Board wrote a memorandum severely criticizing certain of the Board's findings in the case.[27] No more sweeping indictment of the Board's fact-finding delinquencies can be devised than is contained in this memorandum, and for this reason pertinent sections are set out:

The latter finding would appear to be a pure fabrication. There is no evidence whatever that respondent in any way sought or arranged for reports concerning the Union meeting. The fact that Hays, a nonsupervisory employee in the personnel office, attended the meeting proves nothing.

* * * * * * *

The result on this score is the appearance in the Board's decision of a finding, almost plucked out of thin air, *sufficient to convict the Board of the charge of prejudice of which it is consistently accused.* [Italics supplied.]

The committee recommends that this memorandum be read in its entirety as illustrative of the basis of Board "findings."

The primary purpose of presenting these few excerpts from judicial opinions (which could be multiplied)[28] and the material obtained from the Board's files, is to exemplify the serious menace of irresponsible admission and weighing of hearsay, opinion, and emotional speculation in place of factual evidence.

Demonstrating the attitude of the chief trial examiner in regard to the "juggling" of evidence, is his statement to a trial examiner:[29]

I think, therefore, that you may have unduly limited Board counsel in the presentation of evidence bearing on the connection between respondents and the new A.F. of L. Union [since it is contrary to Board policy to allow 8 (2) charges to be filed against member unions of either of the two large national unions] and I suggest that hereafter you bear in mind the fact that 8(1) is a very broad section which would permit a broad latitude in the introduction of evidence and that the absence of an allegation of violation of 8 (2) bears chiefly on the question of remedy and not on the question of admission of evidence.

Fully as significant of this policy is the statement by William J. Avrutis, attorney for the Board, to Mr. Robert B. Watts, associate general counsel, under date of February 10, 1938:[30]

By the use of leading questions in the proof of back-pay claims we fully doubled the number of claims we were able to put in daily * * *.

One trial examiner even went so far as to consider as evidence statistics concerning the homicide rate in a particular county, which information he had requested and which was prepared for him by the Board's Division of Economic Research, although the record discloses that such information had no possible bearing upon the issues of the particular case which he was then trying.[31]

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[27] Committee exhibit 832, II 688–689.
[28] See, for example, *N.L.R.B.* v. *Lion Shoe Co.*, 97 F. (2d) 448 (C.C.A. 1st, 1938), *Ballston-Stillwater Knitting Co., Inc.* v. *N.L.R.B.*, 98 F. (2d) 758 (C.C.A. 2d, 1938), and *N.L.R.B.* v. *Sands Manufacturing Co.*, 96 F. (2d) 721 (C.C.A. 6th, 1938).
[29] Committee exhibit 566, II 117(3).
[30] Committee exhibit 782, II 343(2).
[31] Whittemore, II 89(1).

At least one trial examiner seems to be of the opinion that the policy of the Board with respect to the admission of hearsay evidence is subject to criticism.[32] The same examiner admitted [33] that to a "great extent" it is true that trial examiners—

> * * * have to admit a lot of evidence that is hearsay or rumor, has no real competency in proving any issue involved * * *.

Such a lax application of the rules of evidence has a decided tendency to burden the record and color decisions of inexperienced examiners and review attorneys. A closer adherence to evidentiary requirements by the Board is desirable to overcome inequalities of treatment, to reduce expense to respondents and to restore or create public confidence in the work of the Board.[34]

E. PROCEDURAL DEFECTS DISCLOSED IN THE ACT

1. Employer petitions

One of the most frequently asserted criticisms of the Board's policy with respect to representation cases is that no provision had been made in the Act and there is no adequate provision in the Board's rules and regulations to allow an employer to petition for an election in those instances where he was confronted by conflicting claims of rival unions each claiming a majority.[35] In many situations the Board's policy rather contributed to than minimized or prevented industrial strife, particularly where neither contending union petitioned the Board for an election and certification. All too frequently the employer was left at the mercy of the rival unions.

As an attempted answer to this criticism, the National Labor Relations Board on July 14, 1939, published its second series of rules and regulations pursuant to section 6 (a) of the act. Article II, sections 1, 2 (b), and 3, of these new rules and regulations make provision for employer petitions in instances where two or more unions each claim to represent a majority.

However, this change does not go to the root of the matter. Under the present act the question of employer petitions is purely discretionary, and there is nothing to prevent the Board from reverting to its original position that employer petitions would not be entertained. Even under the change in the Board's rules and regulations allowing such petitions, the Board is not required to act on such petitions even when all the conditions have been complied with by the employer. Because the matter of employer petitions remains entirely within the dis-

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[32] In his testimony before the committee he stated:
"I used the words, 'I must hear it [hearsay evidence]; I wish I didn't have to.' Of course that was purely, sir, a personal opinion and perhaps a selfish reaction, because I have had to spend a great deal of time listening to hersay evidence which in my opinion in many instances didn't amount to anything, when all was said and done, and I don't like to have a protracted hearing, sir, because from my experience, one of the worst things that can happen to a dispute in this kind is a long-winded hearing." Davidson, II 63(3).

[33] Davidson, II 63(3).

[34] In committee exhibit 290, I 341, 342(3), Mrs. Elinore Herrick, regional director of the Board's New York office, recommended to the Board that the rules of evidence be adhered to and that Congress should strike out that part of section 10(b) of the act that states rules of evidence are not controlling. In her testimony before the committee Mrs. Herrick stated that she had changed her mind. Herrick, I 343(2). On being questioned, she admitted that if she were to be tried by a court, she would want the rules of evidence applied. Herrick, I 346(1).

[35] Cf. hearings, before the Committee on Education and Labor, United States Senate, 76th Cong., 1st sess: throughout which frequent and critical reference was made to this policy of the Board.

cretion of the Board, regardless of the change in the Board's rules and regulations, it is essential that the rule be crystallized in order to prevent the Board from setting up or taking away at its whim a right that in view of its importance, must be established.

Most significant is the opinion of Mr. Justice Stephens, of the United States Court of Appeals for the District of Columbia, in the *Fur Workers' Union* (C. I. O.) v. *Fur Workers' Union* (A. F. L.) *and H. Zirkin and Sons, Inc.*,[36] refusing to indulge in judicial legislation:

> Where, under the language of a statute, the intent of Congress is plain, it is the duty of the courts to apply the statute as it stands, even if the consequence is hardship or injustice * * *. Such argument of hardship must be addressed to Congress in respect of the possibility of an amendment of the National Labor Relations Act in such a manner as will give to employers a right to invoke the jurisdiction of the Board for a settlement of disputes concerning rights of representation. It would be, in our view, clear judicial legislation, in which we have no right to indulge, for the court to give effect in this proceeding to the argument in question * * * ["that while the employer has a substantive right to carry on his business, he lacks a legal remedy for protecting the same against injury through the struggle of competing unions, even though he be indifferent as to the choice of his employees between them;"]. The Supreme Court has held * * * that the one sidedness of the Act is a matter of Congressional policy which does not invade constitutional limitation.

The "substantive right" of the employer to carry on his business must be protected by the insistence upon the right of employers to invoke the jurisdiction of the National Labor Relations Board in representation cases, where an election to determine the representatives of its employees is necessary for protection of employer and employees, and where such a right in no way interferes with the rights of employees to collective bargaining. A protection of this right should be afforded by making it mandatory upon the Board to allow employer petitions instead of leaving this to the administrative discretion of a Board which, despite repeated urging, did not see fit to grant such a right, even at its discretion, until 4 years after its creation.

Not only did the Board wait until 4 years after its creation to grant employers the right to petition in representation cases, but since the amendment of the Board's rules and regulations to allow such a petition, the Board has held but one election as a result of an employer petition.[37] It is obvious that this change was brought about only as a result of strenuous and justifiable criticism. The fact that the granting of this right is still discretionary and hedged about with numerous restrictions by Board regulations, and that only one election based on an employer's petition has been held, makes it clear that specific provision should be made in the law to assure this right to employers in proper cases. This the committee has attempted to do.

Of course, this employers' right to petition should be limited strictly to the class of cases where two or more rival unions are seeking to organize a plant and the employer in such circumstances is unable to recognize either without being in danger of committing a violation of the act.

[36] 105 F. (2d) 1, (U.S. Court of Appeals, D.C., 1939.)
[37] Madden, H 650(1).

2. Issuance of subpenas

The regulation of the National Labor Relations Board dealing with the issuance of subpenas has been severely criticized.

Article II, section 21, of the Rules and Regulations of the National Labor Relations Board, providing for the issuance of subpenas to respondents, reads in part:

> Applications for subpenas may be filed by any party prior to the hearing with the Regional Director. The Regional Director may grant or deny the application, or may refer it to the Trial Examiner, who may grant or deny the application. Such applications shall be timely, and shall specify the name of the witness and the nature of the facts to be proved by him, and, if calling for documents, must specify the same with such particularity as will enable them to be identified for purposes of production.

No more complete indictment of this broad discretionary power and its attendant injustices can be found, than is contained in the opinion of Judge Major in the *Inland Steel Co. case:* [38]

> The fact is, the rule [Article II, sec. 21, of the Board's Rules and Regulations] was not applied to counsel for the Board and, therefore, he was not required to file such application. When petitioner raised the question early in the hearing, counsel for the Board stated: "That the rules and regulations do not provide that the Board must apply to itself for subpenas; that to construe the rules in that manner would be ridiculous; and that for both of those reasons the practice is that the Board does not apply to itself for subpenas."
>
> Assuming that counsel for the Board correctly appraised the situation, and we think it did, it discloses the unfairness of the procedure employed * * *. The further assumption that the ruling of the Trial Examiner was in compliance with the Board's rule, does not improve the situation—it merely shows the rule itself is unfair and discriminatory.
>
> Under the procedure followed, petitioner was required to make application for subpenas, not to the Examiner or a Regional Director, but to the Board or a member thereof in Washington, specifying the "name of the witness and the nature of the facts to be proved by him." How the Board in Washington, or a member thereof, could be in a position to determine the materiality of "the nature of the facts to be proved," especially where the issues were as numerous and complicated as they were in the instant case, it is difficult to understand. Waiving aside this thought, however, a burden was placed upon one side which did not exist as to the other in the matter of obtaining witnesses. The situation may be aptly stated thus: Petitioner, in order to obtain a subpena, was required to present to its opponent an application therefor with notice as to what it expected to prove by the witness desired to be subpenaed. Thus, it was within the discretion of the Board (the prosecutor, if not a party) to determine when process should issue in favor of the one to be condemned.
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> * * * * * * *
>
> It is further argued by the Board that petitioner's complaint is without merit because there is no showing that evidence favorable to it was excluded. This argument begs the question. We are not now considering the extent to which petitioner was prejudiced, but whether it was, by such procedure, deprived of a substantial right, or whether the procedure employed placed it at a disadvantage in contrast with its opponent. It is also argued that the rule is reasonable because petitioner, under Section 10(e) of the Act, has a right to make application to this court to adduce additional evidence. This argument also is not tenable. Such provision has no bearing upon what we regard as an unreasonable and unfair restriction upon petitioner's right to the process of subpena.

The court's accusation of unfairness and unreasonableness in this instance was not directed to any misuse or improper application of the Board's rule covering issuance of subpenas, but rather was directed to the rule itself. The committee cannot refrain from questioning

[38] 109 F. (2d) 919 (91940).

whether the Board demonstrates itself to have been content with observance of the formalities of due process, without regard to the accomplishment of substantial justice.

With reference to that portion of the Board's regulation, "such applications (for subpenas) shall be timely," an instance appearing in the record is set forth in this report. In a memorandum [39] dated October 27, 1937, a regional director had this to say with respect to the Board's control of the subpena power:

> The strict control by the Board of the subpena power has created needless friction. Recently, an employer requesting a subpena on Monday, received it on Wednesday after the hearing had closed. He was more than a trifle indignant. It is suggested that the Regional Attorney and Director be given more discretion than heretofore on this point.

This incident throws light upon the Board's interpretation of "timely."

While the Board displays at all times extreme reluctance [40] to issue subpenas to respondents, nonetheless, with respect to subpenas issued for its own purposes, the Board has apparently not been too scrupulous in the use of its discretionary power. In the case of the *National Labor Relations Board* v. *Eastern Footwear Corporation*,[41] the Board sought an order from the district court to compel respondent to produce certain of its books in response to a subpena issued by the Board. The Board stated that these books were required for the purpose of developing jurisdictional facts, i.e., the interstate character of the respondent's business. The court, however, learned that this point had already been conceded by the company, and that therefore the production of the books became unnecessary. It was held that the company was within its rights in refusing to comply with the subpena, and therefore the Board's petition was denied. In view of the practice of the Board in this respect, the committee deems it essential that an amendment should be adopted clearly guaranteeing to all parties to the litigation the right, which no one challenges, to have prompt and equal process for obtaining their witnesses.

F. NECESSARY CLARIFICATION OF POLICIES OF THE ACT

1. Collective bargaining

The Board's insistence upon what it calls "good faith" in collective bargaining, an element nowhere to be found in the wording of the act, has resulted in its requirement of counterproposals from the employer. As an example of the Board's position in this matter, in its Third Annual Report (p. 97) it is said:

> * * * And the Board has considered counterproposals so important an element of collection bargaining that *it has found the failure by the employer to offer counterproposals to be persuasive of the fact that the employer has not bargained in good faith.* [Italics supplied.]

An examination of the cases involving this question of "good faith" indicates a determination on the part of the Board to compel employers to negotiate agreements.[42] The Board's interpretation leaves

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[39] Committee exhibit 290: Herrick, I 343(1).

[40] An examination of the telegrams sent by the Chief Trial Examiner to trial examiners, discloses that in numerous cases and almost without exception respondent's applications for subpenas were ordered to be denied. Committee exhibit 580.

[41] *Labor cases* CCH par. 18108.

[42] Third Annual Report of the National Labor Relations Board, pp. 96–100, and cases cited therein.

no doubt that the best evidence from the Board's point of view of "good faith" in negotiations is the actual making of an agreement.[43]

This construction on the part of the Board is directly contrary to the congressional intent in the passage of the act, as illustrated by statements repeatedly made by the sponsors of the measure on the floor of the House and Senate at the time that it was under consideration. Evidently the Board in reaching its conclusions neglected to consider the congressional debates preceding the adoption of the measure. For the guidance of the Board in its future interpretation of this section, we quote the following extracts from the Senate and House debates.

Senator Wagner, who sponsored the bill in the Senate, made the following statement:[44]

* * * It does not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him. The very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met.

In the same vein, the Senator further stated:[45]

* * * The law does not require any employer to sign any agreement of any kind. Congress has no power to impose such a requirement. An agreement presupposes mutual consent. The law merely requires that an employer bargain collectively with his workers, which means that he shall receive their representatives and engage in a fair discussion in the hope that terms may be voluntarily agreed upon by both sides without recourse to strife.

Senator Walsh, also an ardent advocate of the measure, made the following statements:

Let me say that the bill requires no employer to sign any contract, to make any agreement, to reach any understanding with any employee or group of employees.[46]

* * * * * * *

A crude illustration is this: The bill indicates the method and manner in which employees may organize, the method and manner of selecting their representatives or spokesmen, and leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. The bill does not go beyond the office door. It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary and with that sacredness and solemnity to a voluntary agreement with which both parties to an agreement should be enshrouded.[47]

* * * * * * *

Let me emphasize again: When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into, and the bill does not seek to inquire into it. It anticipates that the employer will deal reasonably with the employees, that he will be patient, but he is obliged to sign no agreement; he can say, "Gentlemen, we have heard you and considered your proposals. We cannot comply with your request"; and that ends it.

There is no effort in that respect to change the situation which exists today. All employers are left free in the future as in the past to accept whatever terms they choose.[48]

All the section does is to designate the agency to negotiate on behalf of the employees, with whom the employer must deal. He does not have to accept

[43] Idem.
[45] Quoted in *Inland Steel Co.* v. *N.L.R.B.* (109 F. (2d) 9, 24 (1939).
[44] 79 Congressional Record, 7571, 74th Cong., 1st sess. (1935).
[46] 79th Congressional Record, p. 7659, 74th Cong., 1st sess. (1935).
[47] Id., p. 7659.
[48] Id., p. 7660.

any particular contract with them, but he must bargain with them in a bona fide effort to reach a mutually satisfactory agreement.[48]

In the House of Representatives Congressman Welch, of California, then and now a member of the Labor Committee, made this statement:

It does not require an employer to sign any contract, to make any agreement, to reach any understanding with any employee or group of employees.[50]

Not only has the Board misconstrued the act to the extent of virtually forcing the employer to make an agreement, but it has gone further and, in the absence of any authority of the act whatsoever, has held that such an agreement, when reached, must be reduced to writing and signed, and that the refusal of the employer to do so was a violation of the act in that it was a refusal to bargain in good faith.[51] While the circuit court of appeals in two cases[52] sustained the Board's position requiring a written contract, in the well-considered case of *Inland Steel Co.* v. *National Labor Relations Board*,[53] where the requirement of a written contract was a vital issue before the court, the court specifically and flatly held that there was nothing in the act requiring a written agreement and that the Board in so construing it exceeded its authority. The court in that case said:[54]

Notwithstanding that the Act does not "compel any agreement whatever" the petitioner was found to have violated Section 8 (5) of the Act because of its refusal to enter into a signed agreement * * *, and was affirmatively directed to embody any agreement reached in a signed agreement. We do not think that the Act contemplates such a requirement and if we are right in this conclusion, it follows that the order of the Board in this respect is invalid.

It is submitted that an examination of the congressional debates prior to the passage of the act evinces on the part of the sponsors of the bill a definite intent not to impose either requirements of counter-proposals or signed agreements or the making of any agreement.

2. Freedom of speech

Since the right to freedom of speech has long been regarded as one of our most fundamental constitutional guaranties, it is necessary to make certain that the act as written, and administered, shall not lead to any impairment of that right.

With reference to this question, at least one member of the Board entertained serious doubts as to the validity of the Board's practice in making the distribution of a pamphlet containing adverse criticism of the Board the basis for an unfair labor practice charge. Attached to a draft decision admitted into evidence during the testimony of a review attorney,[55] the following appears:[56]

The attached pages were redrafted in accordance with the request of Donald Wakefield Smith (former Board member). It is his opinion that the quotation appearing in the original draft should be omitted as a matter of policy, due to the possibility of distortion, and a conclusion being drawn that the Board had used Hoffman's speech as a basis for an unfair labor practice. Unless the clari-

[48] Id., p. 7672.
[50] Id., p. 9711.
[51] See *Matter of St. Joseph's Stockyards Co.*, cited N.L.R.B. Third Annual Report, p. 102.
[52] *Jeffrey-De Witt Insulator Co.* v. *N.L.R.B.*, 91 F. (2d) 134 (C.C.A. 4th, 1937); *Art-Metal Construction Co. case* (C.C.A. 2d), decided February 26, 1940.
[53] 109 F. (2d) 9 (C.C.A. 7th, 1940).
[54] Idem.
[55] Raymond Compton.
[56] Committee exhibit 756, II 302(1).

fying statement is added that "it is evident from the pamphlet itself, etc., * * *" which properly places the emphasis upon distribution by an employer.

The Board has taken the position that the truth or falsity of a statement made by an employer is immaterial.[57]

Indicative of the extent to which the Board has gone in determining that certain expressions of opinion on the part of employers constitute bases for the finding of unfair labor practices, are the following few examples:

A statement that "there is no law in the world that would force the company to sign a closed-shop contract;" [58] a speech by an employer informing his employees of rights under the act in which the employer remarked that he would be pleased to bargain collectively with a "group of your fellow workers;" [59] the condemnation of sit-down strikers as "a small minority preventing all employees from working." [60]

The Board has held that even though the employer expressed his opinions pursuant to a request made by his employees, that fact does not excuse him if the Board finds the statements made to be violative of the act.[61]

Even where judicial review of an administrative interpretation limiting the right of freedom of speech is possible, it is too often defeated by the cost involved in an appeal to the courts. The constitutional guaranty should not be limited in its efficacy and protection only to those who have the necessary funds to prosecute an appeal in the courts.

In the *National Labor Relations Board* v. *Union Pacific Stages, Inc.*,[62] respondent's superintendent made the statement that if he had a son he would advise him not to join the union. Some other alleged statements somewhat critical of unions were denied. Although the Board found the existence of an unfair labor practice, the court refused the Board's petition except as to the requirement of posting of cease-and-desist notices. Said the court:

> It is difficult to think that congress intended to forbid an employer from expressing a general opinion that an employee would find it more to his advantage not to belong to a union. *Had Congress attempted so to do, it would be in violation of the First Amendment.* * * * The right of workers to organize freely must be conceded. It is a natural right of equal rank with the great right of free speech protected by the Constitution. But the right of the workers to organize is not destroyed by expressions of opinion of the employer or employee such as referred to above. The case is different where the employer makes use of threats to prevent organization. [Italics supplied.]

At the present time, considerable comment has been occasioned by the decision of the Board in the *Ford Motor Company case*, C–398, wherein a finding was made that certain pamphlets distributed by the respondent alleging that the company regarded the membership of its employees in the United Automobile Workers of America with disfavor, constituted an unfair labor practice. In support, the Board relied on *Virginia Railway Company* v. *System Federation No. 40*,[63]

[57] *Armour and Co.*, 8 N.L.R.B., No. 1100, and other cases.
[58] *Adams Bros. Salesbook Co.*, 17 N.L.R.B., No. 88.
[59] *Fanny Farmer Candy Shop, Inc.*, 10 N.L.R.B., 288.
[60] *General Motors Corp.*, 14 N.L.R.B., No. 8.
[61] *Cudahy Packing Co.*, 17 N.L.R.B., No. 18.
[62] 99 F. (2d) 153.
[63] 300 U.S. 515.

National Labor Relations Board v. *Falk Corporation*,[64] and *Virginia Ferry Corporation* v. *National Labor Relations Board*.[65] These cases seem to suggest that the limitation upon the exercise of the right of freedom of speech lies in the attempt by the employer, through an antagonistic attitude to coerce (because of the master and servant relationship) his employees in their determination to be represented for collective-bargaining purposes. A nice sense of balance is essential to a fair determination of what is truly coercive under these circumstances.

In its proposed amendment to section 8 (1) of the Wagner Act, the committee gave careful attention and consideration to the insurance of the fundamental rights guaranteed to labor under the Wagner Act and was impelled by a desire in no way to impair these rights or to render nugatory in any degree the provisions of section 8, defining unfair labor practices on the part of employers. Therefore the committee in its earnest purpose to preserve the rights of labor, added to its proposed amendment guaranteeing freedom of speech the proviso "that such expressions of opinion are not accompanied by acts of coercion, intimidation, discrimination, or threats thereof." It is noteworthy that in so doing, the committee goes much further in its restrictions upon these expressions of opinion than does the similar amendment proposed by Senator Walsh,[66] and endorsed by the American Federation of Labor which adds to the guaranty of freedom of expression the proviso, "that such expressions of opinion are not accompanied by acts of discrimination or threats thereof." [67] The proposed amendment of this committee adds the words "coercion" and "intimidation" which additions it is believed will thoroughly effectuate the purposes of the act.

3. Definition of "Agricultural Laborer"

The committee has given much thought to the confusion which exists in respect to the jurisdiction of the National Labor Relations Board over the agricultural labor field in spite of the prohibition contained in section 2 (3) of the present National Labor Relations Act. By interpretation of the term "agricultural laborer," it has been contended that the Board has tended more and more to encroach upon the rights of the traditionally free American farmer.[68]

Feeling that an urgent necessity exists for clarification of this problem and a prevention of infringement beyond congressional intent, the committee recommends the adoption of its amendment to section 2 (3) of the National Labor Relations Board, stating:

> For the purpose of this subsection, "agricultural laborer" means any person employed in performing "agricultural labor" as that term is defined in section 1426 (h) of the Internal Revenue Code as amended.

Section 1426 (h) of the Internal Revenue Code provides as follows:

> Agricltural labor. The term "agricultural labor" includes all services performed—

[64] 102 F. (2d) 383.
[65] 101 F. (2d) 103.
[66] S. 1000, 76th Cong., 1st sess.
[67] Idem., sec. 8(e).
[68] See *North Whittier Heights Citrus Association* v. *National Labor Relations Board* (C.C.A. 9th) 109 F. (2d) 76; and *Matter of Growers and Shippers Vegetable Association of Central California and Fruit and Vegetable Workers Union of California, No 18211*, 15 N.L.R.B. No. 39.

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.

(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

(3) In connection with the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in section 15 (g) of the Agricultural Marketing Act, as amended [12:1141 j], or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes.

(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.'
consumption.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

Part IV. Conclusions and Recommendations

Although the investigation of this committee is far from complete, the disclosures relative to the administration and operation of the National Labor Relations Act thus far developed have convinced the committee that in order to furnish a measure of immediate relief for the wrongs that are being perpetrated daily upon industry, labor and the general public, some remedial legislation during this session of Congress is imperative.

Your committee is not unmindful of the fact that irrespective of what amendments it may propose to the act, they will be labeled immediately by certain selfish interests as intended to emasculate and to destroy the purposes for which it was enacted. To refute this fallacy, we urge the Congress to study carefully this report and our recommendations for amendment. Such impartial study will reveal beyond question that this committee has proposed no amendment to the act which in any wise—directly, indirectly or remotely—adversely affects its fundamental purposes. The committee has, however, after many days of careful, painstaking consideration of the act and its administration and operation, recommended amendments which, if adopted, will make the act more effective in achieving the fundamental purposes for which it was devised. In suggesting these amendments, the committee reaffirms its belief in the right of employees to organize and bargain collectively through representatives of their own choosing and in the obligation of government to protect that right. The

ultimate responsibility for any amendment of the act is upon the Congress.

Taking the proposed amendments as they appear, following the act section by section, they are as follows:

PREAMBLE

To section 1, which is merely the preamble to the act, two minor amendments are suggested. First we propose to strike out "The denial by employers of the right of employees to organize, and the refusal by employers to accept the procedure of collective bargaining, lead to strikes," etc., and to make it read: "Failure to bargain collectively leads to strikes," etc.

The reason for this deletion is to change that portion which constitutes a general indictment of all industry. It has no place in the act and no effect other than to encourage strife and ill feeling between employer and employee, a condition directly contrary to the stated purposes of the act.

The second amendment to section 1 proposes to strike out the language, "by encouraging the practice and procedure of collective bargaining." This language has apparently created the impression in some quarters that Congress has declared it to be its policy to encourage the practice and procedure of collective bargaining. We conceive it to have been the purpose of Congress to encourage and protect the right of employees to self-determination, and we do not believe that the act was intended as a mandate to the National Labor Relations Board to undertake to unionize the workers of the country whether they desired it or not.

It has been suggested that such a change might affect the constitutionality of the act, section 1 having been referred to by the Supreme Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Company*, in declaring the act constitutional. However, the Supreme Court did not indicate in this case, or in the other Labor Board cases decided the same day, April 12, 1937, that this language was in any way material or necessary to the determination of the constitutionality of the act. After all, the preamble is not at all necessary in determining the legal rights of anyone under the act.

It is therefore obvious that this proposed change in the statute could not in any degree affect the constitutionality of the act. This is, perhaps, another example of the usual attempts to thwart or forestall any amendments which have the purpose of consolidating labor's rights without sacrificing those of the community as a whole. The cry of unconstitutionality is easily voiced, makes a general appeal, but is most difficult to substantiate.

REINSTATEMENT OF EMPLOYEES

Section 2 (3) is proposed to be amended to provide that the term "employee," so far as reinstatement by the Board is concerned, shall not include any employee who a "preponderance of the testimony shows has willfully engaged in violence or unlawful destruction or seizure of property in connection with any unfair labor dispute or unfair labor practice involving such employer or in connection with

any organizational activities of a labor organization among employees of such employer."

This provision is taken from the language used in the case of the *National Labor Relations Board* v. *Fansteel Metallurgical Co.* (306 U.S. 240) where the Supreme Court of the United States reversed the findings of the Board in which the Board undertook to justify and put its stamp of approval on the anarchistic sit-down strikes. We have taken the language in almost identical terms from the decision of the Supreme Court where it said, through Mr. Chief Justice Hughes:

> We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct, to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employers' property, which they would not have enjoyed had they remained at work. * * *

We think it highly desirable to include this amendment because, notwithstanding the above-quoted language of the Chief Justice in the *Fansteel case*, the Board subsequently in the case of *McNeely & Price Co.* v. *National Labor Relations Board* undertook, in the face of the *Fansteel decision*, to force reinstatement of employees who had engaged in a sit-down strike. And had the respondent in the later case (*McNeely & Price*) failed or been financially unable to enforce his rights by an appeal to the United States Circuit Court of Appeals (where the Board was reversed in no uncertain terms), the sit-down strike would still have the stamp of approval of the National Labor Relations Board. It is obvious from the *McNeely & Price case* that the Board has not receded from its original position.

It has been suggested that this provision undertakes to deprive employees of reinstatement who may have engaged in minor or accidental violence. The amendment has no such purpose and cannot be so construed. The recommendation is only that willful violence shall preclude reinstatement. "Willfulness" necessarily implies a type of conduct which is not subject to a characterization as "minor or accidental." The rights of employees to reinstatement, under this provision, would be determined by the Board, and the Board would determine whether, by a preponderance of the evidence, the person had actually been guilty of willful violence.

It might also be noted, at this point, that many persons and organizations throughout the country have recently been urging that labor should be put on trial in respect to various provisions of the act. For instance, it has been strongly urged that any labor organization, having invoked the provisions of this act and having thereby obtained a contract with an employer, should forfeit its rights under the act upon breaching its said contract. It has also been strongly urged that the organizing activities of labor organizations should be curbed in view of the restraint placed upon employers. None of these suggestions has been recommended by this committee.

The above provisions in respect to reinstatement of employees who would engage in willful violence or unlawful destruction or seizure of property, is the only added responsibility or obligation placed upon employees by these recommended amendments. This amendment,

by and large, simply writes the doctrine of the *Fansteel case* into the law. The committee is not aware of any general dissatisfaction with the doctrine of that case.

DEFINITION OF AGRICULTURAL LABORER

In the same section the committee recommends an amendment to read as follows:

> For the purposes of this subsection "agricultural laborer" means any person employed in performing "agricultural labor" as that term is defined in Section 1426 (h) of the Internal Revenue Code as amended.

The section of the Internal Revenue Code referred to is that section in which Congress in the social security law has already specifically defined the term "agricultural labor." We deem this desirable because, in the act, Congress expressly excluded agricultural laborers from its definition of "employees." As shown in the body of this report, the Board has attempted to extend its jurisdiction to fields specifically denied it by the Congress. To remove the uncertainty respecting agricultural labor, we deem this amendment desirable for the language of that section of the Internal Revenue Code, as drafted by the House Ways and Means Committee, is clear. Having been adopted by the Congress, this language will secure through the proposed amendments the advantage of uniformity for the act. It will afford manifest protection to the farmer from predatory encroachment by the Board.

COLLECTIVE BARGAINING

The committee suggests an amendment to section 2 defining specifically the term "collective bargaining" as follows:

> The terms "collective bargaining" and "bargaining collectively" shall be deemed to include the requirement that an employer or his representatives shall meet and confer with his employees or their representatives, listen to their complaints, discuss differences, and make every reasonable effort to compose such differences, but shall not be construed as compelling or coercing either party to reach an agreement or to submit counterproposals.

This proposed amendment does not in any way jeopardize the rights of employees either to self-organization, representation, or collective bargaining, but merely adopts in concerte form the language of Mr. Chief Justice Hughes in the *Jones & Laughlin* case, wherein he said:

> The Act does not require agreements between employers and employees. It does not compel any agreement whatever * * *. The theory of the Act is that *free* opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel.

In answer to certain questions from the floor during the debate on the National Labor Relations Act, Senator Wagner, one of its sponsors, said:

> It (the Act) does not compel anyone to make a contract of any kind if no terms are arrived at that are satisfactory to him (the employer).

This statement is certainly emphatic enough to dispel any doubt as to the clear intent of Congress.

Senator Walsh, another sponsor, in answer to a question from the floor said:

Let me say that the bill requires no employer to sign any contract, demand any agreement, to reach any understanding with any employee or group of employees.

In Congress, Representative Welch of California reiterated the same thought in these words:

It does not require an employer to sign any contract, to make any agreement, to reach any understanding with any employee or group of employees.

How language so sweeping could have been disregarded by the Board so entirely is beyond the committee's comprehension and is only to be explained by the Board's usual flaunting disregard of employer rights.

Experience of employers and employees before the Board since the *Jones & Laughlin decision* has demonstrated that the Board has not receded from its original position that the consummation of an agreement is virtually the only method by which the employer can demonstrate his good faith in the collective bargaining process. Time and again, the Board has found an employer guilty of violating section 8 (5) (refusal to bargain collectively) because he actually failed to reach an agreement, although he was not only willing to negotiate but did negotiate with his employees or their representatives.

In a recent and famous case involving the Board, namely, *Inland Steel Co.* v. *National Labor Relations Board* [109 F (2d) 9 (1940)] the United States Circuit Court of Appeals (Seventh Circuit) in a well-considered opinion, from which the Board has not yet dared to take an appeal, specifically held, what is obviously true, that there is nothing in the act compelling the employer to enter into a written contract with his employees or their representatives. This committee expresses no opinion as to whether such an agreement should be in writing.

SEPARATION OF FUNCTIONS

There is no criticism of the Board that has been more consistent, on the part of litigants and the courts, than the failure to separate its administrative and judicial functions, which separation is the very cornerstone of our whole democracy. Consequently, the committee recommends most emphatically the adoption of its amendment to section 3 (a) of the act, which creates an entirely separate board entrusted solely with the judicial function of this agency. There is proposed in section 3 (d) an Administrator (following the pattern of some of the more recently created administrative bodies) whose function will be to carry on the investigative and prosecuting functions entirely separate and distinct from the judicial function of the Board proper. Thus there could be none of that confusion and intermingling of functions that has so completely characterized the present Board. Thereby the committee believes that a true separation, in accordance with a genuine regard for the democratic principle, will be achieved.

The Administrator, of course, will have to be a competent and trustworthy public official, appointed by the President and confirmed by the Senate, for in his discretion lies the determination of which cases are worthy of prosecution. Objection has been made to this provision on the ground that it will lie within his discretion as to whether complaints shall be preferred for violation of the act. This is true. It is equally true that that discretion now rests with the Board. The

committee has no reason to anticipate that the Administrator, whoever is appointed, will not honestly perform his functions. However, in order to safeguard this feature to the utmost, the amendment provides that he shall hold office without term, so that if he should fail to perform his proper duties he may be instantly removed by the President. This power of removal does not exist as to the present Board, the members of which hold office for specified terms.

The objection that the initiation of proceedings rests in the discretion of this Administrator is an objection equally tenable with respect to our whole judicial system, both State and Federal, in the prosecution of criminal cases, which always rests in the discretion of the prosecuting officer.

By recommending the creation of a new three-man National Labor Relations Board, limited in its scope to the exercise of the judicial function, and the conduct of elections for the choice of representatives for collective bargaining, the committee has sought to relieve the Board of a considerable volume of its present work which would devolve upon the Administrator. It is the conviction of the committee that a good three-man Board could accomplish the work in a satisfactory manner, thereby obviating any necessity for a larger personnel.

In providing that not more than two Board members shall belong to the same political party, there is preserved the general bipartisan character of many of our public bodies.

Let it be clearly understood, however, that in creating a new three-man Board and the Administrator, this committee has not taken from the act one single power now contained therein. There has been no subtraction of authority or power from the act. There has been only a division of power between the Board and the Administrator. This committee believes such a division in the best interests of the public, and particularly of those whose rights, under this act, are to be protected.

It certainly is fair to assume that the Administrator, to be appointed under the proposed amendments, would be diligent and aggressive in the prosecution of the rights of employees. The decisions of the Board in cases prosecuted by the Administrator and his staff would not be tinged with the semblance of partiality, which is implicit in any arrangement under which the judge is also the prosecutor.

The committee is further constrained to suggest that numerous interests and persons throughout the country have contended that persons sought to be protected by the act should provide their own counsel and do their own prosecuting, thereby achieving a separation of the prosecuting from the judicial functions by doing away with the prosecution functions. The committee did not accept such suggestions, believing that the Government, having undertaken by law to protect the rights of workers to organize and bargain collectively through representation of their own choosing, must assume the primary responsibility of enforcing such law. That such enforcement will be more effective, if this amendment is adopted, is the considered judgment of the committee.

STATISTICAL WORK

Section 4 of the act now contains the following provision:

> Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work) where such services may be obtained from the Department of Labor.

As indicated in the body of this report, the present Board, notwithstanding the prohibition contained in the present act, has built up a Division of Economic Research consisting of 14 economists with their attendant clerical aid, involving an annual salary expenditure of $73,000. The Division of Economic Research has engaged in activities (referred to in the body of this report) deemed by our committee not only unnecessary but highly improper.

FREE SPEECH

Section 8(1) provides that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." This section has been construed by the Board as a mandate to close the employer's mouth, in dealing with his employees, to the extent of penalizing him for even the most casual remarks concerning union activities. The lengths to which the Board has gone in construing the word "interference" in its attempt to restrain the constitutional right of free speech, have been so extreme as to meet with universal condemnation. The present policy of foreclosing the most innocent communication between employer and employee is inexcusable and indefensible.

The American Federation of Labor traditionally has been the outstanding champion of the right of freedom of speech over the years, because it has realized that its most effective legitimate weapon lay in that constitutional guaranty. This organization has had the wisdom to see and maintain that if the right of free speech is encroached upon in one direction, it is only a matter of time and opportunity before it is curtailed in other directions. Therefore the American Federation of Labor, in its time-honored championship of this right, has proposed and advocated an amendment to this section of the act.

Your committee, after many hours of deliberation, decided to further restrict the A.F. of L. amendment. That proposal prohibited expression of opinion by employers only when accompanied by acts of discrimination or threats thereof. The committee feels that expression of opinion involving intimidation or coercion should also be prohibited. Therefore, the amendment of the American Federation of Labor, as modified, prohibits coercion or intimidation as well as discrimination; and as thus modified, the amendment reads as follows:

SEC. 8. It shall be an unfair labor practice for an employer—(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *, but nothing in this section or in this Act shall be construed or interpreted to prohibit any expressions of opinion with respect to any matter which may be of interest to employees or the general public provided that such expressions of opinion are not accompanied by acts of coercion, intimidation, discrimination, or threats thereof.

EMPLOYER PETITIONS

The committee has found a most overwhelming and unanimous criticism directed to the interpretations the Board has given section 9(a). The consistent refusal of the Board to entertain employer petitions for the certification of the collective-bargaining representative, where a dispute exists between two rival labor unions, led to situations where the employer, although entitled as a matter of right to strive to earn a living by engaging in business, and not engaged in any labor

dispute with his employees, was unable to make effective this right because neither the Board nor the courts would grant him relief (the act not providing for recourse to the courts unless the Board had made a final order). This, the committee believes, shows a very real necessity for the adoption of the amendment to section 9(a), which would enable the employer, as a matter of right conferred by legislative mandate, to petition and compel the Board to certify the appropriate bargaining unit whenever a controversy existed between rival unions, thereby correcting this grievous deficiency in the present statute.

It might be argued that in the new regulations promulgated on July 14, 1939, the Board, yielding to the tempest of vociferous and reiterated criticism, finally seemingly changed its policy by permitting employers to file petitions for elections in a very limited class of cases. The practical operation of the new regulations only serves to demonstrate the true character of the Board's pretended change of policy: Only one employer petition has resulted in an election being held!

APPROPRIATE BARGAINING UNIT

In order to remove many of the evils attached to the present system of the Board undertaking to select for the workers the unit appropriate for collective bargaining, the committee proposes to amend section 9 of the act to take this power from the Board and return it to the workers, where it rightfully belongs. This is to be accomplished through the requirement that when two or more petitions for certification as the collective-bargaining representative have been filed and the bargaining units claimed in such petitions are conflicting—

the Board shall make a finding to that effect and shall not have any power to determine the unit appropriate for the purposes of collective bargaining until such representatives have by written agreement settled the dispute between them as to the appropriate unit.

This proposed amendment was substantially embodied in the testimony before the committee of Dean Lloyd K. Garrison, former chairman of the old National Labor Relations Board. While Dean Garrison used the term "substantial dispute" in this connection, the committee prefers to define these rights, rather than leaving it to administrative discretion, in view of recent experiences with that form of discretion as exemplified by the record and this report. A substantial dispute has been defined specifically in the proposed amendment as one where the employees or representatives representing employees constitute not less than 20 percent of the employees in the bargaining unit claimed to be appropriate for the purpose of collective bargaining, allege:

(*a*) That a controversy has arisen among the employees in the unit so claimed as to who have been designated their representative or representatives for collective bargaining, or whether the majority of the employees in such unit have designated a representative or representatives for collective bargaining; or

(*b*) That a controversy has arisen as to the unit or units appropriate for the purposes of collective bargaining; and

(*c*) They are not members of, or that such representative is not, a labor organization established, maintained, or assisted by any action defined in section 8 as an unfair labor practice.

It will be recalled that in order to aid its determination of the appropriate bargaining unit when confronted by petitions for certification as the bargaining agent by both a craft and an industrial union, the Board adopted a procedure known as the Globe doctrine (wherein a simple majority of the employees in craft units was entitled to express its desire as to the unit appropriate for bargaining purposes, when the Board was in any doubt as to such appropriate unit). The application of this doctrine has resulted in many instances in enabling an industrial union to undermine and eventually destroy a craft union.

The interpretation of the act finally adopted by a majority of the Board frequently resulted in the permanent crystallization of the industrial union at the expense of the craft union. There have been many instances where both personal liberty and property rights have been infringed with reckless abandon under the present administration of the act in the selection of the bargaining unit in direct contravention of the intent of Congress. While shocked at some of these actions on the part of the Board, the courts on numerous occasions have declared themselves powerless to intervene, due to the failure of the present act to provide judicial review of representation cases.

The committee believes that this amendment will afford the necessary protection to craft-union minorities that heretofore have been absorbed by merger or strangulation in larger industrial-type unions.

Further protection is afforded by proposed amendment 9(e), wherein the employer is not obliged to bargain collectively with representatives claiming to represent a majority of the employees of rival unions: nor may the Board intervene to determine the unit appropriate for such purposes until the representatives have by written agreement settled the dispute between themselves as to the appropriate unit in that where rival unions through their representatives are unable to agree in writing on the unit appropriate for bargaining purposes, the Board is deprived of its heretofore arbitrary power to decide in favor of one organization and thereby destroy the other.

To make this proposed amendment completely effective, section 8(5) must be amended so that the refusal to bargain collectively with representatives not certified may not be found an unfair labor practice on the part of the employer.

STATUTES OF LIMITATIONS

To prevent the indefinite nature of proceedings before the Board, the committee has recommended a modification of section 10(b) so that the Administrator may not issue a complaint later than 6 months after the alleged unfair labor practice was committed. This merely codifies the Board's present practice.

The committee, referring to the dilatory tactics that have characterized the administration of the act to the extent of depriving litigants of basic personal and property rights, has recommended amending section 10(c) to include a limit of 6 months on back pay that may be ordered as the result of a discriminatory discharge.

The employer is helpless in the face of the Board's delay, for there is no means whereby he can expedite proceedings under the present act. In several cases, particularly that of the Eagle Picher Co., back-

pay orders amounted to hundreds of thousands of dollars which could easily lead to the ruin of respondents.

Also, a case must be set for hearing not less than 15 days after the service of the complaint; this further protects the rights of litigants.

PREPONDERANCE OF EVIDENCE

There is nothing in the present act authorizing the Board to stray from the usual and customary rules prevailing in trial courts for the weighing of evidence and the amount of proof necessary to establish ultimate facts; the present provision that "rules of evidence prevailing in courts of law or equity shall not be controlling" relates solely to the admission of evidence. In the light of the disclosures of the disregard by review attorneys, trial examiners, and Board members of evidence that should have been given proper weight and consideration in arriving at ultimate facts, the committee recommends an amendment requiring the adherence to the common-law rule that a "preponderance of the testimony" is necessary to establish a violation that has been alleged [sec. 10(c)].

The committee emphasizes that the act makes the findings of fact of the Board conclusive upon the appellate courts; because of this, it is of particular importance that the determination of those findings of fact be made in accordance with well-established procedure.

RULES OF EVIDENCE

The same subsection is to be changed by requiring the proceedings of the Board, insofar as practicable, to be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure for the District Courts of the United States.

In connection with hearings conducted under the National Labor Relations Act, as well as in hearings conducted by other administrative agencies, much criticism has been directed at the failure of examiners to observe the general rules of evidence. It has been frequently charged that rank hearsay, opinions, conclusions, and so forth, have not only been admitted, but have been given probative value in deciding the case. It has also been pointed out that the admission of such evidence unnecessarily extends the time devoted to hearings and unnecessarily adds to the cost of litigation.

The committee recognizes that some latitude, particularly in respect to so-called technical rules of evidence, must be given to administrative agencies charged with determining ultimate facts. But the committee is also firmly convinced that the general rules of evidence, which have been devised throughout all of the history of our jurisprudence, are still the most effective way of arriving at decisions as to ultimate facts. The act, as presently written, provides that the rules of evidence applicable in courts of law and equity shall not be controlling in hearings held by the Board or its agents. The evidence before this committee indicates that such provision has frequently been urged as constituting an invitation to completely ignore the established rules of evidence.

The amendment recommended by the committee does not, in any sense of the word, require that the rules of evidence applicable in

courts of law and equity shall be applied. They are to be applied only "so far as practicable."

Probably the most that can be said for this provision is that it is a suggestion and an invitation to the Board and its trial examiners to observe the rules of evidence so far as they are deemed to be applicable. It is the careful and considered opinion of the committee that the ends of justice will be furthered if more attention is paid to the general rules of evidence.

Section 10(e) is made to read that evidence—

> shall be conclusive unless it is made to appear to the satisfaction of the court (1) that such findings are clearly erroneous, or (2) that such findings are not supported by substantial evidence * * *.

To support this proposed alteration, the committee refers to the Walters-Logan bill, reported favorably by the House Judiciary Committee, which embodies both of these proposals. The Supreme Court of the United States, through Mr. Chief Justice Hughes, in *Consolidated Edison Company of New York* v. *National Labor Relations Board*, and Mr. Justice Roberts in *Washington, Virginia & Maryland Coach Company* v. *National Labor Relations Board*, has declared that the statement in the present act that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive," meant that the evidence relied upon to support the findings of fact had to be "substantial evidence." It is the purpose of this amendment to enact into legislation the principles already approved by the House Judiciary Committee and the Supreme Court of the United States.

COURT REVIEW

In section 10(f) the committee has sought to correct a most serious deprivation of property rights in cases exemplified by "gerrymandering" tactics in determining the appropriate bargaining unit. The decision in *American Federation of Labor* v. *National Labor Relations Board* (the Pacific Coast Longshoremen's dispute) is illustrative; there the United States Court of Appeals for the District of Columbia said:

> The Supreme Court has held in a number of cases that mere preliminary or procedural orders of an administrative body are not reviewable by the Circuit Courts of Appeals * * *.
>
> Accepting, as we must, this restrictive definition and applying it to the case at hand, we hold that, though the decision here was required by the Act to be made and to be made on the evidence and argument after judicial hearing, and though it was definitive, adversary, binding, final, and in this case struck at the very roots of petitioner's union and destroyed its effectiveness in a large geographical area of the Nation, was not an order because the Act did not require it to be made in the language of command * * *.

To supply the lack now made obvious by the courts' decisions, the committee proposes to make the orders of the Board in certification proceedings final, and couched in the language of command, so that they shall be reviewable in the United States circuit courts of appeals as are complaint cases now.

Under the present law as it has been construed by the Board and the courts, no appeal lies in so-called representation cases. Those are the cases in which the unit of representation is either agreed upon or

is fixed by the Board and in which the Board certifies the organization representing a majority of the workers as the collective bargaining agent for those workers.

In the past, and on numerous occasions, organizations of employees have complained about the correctness of certifications made by the Board and have felt themselves aggrieved thereby. It is their contention that appeals to the courts should be granted in such cases in order that they might have the right to bring about a review of the Board's action. The American Federation of Labor has been particularly insistent as to this suggested amendment. The committee is of the opinion that the right of court review should be granted in this type of cases, as well as in the unfair labor practice cases, as was contemplated by the Congress for the protection of the rights of employees guaranteed by this act.

ISSUE OF SUBPENAS

As the record and report show a careless disregard by the Board of the rights of parties to obtain compulsory attendance of witnesses and records material to the case being heard, the committee, seeking to correct this unsatisfactory situation, has suggested an amendment to section 11 whereby subpenas for such witnesses and records are to be issued "forthwith" to all parties. This amendment protects the rights of persons being subpenaed against "fishing expeditions" by permitting objections to the subpenas to be made within 5 days after service thereof, which objections are then to be heard and decided by the Board.

HOWARD W. SMITH,
CHARLES A. HALLECK,
HARRY N. ROUTZOHN.

MARCH 30, 1940.

APPENDIX

A. HOUSE RESOLUTION 258

IN THE HOUSE OF REPRESENTATIVES

JULY 13, 1939

Mr. SMITH of Virginia submitted the following resolution, which was referred to the Committee on Rules

JULY 18, 1939

Referred to the House Calendar and ordered to be printed

JULY 29, 1939

Considered and agreed to

RESOLUTION

Resolved, That a committee of five Members of the House of Representatives be appointed by the Speaker of the House to take testimony, investigate, and report to the House as follows:

1. Whether the National Labor Relations Board has been fair and impartial in its conduct, in its decisions, in its interpretation of the law (particularly with respect to the definition of the term "interstate commerce"), and in its dealings between different labor organizations and its dealings between employer and employee;

2. What effect, if any, the said National Labor Relations Act has had upon increasing or decreasing disputes between employer and employee; upon increasing or decreasing employment and upon the general economic condition of the country;

3. What amendments, if any, are desirable to the National Labor Relations Act in order to more effectively carry out the intent of Congress, bring about better relations between labor unions and between employer and employee, and what changes, if any, are desirable in the personnel of those charged with the administration of said law;

4. Whether the National Labor Relations Board has by interpretation or regulation attempted to write into said Act, intents and purposes not justified by the language of the Act;

5. Whether or not Congress should by legislation further define and clarify the meaning of the term "interstate commerce" and whether or not further legislation is desirable on the subject of the relationship between employer and employee.

The said committee shall recommend to the Congress such changes as they deem desirable in said Act or in the personnel of those administering said Act and shall recommend such legislation as they may deem desirable.

The committee, or any subcommittee thereof, shall have power to hold hearings and to sit and act anywhere within or without the District of Columbia whether the House is in session or has adjourned or is in recess; to acquire by subpena or otherwise the attendance of witnesses and the production of books, papers, and documents; to administer oaths; to take testimony; to have printing and binding done; and to make such expenditures as it deems advisable within the amount appropriated therefor. Subpenas shall be issued under the signature of the chairman of the committee and shall be served by any person designated by him. The provisions of sections 102 to 104, inclusive, of the Revised Statutes shall apply in the case of any failure of any witness to comply with any subpena or to testify when summoned under authority of this resolution.

B. CORRESPONDENCE BETWEEN CHAIRMAN HOWARD W. SMITH AND THE ATTORNEY GENERAL OF THE UNITED STATES

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., March 18, 1940.

HON. ROBERT H. JACKSON,
The Attorney General, Washington, D.C.

DEAR MR. ATTORNEY GENERAL: I have your letter of March 13 in which you indicate that section 859 of the Revised Statutes (U. S. C., title 28, sec. 634) is delaying what would otherwise be prompt enforcement of the criminal penalty of section 6 of the Third Deficiency Appropriations Act, fiscal year 1919 (U. S. C., title 18, sec. 201), against certain members and employees of the National Labor Relatons Board.

In your letter, you purport to quote section 859 of the Revised Statutes, and suggest that, because of this section, your Department cannot resort to the proceedings before our committee to establish a case. In view of the publicity given your letter, I regret that you failed to quote the statute correctly. For your information, section 859 of the Revised Statutes reads as follows:

"SEC. 859. No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. *But an official paper or record produced by him is not within the said privilege.*"

I have italicized the important sentence of the statute omitted from your letter. That sentence which excepts official papers and records from the immunity provisions of the statute has appeared in section 859 since its original enactment.

In view of the fact that the evidence before our committee with respect to lobbying activities of members and employees of the Labor Board consists almost entirely of official papers and records from the Board's files, which are specifically exempted by the sentence of the statute omitted from your letter, I am at a loss to understand why you were not informed about the exception dealing with such matter.

Since your opinion as to the applicability of section 859 was given on the basis of incomplete and inaccurate information as to what that section contained, I am confident that you will now agree with me that you may resort at least to the documentary evidence before our committee and that this evidence constitutes such prima facie evidence of the violation of the statute, in such a great number of instances, as to require your further action.

I thank you for your offer to cooperate in the preparation of a clarifying amendment to the statute prohibiting the use of Government funds for lobbying activities.

That statute makes it unlawful to use any part of a Government appropriation directly or indirectly to pay for any personal service, telegram, telephone, letter, or written matter to influence in any manner a Member of Congress to favor or oppose any legislation or appropriation by Congress.

You will recall that the documentary evidence furnished you by our committee disclosed the use of all of these devices at considerable Government expense in a Nation-wide effort to influence the Senate committee in opposition to any amendment to the Wagner Act in the one instance, and to influence the House committee in any reduction in the appropriation for the Labor Board in the other instance.

Pursuant to your suggestion as to an amendment to the present statute, I have conferred with the experts of the Legislative Counsel's office of the House of Representatives in the light of the evidence above referred to, and I am convinced that the applicability of the present statute to the situation disclosed is clear and explicit.

I believe that, upon further examination of the documentary evidence previously laid before you, you will agree with me that what is needed is not clarification, but enforcement of existing law.

With kind personal regards, I am

Sincerely yours,

———— ————.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., March 13, 1940.

Hon. HOWARD W. SMITH,
House of Representatives,
Washington, D.C.

MY DEAR MR. CONGRESSMAN: Your letter of February 27th referring to activities of certain officials of the Labor Board in relation to the antilobbying provisions of the Appropriation Act of 1919 quite properly says: "Any further action lies solely in the province of" the Department of Justice.

I had initiated a comprehensive investigation of the whole matter by the Federal Bureau of Investigation. This is necessitated by the provisions of title 28, United States Code, annotated, section 634 that: "No testimony given by a witness before either House, or before any committee of either House of Congress shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony." [6]

As this Department cannot resort to your proceedings to establish a case, the determination of a policy should, of course, await the results of our investigation.

Meanwhile, I am impressed with the practical common sense of your own suggestion that: "I think it entirely possible, if the incident referred to does not constitute a violation of the act, that Congress would desire to enact necessary legislation to prevent the continuance of the lobbying activities referred to."

A prosecution under a statute so uncertain in application that your congressional committee sought an opinion of the Attorney General to determine its meaning would, of course, be in the nature of a test case. It might obtain a judicial decision as to the meaning of the statute. But in any event, the final answer of the courts to our doubts as to the applicability of the act will be months or perhaps years away.

Meanwhile Congress could quickly and with certainty rewrite this act to make it say just what Congress wants it to mean and to place upon officials whatever limitations and prohibitions it thinks desirable. Certainly, as to the future, if Congress regards this conduct as improper it should express itself in a statute that will leave neither administrative officials nor courts nor congressional committees in doubt.

I hope you will obtain such a clarification of the act, and if we can properly be helpful, we will be glad to respond.

With best personal good wishes,

Yours very truly,

ROBERT H. JACKSON,
Attorney General.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., February 27, 1940.

Attorney General of the United States,
Department of Justice, Washington, D.C.

MY DEAR MR. ATTORNEY GENERAL: I acknowledge receipt of your letter of the 23d in reply to my letter of February 13, in which I asked for your opinion as to whether there had been a violation of officials of the National Labor Relations Board of section 201 of title 18 of the United States Code relative to the use of Government appropriations for lobbying activities.

I note your statement that, owing to precedents established by your predecessors you are impelled to reply that you could not, with propriety, render an opinion to a committee of Congress on the subject. I have read the precedents referred to in your letter, which seem to me fully justify your position.

It is regrettable that a committee of Congress, conducting an investigation under specific authority with a view to recommending remedial legislation, should not have the benefit of the advice of the chief law officer of the Government as to whether, under an undisputed statement of facts, a criminal statute has been violated.

I think it entirely possible, if the incident referred to does not constitute a violation of the act, that Congress would desire to enact necessary legislation to prevent the continuance of the lobbying activities referred to.

As to the particular incident involved, my committee is charged solely with the duty of investigation and report. Any further action lies solely in the province of your Department.

With kind personal regards, I am

Sincerely yours,

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., February 23, 1940.

Hon. HOWARD W. SMITH,
House of Representatives,
Washington, D.C.

MY DEAR MR. SMITH: I have your letter of February 13, asking if I could with propriety give your committee my opinion as to whether the testimony before the committee established a violation within the prohibition of United States Code, title 18, section 201.

Almost from the beginning of the Government my predecessors have, with great unanimity, taken the position that the statutes prescribing the duties of the Attorney General do not authorize him to render opinions to the Congress or to its committees or Members.

These statutes have not been substantially changed since 1789. As early as 1818, Attorney General Wirt, and as late as October 4, 1939, Attorney General Murphy each ruled that under the statutes Attorneys General are not authorized to give official opinions on questions of law except upon call of the President or the head of an executive department to enable him to decide a question pending in his own department for action. It has been pointed out that the effort to advise both the executive and the legislative branches of the Government would be inappropriate under the doctrine of separation of the power of the two branches, and that, like other efforts to serve two masters, such a practice would likely introduce conflict of duties. Congress has never seen fit to change the statutes so construed, and I take it that in spite of frequent requests for opinions Congress in its deliberate judgment has acquiesced in the meaning so uniformly ascribed to these statutes for well over a century.

I have been constrained to reach this conclusion notwithstanding the Chairman of the National Labor Relations Board, who I understand was furnished a copy of your letter to me, has urged that in responding to you, I fully consider and discuss the legal principles involved.

I think you will agree that the rule, both well established and wise, requires me to answer your inquiry that I could not with propriety render the opinion which you suggest.

With best personal regards,
Sincerely yours,

ROBERT H. JACKSON,
Attorney General.

HOUSE OF REPRESENTATIVES,
SPECIAL COMMITTEE TO INVESTIGATE
THE NATIONAL LABOR RELATIONS BOARD,
Washington, D.C., February 13, 1940.

Hon. ROBERT H. JACKSON,
Attorney General,
U.S. Department of Justice,
Washington, D.C.

MY DEAR MR. ATTORNEY GENERAL: During the course of the hearings before the Special Committee to Investigate the National Labor Relations Board, testimony was introduced of the activities of members of the Board and certain employees, and a question arose as to whether the testimony came within the prohibition of title 18, United States Code Annotated, section 201, which reads as follows:

"Use of appropriations to pay for personal services to influence members of Congress to favor or oppose legislation. No part of the money appropriated by any act shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers and employees of the United States from communicating to Members of Congress on the request of any Member or to Congress through the proper official channels, requesst for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

"Any officer or employee of the United States who, after notice and hearing by the superior officer vested with the power of removing him, is found to have violated or attempting to violate this section, shall be removed by such superior officer from office or employment. Any officer or employee of the United States who violates or attempts to violate this section shall also be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or both (July 11, 1919, c. 6, section 6, 41 Stat. 68.)"

The committee decided that it would like to have your opinion on the evidence before proceeding further with this line of testimony. I was therefore directed to submit the question to you and ask you if you could with propriety give us your opinion on the subject.

It is the opinion of some members of the committee that the actions disclosed by the testimony came within the prohibition of the statute, and that it would not be inopportune to direct attention to the fact for further guidance not only of the National Labor Relations Board, but of other governmental agencies that may be indulging in similar practices.

I am enclosing for your information and consideration the transcript of the testimony of the committee for last Thursday and for today (February 8 and 13); included therein are the exhibits referred to.

Very sincerely yours,

HOWARD W. SMITH,
Chairman.

C. COMPARATIVE TEXT OF THE NATIONAL LABOR RELATIONS ACT AND THE PROPOSED AMENDMENTS

(For the information of the House, changes proposed to be made by the bill (H.R. 8813) in the National Labor Relations Act are shown as follows: Matter in the National Labor Relations Act which is proposed to be omitted is enclosed in black brackets, new matter which is proposed to be added is shown in italics, and matter in which no change is proposed is shown in roman type.)

[PUBLIC—No. 198—74TH CONGRESS]

[S. 1958]

AN ACT To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND POLICY

SECTION 1. The [denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead] *failure to bargain collectively leads* to strikes and other forms of industrial strife or unrest, which have the [intent or the] necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as

to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred [by encouraging the practice and procedure of collective bargaining and] by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicity states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, *and for the purposes of the provisions or section 10 (c) relating to reinstatement by any employer, does not include any employee who a preponderance of the testimony taken shows has willfully engaged in violence or unlawful destruction or seizure of property in connection with any current labor dispute or unfair labor practice involving such employer, or in connection with any organizational activities of a labor organization among employees of such employer. For the purposes of this subsection, "agricultural laborer" means any person employed in performing "agricultural labor" as that term is defined in section 1426 (h) of the Internal Revenue Code, as amended.*

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions o femployment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board created by section 3 of this Act.

(11) [The term "old Board" means the National Labor Relations Board established by Executive Order Numbered 6763 of the President on June 29, 1934, pursuant to Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), and reestablished and continued by Executive Order Numbered 7074 of the President of June 15, 1935, pursuant to Title I of the National Industrial Recovery Act (48 Stat. 195) as amended and continued by Senate Joint Resolution 133 approved June 14, 1935.] *The term "Administrator" means the Administrator of the National Labor Relations Act provided for in section 3(d).*

(12) The terms "collective bargaining" and "bargain collectively" shall be deemed to include the requirement that an employer or his representatives meet and confer with his employees or their representatives, listen to their complaints, discuss differences, and make every reasonable effort to compose such differences, but shall not be construed as compelling or coercing either party to reach an agreement or to submit counterproposals.

NATIONAL LABOR RELATIONS BOARD

Administrator of the National Labor Relations Act

SEC. 3. (a) There is hereby created a board, to be known as the "National Labor Relations Board" ([hereinafter referred to as] *in this Act called* the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as chairman of the Board. *Not more than two of the members of the Board shall be members of the same political party.* Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause. *It shall be the duty of the Board, as hereinfater provided, to hear and determine complaints made and filed with it by the Administrator charging persons with engaging in unfair labor practices, to hold and supervise elections to ascertain representatives who have been selected for the purposes of collective bargaining, to determine units appropriate for the purpose of collective bargaining and to exercise such other functions as are conferred upon it by this Act.*

(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

(d) There is hereby established an Administrator of the National Labor Relations Act. The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 per annum. He shall not engage in any other business, vocation, or employment. The Administrator may appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended, an executive secretary, and such attorneys and regional directors, and may appoint such other employes, with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary. The Administrator may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this subsection may, in the discretion of the Administrator, appear for and represent the Administrator in any case in court. In case of a vacancy in the office of Administrator, or in case of the absence of the Administrator, the President shall designate the offier or employee of the Administrator who shall serve as Administrator during such vacancy or absence. Expenses of the Administrator, including all necessary traveling and subsistence expenses incurred by the Administrator or employees of the Administrator under his orders while away from his

or their official station shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Administrator or by any employee he designates for that purpose. It shall be the duty of the Administrator, as hereinafter provided, to investigate charges of unfair labor practices, to issue complaints if he has reasonable cause to believe such charges are true, to prosecute such complaints before the Board, to make application to the courts for enforcement of orders of the Board, and to exercise such other functions as are conferred on him by this Act. The Administrator shall be made a party to all proceedings before the Board, and shall present such testimony therein and request the Board to take such action with respect thereto as in his opinion will carry out the policies of this Act. Any function which may be exercised by the Administrator may also be exercised by any officer or employee or agency of the Administrator designated by the Administrator for that purpose.

SEC. 4. (a) Each member of the Board shall receive a salary of $10,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board [shall] *may* appoint, without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended, an executive secretary, *a secretary to each member*, and such attorneys [, examiners, and regional directors,] and *and trial examiners*. [shall] *may* appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress. [The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at this direction of the Board, appear for and represent the Board in any case in court.] Nothing in this Act shall be construed to authorize the Board *or the Administrator* to appoint individuals for the purpose of conciliation or mediation [(] or for statistical work [), where such service may be obtained from the Department of Labor].

[(b) Upon the appointment of the three original members of the Board and the designation of its chairman, the old Board shall cease to exist. All employees of the old Board shall be transferred to and become employees of the Board with salaries under the Classification Act of 1923, as amended, without acquiring by such transfer a permanent or civil-service status. All records, papers, and property of the old Board shall become records, papers, and property of the Board, and all unexpended funds and approriations for the use and maintenance of the old Board shall become funds and appropriations available to be expended by the Board in the exercise of the powers, authority, and duties confered on it by this Act.]

[(c)] (*b*) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

SEC. 5. The principal [office] *offices* of the Board *and of the Administrator, respectively*, shall be in the District of Columbia, but [it may meet and] *they may* exercise any or all of [its] *their respective* powers at any other place. The Board may, by one or more of its members or by such [agents or agencies] *trial examiner or examiners* as it may designate, [prosecute any inquiry necessary to its functions] *conduct hearings* in any part of the United States. [A member who participates in such an inquiry shall not be disqualified] *The conducting of any such hearing by a member shall not disqualify such member* from subsequently participating in a decision of the Board in the same case.

SEC. 6. The Board *and the Administrator, respectively*, shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out [the provisions of] *their respective functions under* this Act. Such rules and regulations shall be effective upon publication in the manner which the Board *or the Administrator, as the case may be*, shall prescribe.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have 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.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7, *but nothing in this section or in this act shall be construed or interpreted to prohibit any expressions of opinion with respect to any matter which may be of interest to employees or the general public, provided that such expressions of opinion are not accompanied by acts of coercion, intimidation, discrimination, or threats thereof.*

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) 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: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a), *except that such refusal to bargain collectively with any such representative shall not, unless a certification with respect to such representative is in effect under section 9, be an unfair labor practice in any case where any other such representative (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) has made a claim that it represents a majority of the employees in a conflicting bargaining unit.*

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) 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: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall *upon application under, and subject to the provisions of, subsection (c) of this section,* [decide] *determine* in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, [and otherwise to effectuate the policies of this Act,] the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) [Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, 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]. *Whenever written application is made to the Board under oath—*

(1) by an employer alleging that two or more representatives have each presented to him a claim with respect to the same bargaining unit that it represents a majority of his employees in such bargaining unit, that none of such representatives is a labor organization established, maintained, or assisted by any action defined in section 8 as an unfair labor practice, and that such employer intends to bargain collectively with the representatives designated for that purpose by the majority of his employees in the unit determined by the Board to be appropriate for the purposes of collective bargaining when such representatives are ascertained, or

(2) by employees, or a representative representing employees, of any employer who constitute not less than 20 per centum of the employees in the bargaining unit claimed to be appropriate for the purpose of collective bargaining, alleging (A) that a controversy has arisen among the employees in the unit so claimed as to who have been designated their representative or representatives for collective bargaining, or whether the majority of the employees in such unit have designated a representative or representatives for collective bargaining, or (B) that a controversy has arisen as to the unit or units appropriate for the purposes of collective bargaining, and (C) that they are not members of, or that such representative is not, a labor organization established, maintained, or assisted by any action defined in section 8 as an unfair labor practice.

the Board shall give due notice to interested persons of the filing of such application and set the question for hearing within a reasonable time either in conjunction with a proceeding under section 10 or otherwise. Any interested person may file with the Board an intervening application, which shall be under oath and be in such form and contain such allegations as the Board may by rules and regulations prescribe. If upon the evidence adduced at the hearing the Board finds that the allegations of the application are true and that the question is one affecting commerce, it shall, subject to the provisions of subsection (e), by order determine the unit appropriate for the purposes of collective bargaining, which shall in no case be larger than the largest unit claimed in an application filed by employees or representatives in the proceeding. After determining the unit appropriate for collective bargaining, the Board shall take a secret ballot of employees in the unit so determined and by order certify the name or names of the representatives which a majority of the employees voting have designated or selected as their representative or representaitves for collective bargaining. Such certification shall be effective for one year from the date of the entry of such order.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) Whenever two or more representatives in applications filed in a proceeding under subsection (b) have each alleged with respect to conflicting bargaining units that a majority of the employees therein have authorized such representative to be their representative for collective bargaining, the Board shall make a finding to that effect and shall not have any power to determine the unit appropriate for the purposes of collective bargaining until such representatives have by written agreement settled the dispute between them as to the appropriate unit, or to determine any unit to be appropriate for such purposes which is not specified and agreed upon in such agreement as being appropriate for such purposes. For the purposes of this subsection 'representative' does not include a labor organization established, maintained, or assisted by any action defined in this Act as an unfair labor practice.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the [Board, or any agent or agency designated by the Board for such purposes] *Administrator shall investigate such charge, and if he has reasonable cause to believe such charge is true, he* shall [have power to] issue and cause to be served upon such person a complaint stating [the charges in that respect, and containing a notice of hearing before the Board, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint] *such charge, except that the Administrator shall not have power to issue a complaint stating a charge of any unfair*

labor practice which occurred more than six months prior to the date on which such charge was filed with the Administrator. Upon the filing by the Administrator of such complaint with the Board, the Board shall set the case for hearing before the Board or a member thereof, or before a designated trial examiner or examiners, at a place which the Board shall fix, not less than fifteen days after the serving of such complaint. Any such complaint may, *with the approval of the Board, or with the approval of the member, examiner, or examiners conducting the hearing,* be amended by [the member, agent, or agency conducting the hearing or the Board in its discretion] *the Administrator* at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed [in the complaint] *by the Board.* In the discretion of *the Board, or* the member, [agent or agency] *examiner, or examiners* conducting the hearing [or the Board], any other person may be allowed to intervene in the said proceeding and to present testimony. [In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.] *Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure for the District Courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723–B, 723–C).*

(c) The testimony taken by [such member ,agent, or agency or the Board] *the Board, member, examiner, or examiners* shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon [all] *the preponderance of* the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action *requested in the complaint, which may include* [(including] reinstatement of employees with or without back pay [)], as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time *to the Administrator* showing the extent to which he has complied with the order. If upon [all] *the preponderance of* the testimony taken the Board shall *not* be of the opinion *in the case of any person named in the complaint* that [no person named in the complaint] *such person* has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint *as to such person. No order of the Board or of any court requiring the payment by an employer of money by reason of a finding that such employer has engaged in or is engaging in any unfair labor practice shall require such payment with respect to a period longer than six months, or with respect to a period which when added to any previous period with respect to which such payment was required either by the Board or by any court by reason of the same finding, is longer than six months. In case the testimony taken is taken before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.*

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may, at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it *or by any member, examiner, or examiners thereof.*

"(e) The [Board shall have power to] *Administrator shall at the request of the Board, or may on his own motion,* petition any circuit court of appeals of the United States (including the *United States* Court of Appeals [of] *for* the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the [Supreme Court of] *District Court of the United States* for the District of Columbia) within any circuit or district, respectively, wherein the unfair labor

practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall [certify and] file in the court a transcript of the entire record in the proceeding, *certified by the Board,* including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, [agent, or agency] examiner, or examiners shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts [if supported by evidence] shall be conclusive *unless it is made to appear to the satisfaction of the court (1) that the findings of fact are clearly erroneous, or (2) that the findings of fact are not supported by substantial evidence.* If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, [agent, or agency] *examiner, or examiners* the court may order such additional evidence to be taken before the Board, its member, [agent, or agency] *examiner or examiners* and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which [, if supported by evidence] shall be conclusive *unless it is made to appear to the satisfaction of the court (1) that such findings are clearly erroneous, or (2) that such findings are not supported by substantial evidence,* and [it] *the Board* shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board (*including a final order under section 9*) granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the *United States* Court of Appeals [of] *for* the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the [Board] *Administrator,* and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the [Board] *Administrator* under subsection (e), and shall have the same exclusive jurisdiction to grant to the [Board] *Administrator* such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts [, if supported by evidence,] shall in like manner be conclusive, *unless it is made to appear to the satisfaction of the court (1) that the findings of fact are clearly erroneous, or (2) that the findings of fact are not supported by substantial evidence.*

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the

Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101–115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

INVESTIGATORY POWERS

SEC. 11. [For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation] *For the purpose of any proceeding before the Board, or before a member, examiner, or examiners thereof, or for the purpose of any investigation provided for in this Act—*

(1) The Board, or any member thereof, or any trial examiner shall upon application of the Administrator or of any party to such proceeding, whether before or during any hearing in the case of any such proceedings, forthwith issue to the Administrator or to such party, as the case may be, in the name of the Board, subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board or its duly authorized agent or agents to revoke, and the Board, or such agent or agents, shall revoke, such subpena if in its, his, or their opinion, as the case may be, the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceeding, or if in its, his, or their opinion, as the case may be, such subpena does not describe with sufficient particularity the evidence whose production is required. [Any] *The Administrator or any* member of the Board or any [agent or agency] *examiner or examiners* designated by the Board for such purposes may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the [Supreme Court of] *District Court of the United States for* the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the [Board] *person to whom such a subpena was issued by the Board* shall have jurisdiction to issue to such person *so guilty of contumacy or refusal to obey* an order requiring him to appear before the Board, its member, [agent or agency] *examiner, or examiners, or before the Administrator if the subpena so directs*, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individuals so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(4) Complaints, orders, and other process and papers [of the Board, its member, agent, or agency] *provided for in this Act* may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal

office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post-office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before *the Administrator or before* the Board, its member, [agent, or agency] *examiner, or examiners,* shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the [Board] *Administrator,* upon [its] *his* request, all records, papers, and information in their possession relating to any matter before the Board.

SEC. 12. Any person who shall wilfully resist, prevent, impede, or interfere with *the Administrator or* any member of the Board or any of [its] *their* agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

LIMITATIONS

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

SEC. 14. Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a)), as amended from time to time, or of section 77B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m), as amended from time to time, or of Public Resolution Numbered 44, approved July 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided,* That in any situation where the provisions of this Act cannot be validly enforced the provisions of such other Acts shall remain in full force and effect.

SEC. 15. If any provisions of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 16. This Act may be cited as the "National Labor Relations Act."

THE FOLLOWING SECTION OF THE BILL DOES NOT SPECIFICALLY AMEND THE NATIONAL LABOR RELATIONS ACT SINCE THE MATTERS DEALT WITH IN SUCH SECTION ARE OF ONLY TEMPORARY APPLICATION. IT IS SET FORTH HERE FOR THE INFORMATION OF THE HOUSE

EFFECTIVE DATE

SEC. 13. (a) As used in this section—

(1) The term "old Act" means the National Labor Relations Act in effect prior to the enactment of this Act.

(2) The term "new Act" means the National Labor Relations Act, as amended by this Act.

(3) The term "old Board" means the National Labor Relations Board created by section 3 (a) of the old Act.

(4) The term "new Board" means the National Labor Relations Board created by section 3 (a) of the new Act.

(b) The amendments made by this Act shall take effect on the ninetieth day after the date of its enactment, except that prior to such ninetieth day the President may appoint the new Board and the Administrator, and they may exercise their respective powers under such amendments of employing necessary personnel and making rules and regulations to carry out their respective functions.

(c) Effective as of the expiration of the eighty-ninth day after the date of enactment of this Act, the old Board is hereby abolished.

(d) All orders issued by the old Board and in effect at the time the old Board is abolished shall continue in effect until superseded or revoked by the new Board, or if modified by the new Board, shall continue in effect as so modified, and all such orders may be enforced by the Administrator or reviewed by any person aggrieved thereby in the same manner and to the same extent as if issued by the new Board under the new Act, except that the validity of such orders and the effect given to the findings of fact (including new or additional findings of fact by the new Board) upon which they are based shall be governed by the old Act in the same manner and to the same extent as if this Act had not been enacted. All proceedings and investigations pending before the old Board under section 9 of the old Act at the time of the abolition of the old Board shall be continued by the new Board in the same manner, and shall be subject to the provisions of the new Act to the same extent, as if an application had been filed with the new Board under section 9 (c) of the new Act, and all petitions for such investigations shall within twenty days after the abolition of the old Board, be amended accordingly, or dismissed. Subpenas issued by the old Board under section 11 of the old Act shall remain effective, but the issuance of such subpenas may be revoked by the new Board, and such subpenas may be enforced by the persons to whom they are issued, in the same manner and to the same extent as if issued by the new Board under section 11 of the new Act. No proceeding in any court for the enforcement or review of any order of the old Board shall abate by reason of the abolition of the old Board, but the Administrator shall be substituted as petitioner or respondent, as the case may be, and the validity of such order, and the effect given to the findings of fact (including modified or new findings of fact by the new Board in case the court orders additional evidence to be taken before the new Board) shall be governed by the old Act in the same manner and to the same extent as if this Act had not been enacted. In the case of any proceeding pending before the old Board under section 10 (b) of the old Act at the time of the abolition of the old Board in which a charge has been made but no complaint issued, such charge shall be transferred to the Administrator, and shall be acted upon by him under, and shall be governed by, the new Act in the same manner and to the same extent as if such charge had been made to him under the new Act. In the case of any proceeding pending before the old Board under section 10 (b) of the old Act at the time of the abolition of the old Board in which a complaint has been issued but in which a hearing has not been commenced, the time and place of hearing fixed in such complaint, or such time or place as extended or modified by the old Board, shall be ineffective. The Administrator shall file such complaint with the new Board, and the new Board shall fix the time and place for a hearing thereon in accordance with the new Act. Such proceeding, and every other proceeding pending before the old Board under section 10 (b) or 10 (c) of the old Act at the time of the abolition of the old Board in which no order has been issued shall be governed by the provisions of the new Act, except that in any such proceedings wherein a hearing has been commenced or completed prior to the abolition of the old Board, the rules of evidence prevailing in the courts of law or equity shall not be controling. In the case of any proceeding pending before the old Board under section 10 (b) or 10 (c) if the old Act at the time of the abolition of the old Board wherein an order has been issued and wherein thenew Board directs the taking of additional testimony, and in the case of any proceeding for the enforcement or review of any order of the old Board pending in any court at the time of the abolition of the old Board wherein the court orders the taking of additional testimony before the new Board, the rules of evidence prevailing in the courts of law or equity shall not be controling in the taking of such testimony.

(e) All files, reports, records, documents, papers, and property (including office furniture and equipment) under the control of the old Board shall be distributed, upon the abolition of the old Board, between the new Board and the Administrator in such manner as the President may determine.

MINORITY VIEWS ON THE U.S. CONGRESS HOUSE SPECIAL COMMITTEE TO INVESTIGATE THE NATIONAL LABOR RELATIONS BOARD—PART 2*

April 11, 1940.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. Healey, from the Special Committee to Investigate the National Labor Relations Board, submitted the following minority views

[To accompany H. Res. 258]

THE MINORITY VIEWS OF REPRESENTATIVES ARTHUR D. HEALEY, OF MASSACHUSETTS, AND ABE MURDOCK, OF UTAH, OF THE SPECIAL HOUSE COMMITTEE TO INVESTIGATE THE NATIONAL LABOR RELATIONS BOARD †

FOREWORD

Being unable to concur in the preliminary report of our three colleagues who form the majority of the Special Committee To Investigate the National Labor Relations Board, we have felt constrained to dissent from their recommendations and to file a report which will give Congress a fuller and more accurate picture of our investigation in the hope that it may avert the shattering of important rights conferred upon the wage earners of the United States by the National Labor Relations Act. Believing that this statute is one of the most constructive ever passed by Congress to safeguard the rights of the worker we have felt compelled to point out that the amendments to the National Labor Relations Act proposed by the majority of this committee are not only destructive to vital provisions of the act, but cannot find support in the testimony developed by our investigation.

Throughout some three-fourths of a century labor's struggles to achieve recognition and to secure for the working people of this country better conditions of employment have met with incessant resistance and bitter hostility. Every legislative step in the progress of the labor movement has been achieved only over the bitter and relentless opposition of anti union forces. Some of the blackest pages of American history have resulted from such attempts to stifle collective bargaining, as the use of lock-outs, labor injunctions, blacklists, labor spies, and agents provocateur, which provoke protracted strikes often culminating in violence and bloodshed.

Responding to the rising tide of public indignation based on the realization that a sound program of employer-employee relationships is indispensable to a healthy democratic economy, Congress has

*Seventy-sixth Congress, first session, appointed pursuant to H. Res. 258, to investigate the National Labor Relations Board.

† Footnote references are to the "Verbatim record of the proceedings, of the House Committee Investigating Board and Wagner Act."

striven gropingly in recent years to lay the foundation of a sound and democratic national labor policy. Every step in the evolution of this program has been met with bitter opposition in the part of antilabor elements.

With such a background, therefore, it was hardly to be expected that the enactment of a National Labor Relations Act should meet with immediate general acceptance. Instead, the course of this legislation ran true to form. The Board established by this act was hardly in operation before 58 "legalistic vigilantes" speaking for the Liberty League issued a widely publicized statement to the effect that the National Labor Relations Act was unconstitutional, thereby inciting general defiance of this duly enacted law of Congress. Within a few months, the effective administration of the act was virtually a dead letter so widespread was this fomented defiance and so extensive the multiplicity of injunctive suits.

The validity of the act had scarcely been established by the Supreme Court, however, when its opponents transferred their attack to the legislative branch of the Government demanding the repeal or nullification of statutory provisions without even giving them a fair test. The issues raised by this campaign were so explosive that it was not easy for Congress to consider proposals for amendment in an atmosphere of calm and dispassionate detachment.

It was our opinion, therefore, that in establishing this special committee, Congress intended to have an investigation which would enable it to secure concrete facts upon which it might chart its course of action and thereby remove the problem from the field of acrimonious debate. For that reason we have constantly maintained the position that any expression of opinion by this committee should be based on evidence actually developed through this investigation and that any recommendations made by our committee to Congress are entitled to respect only insofar as they are based on substantial evidence of record.

We desire to acknowledge with gratitude the valuable assistance received by us in the preparation of this report from our respective secretaries, Edmund J. Massello and Ray R. Murdock; and Frederick U. Reel, Department of Labor attorney.

INTRODUCTION

The introduction to the majority report describes at considerable length the procedure before this committee. It states that "it was soon decided that in admitting testimony the committee would seek to follow insofar as possible the rules of evidence prevailing in the district courts of the United States" (III, 362). If the majority means by this to imply that the proceedings before our committee resembled, in any substantial sense, a judicial proceeding, we emphatically reject that implication.

The majority report sets out that in response to its request, the committee received thousands of completed questionnaires from various people throughout the country, that it had access to and analyzed the files of important cases before the Board as well as numerous personnel files, and that it held public hearings from December 11 until February 28 with a brief recess. What the reports fails to state

however, is that the committee made little effort to follow out the mandate of the House that it "investigate and ascertain the facts" which might point the way to describe changes in the National Labor Relations Act.[1] Rather, under the guidance of the general counsel this committee spent many weeks listening to charges and countercharges of unrelated instances of alleged indiscretion on the part of various employees of the Board, rather than focusing its attention on the problems with which the Board was dealing in the administration of the act and the extent, if any, to which the Board or the provisions of the present statute fell short of achieving the objectives so clearly set forth in the preamble of the act.

Instead of continuing to a completion of a thorough and well rounded investigation, the committee abruptly suspended hearings and the majority immediately prepared a draft bill which contemplates the most drastic modifications of the present law. As this report will point out, not only were these findings and recommendations based on an entire lack of substantial testimony, but in many cases there was not even a scintilla of evidence to support them.

A word should be said at this point with regard to one of the introductory paragraphs[2] of the majority's report. Its misleading character is typical of the whole tenor of its recommendations which profess to be moderate and actuated by a desire to "make the act more effective." This paragraph points out that the report of the majority is not as scathing as certain comments by the heads of the two major American labor organizations, the American Federation of Labor and the Congress of Industrial Organizations with respect to the National Labor Relations Board. Lest there be any doubt on this point, however, we wish to emphasize that whether or not the majority's report has been more temperate than the occasional comments of these two labor leaders, it is a matter of public record that both these great branches of organized labor are united in opposition to the drastic and destructive recommendations of the majority of this committee.

Upon the publication of the recommendations of the majority, Mr. William Green, president of the American Federation of Labor, issued a statement in which he said:

> * * * The amendments offered by the Smith committee as a whole strike in a destructive way at vital, fundamental principles of the Labor Relations Act. The American Federation of Labor has repeatedly stated and emphasized its oppostion to any impairment of the fundamental principles of the Labor Relations Act in any way whatsoever. We again urge and insist that its principles and its fundamentals shall be preserved and protected. The Labor Relations Act still remains the Magna Carta of Labor.

On the same day the Congress of Industrial Organizations and its affiliated unions gave out a statement in which the following comment was contained:

> Not a single amendment contained in H.R. 8813 supported by the record of the hearings of the Special Committee to investigate the National Labor Relations Board. No evidence has been produced to justify these emasculatory amendments. The specific proposals are directed toward the destruction of the rights of labor guaranteed by the National Labor Relations Act.

That the instantaneous reaction of organized labor to the committee's proposals was fundamentally accurate is illustrated by reference to certain substantive amendments.

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[1] H. Res. 258, 76th Cong., 1st sess.
[2] III, 361–362.

The majority report indicates that with respect to certain sections of the act the express language of the statute did not necessarily compel the construction placed upon it by the Board even though in many instances such construction has been unheld by the courts. The report points, for example, to litigation with respect to the requirement of a signed contract where the parties have reached a verbal agreement; to litigation over rulings recognizing the right of applicants for employment to be protected from discrimination; and to litigation over the coverage of the act with respect to plants engaged in packing and canning fruits and vegetables.

In most of this litigation the interpretations of the Board were sustained by the courts although the casual reader of the majority report would never infer this from the disapproving language of the majority. We submit, however, that irrespective of what the courts may have reached in these cases and whether or not the majority agrees with the Board or with the courts on the questions of construction involved, the solution to these problems advocated by the majority is, on reason and principle, clearly wrong. If it should be conceded for the sake of argument that the sections of the statute involved in these cases were ambiguous, then we submit that the proper remedy is clarification and not surgery. The amendments recommended by the majority are simply an attempt to carve the act by excluding from its protection large classes of persons who now enjoy its safeguards.

We can only conclude, therefore, that under the guise of "making the act more effective" the majority of the committee seeks to confer immunity upon employers who have violated verbal agreements, refused to hire persons because of union affiliations, or have discharged packing and cannery employees for attempting to organize or belong to unions.

At this point, we also take note of the statement of the majority report that "irrespective of what amendments it [the committee] may propose to the act, they will be labeled immediately by certain selfish interests as intended to emasculate and to destroy the purposes for which it was enacted." [3]

We confess ourselves mystified as to who these "selfish interests" may be.

Upon the submission of the proposed amendments to us, we immediately characterized them as "emasculatory" because they obviously qualified for that description.[4] We are vitally interested in the success of American industry and the welfare of the great masses of those who labor for a livelihood. We believe it essential to the achievement of these objectives that there be preserved the machinery provided by Congress for peaceful and rational settlement of employer-employee disputes. We believe that a recurrence of violent and bitter industrial warfare would result from any substantial impairment of the effectiveness of this act. Numerous prominent labor leaders sharing like beliefs have also labeled the proposed amendments as emasculatory. We cannot believe that the majority of the committee intended to characterize either the minority members of the committee or those labor leaders as "selfish interests." We can only conclude that the implications of the majority's statement represent an attempt to foreclose discussion on the merits of the amendments proposed by the majority.

[3] III, 394.
[4] III, 339—Minority's preliminary statement.

I. SPECIFIC AMENDMENTS RECOMMENDED BY MAJORITY

Preamble

The majority proposes two amendments to section 1, which sets forth the policy to the National Labor Relations Act. Section 1 now reads as follows:

> The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest * * *.

The majority proposes to amend this provision to read:

> The failure to bargain collectively between employers and employees leads to strikes and other forms of industrial strife and unrest * * *.

The reason given for this alteration of one of the basic congressional findings is that it constitutes "a general indictment of all industry. It has no place in the act and no effect other than to encourage strife and ill feeling between employer and employee, a condition directly contrary to the stated purposes of the act." [5] We are not aware of anything in the record which indicates that the effect of this preamble has been to incite employers to "strife and ill feeling." Nor can we credit the majority's statement that the words proposed to be deleted indict "all industry." This provision refers only to those employers who indulge in the practices Congress has sought to prohibit.

Congress found that "denial by employers of the right of employees to organize" leads to strikes. There is no evidence in the record to indicate that Congress was erroneous in the statement and the majority does not so assert.

The reason given for the change is ingenuous, but implicit in the language is the thought that employees and employers are equally to blame for "failure" to bargain. We challenge emphatically this assumption. The history of the labor movement is one of unions and employees constantly seeking recognition and the right to bargain collectively from employers.[6]

The suggested change repudiates the finding of Chief Justice Hughes in ths *Jones and Laughlin case*: [7]

> Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.

If the proposed amendment has not a purpose going beyond the reason given (which is not supported by the record) it does not "make the act more effective in achieving the fundamental purposes for which it was devised." [8]

A second amendment is proposed to section 1 which now reads:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging*

[5] III, 394.
[6] Garrison, II, 494—"There was aggressive and undisputed opposition throughout a very considerable part of industry toward the principle of union organization and toward collective bargaining."
[7] 301 U.S. 1, 42.
[8] III, 394.

the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self organization * * * [Italics supplied].

It is proposed that the underscored language be deleted. The majority states: "This language has apparently created the impression in some quarters that Congress has declared it to be its policy to encourage the practice and procedure of collective bargaining by promoting or requiring unionization." [9]

The intimation that the Board itself has "promoted" or "required" employees to join unions is unwarranted by the record. The language proposed to be deleted clearly means that Congress approves of the collective bargaining process—not that it intends to do the work for the unions.

More clearly than elsewhere, the majority has struck at the central core around which the act revolves. If failure to bargain collectively has resulted in strikes burdening interstate commerce, certainly it is the policy of Congress to encourage a practice which will lead to the mitigation of such industrial disturbances. The entire significance of the act is in that very principle.

The record does not controvert the testimony of the Chairman of the Board or the Commissioner of Labor Statistics on the steady decline since the validation of the National Labor Relations Act in the number of strikes in the United States.[10] Nor has there been any recognition by the majority members of the committee of the service undoubtedly rendered by the Board in averting strikes as a consequence of its regular work.

The majority's plea for this amendment states: [11] "After all, the preamble is not at all necessary in determining the legal rights of anyone under the act." Even were this true, we are unable to discern how this amendment would "make the act more effective."

We are unable to discuss the evidence in support of this amendment, since there is none.

Collective Bargaining

The majority has proposed an addition to section 2 of the act which would define "collective bargaining" as follows:

> The terms "collective bargaining" and bargain collectively" shall be deemed to include the requirement that an employer or his representatives meet and confer with his employees or their representatives, listen to their complaints, discuss differences, and make every reasonable effort to compose such differences, but shall not be construed as compelling or coercing either party to reach an agreement or to submit counterproposals.

The majority states the amendment "merely adopts in concrete form the language of Chief Justice Hughes in the *Jones and Laughlin case* (301 U.S. 1)" [12] to the effect that the act did not compel the making of agreements.

In fact, this provision strikes at the compulsion imposed upon employers to make a *genuine effort* to reach an agreement. This purpose is manifested by the emphasis placed on the machinery—"meeting," "conferring," "listening," "discussing," "composing,"

[9] III. 394.
[10] See II. 362, et seq.
[11] III. 394.
[12] III. 395.

with the sting in the tail of the provision—"shall not be construed as compelling or coercing either party to reach an agreement *or to submit counterproposals.*" We submit that the very essence of bargaining includes proposals and counterproposals. They are the necessary steps leading to the possibility of reaching an agreement. Collective bargaining goes beyond the mere formal etiquette of meeting, listening, and politely discussing. To state categorically that failure to submit counterproposals may not constitute an unfair labor practice [13] (which is the effect of the amendment), is to strike at the heart of the collective bargaining process and its purpsoe—the making of an agreement. [Italics supplied.]

Senator Wagner, speaking for the enactment of the National Labor Relations Act, stated that it embodied the rule enunciated by the old National Labor Relations Board in the *Houde case*. The ruling read: [14]

> An employer is obligated by the statutes to negotiate in good faith with his employees' representatives; to match their proposals, if not acceptable, with counterproposals; and to make every reasonable effort to reach an agreement.

Historically and in practice, collective bargaining has meant that, if the parties can compose their differences and reach an understanding, that understanding shall be embodied in a collective agreement. The Supreme Court has recognized that the making of an agreement is an integral part of the collective bargaining process. In *Consolidated Edison Co. of N.Y.* v. *National Labor Relations Board* (305 U.S. 197, 236), the Supreme Court held:

> The act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining.

The circuit courts of appeals have reached the same conclusion.[15] In *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, (C.C.A., 4th Circuit, Mar. 11, 1940), the court held:

> * * * The requirement to bargain collectively is not satisfied by mere discussion of grievances with employees' representatives. It contemplates the making of agreements between employer and employee which will serve as a working basis for the carrying on of the relationship. The act, it is true, does not require that the parties agree; but it does require that they negotiate in good faith with the view of reaching an agreement if possible; and mere discussion with the representatives of employees, with a fixed resolve on the part of the employer not to enter into any agreement with them, even as to matters as to which there is no disagreement, does not satisfy its provisions.

Chief Justice Hughes, Senators Wagner and Walsh, and Representative Welch, in stating [16] that the act did not require the making of an agreement, were not indulging in words which camouflaged some subtle meaning. They intended the obvious—that the specific terms of an agreement, or a specific agreement, could not be dictated or compelled; [17] not that the agreement was not the purpose of the collective

[13] Section 8(5).
[14] 79 Cong. Rec. 7571.
[15] *Globe Cotton Mills* v. *National Labor Relations Board* (103 F. (2d) 91 (C.C.A. 51)).
[16] III, 392; III, 393; III, 395.
National Labor Relations Board v. *Griswold Manufacturing Co.* (106 F. (2d) 713 (C.C.A. 3)).
[17] (301 U.S. 1) and *the Virginian Railway* (300 U.S. 515) cases.

bargaining process. In other words, if the parties bargain in good faith, but are unable to come to an understanding, the act does not compel them to agree.

The majority refers [18] to Senator Wagner's statement [19] in regard to the collective bargaining process: "It does not compel anyone to make a contract of any kind *if no terms are arrived at that are satisfactory to him*." [Italics supplied.] The clear implication is that if terms are agreed upon, there shall be an agreement. Senator Walsh makes, in effect, the same assertion.[20] "He [the employer] does not have to accept any *particular* contract with them, but he must bargain with them in a bona fide effort to reach a mutually satisfactory agreement." [Italics supplied.] That there need be no contract, even though terms are agreed upon, may be taken as the proper interpretation of the majority's proposal and not of the act as it stands. The proposal effects, in fact, a repeal by definition. It is difficult to comprehend how industrial strife would be minimized by removing the act's protection at this point. The amendment in effect invites the substitution of industrial conflict for the orderly processes of collective bargaining. It is not clear how this would "make the act more effective."

It is the contention of the majority of the committee, however, that the language of the amendment does nothing more than to enunciate the rule formulated by the *Jones and Laughlin and Virginian Railway cases*.[21] Of course, if the act as interpreted by the Supreme Court already means what the majority claims it would amend it to mean, then the amendment is obviously futile and unnecessary.

The actual purpose of the proposed amendment—to free the employer from the necessity of attempting to reach an agreement—is clarified by the charge that "The Board's interpretation leaves no doubt that the *best evidence* from the Board's point of view of good faith in negotiations is the actual making of an agreement." [22] The accusation that unless an agreement is arrived at, the Board will find an unfair labor practice under section 8 (5) is a complete distortion of the record which reveals that fully one-third of this class of cases going to formal hearing are dismissed by the Board.[23]

The majority further attacks the agreement-making process by making much of the Board's holding that agreements must be reduced to writing where the terms are agreed upon. We do not propose at this point to discuss the matter in detail.[24] Three circuit courts of appeals have sustained the Board in this respect.[25] Only

[20] 79 Cong. Rec. 7672.
[21] 301 U.S. 1; 300 U.S. 515.
[22] III, 392.
[23] II, 377.
[24] We discuss this point more fully—infra.
[25] *Art Metal Construction Company* v. *N.L.R.B.* (C.C.A. 2, Feb. 26, 1940); *Highland Park Manufacturing Co.* v. *N.L.R.B.* (C.C.A. 4, Decided Mar. 11, 1940); *Heinz Co.* v. *N.L.R.B.* (C.C.A. 6, Decided Apr. 3, 1940).

one circuit court has ruled the other way,[26] but has since retreated from its position.

The majority on other points [27] has been among the first to criticize when it believed the Board had flown in the face of judicial precedent. In this instance, the majority prefers the Seventh Circuit (minority) view, and states [28] "not only has the Board misconstrued the act to the extent of virtually forcing the employer to make an agreement, but it has gone further and * * * held that such an agreement, when reached, must be reduced to writing.[29] We would have thought that the weight of judicial opinion would have tempered the language of the majority.

Having painted the picture in indelible colors, the majority, in making its recommendation on this provision, writes: "This committee expresses no opinion as to whether such an agreement must be in writing." [30] We mention this discussion only because it is typical of the lack of relationship between the record and the majority report.

If any amendment were required to "*make the act more effective*," it should expressly confirm the Board's holding. We are content for the present to abide by the court's affirmation of the Board's position. The reasons for the desirability of a written agreement [31] to diminish possible controversy would seem to be obvious. In the *Highland Park Manufacturing Co. case* (C. C. A. 4, Mar. 11, 1940), the court speaks on this question:

> The purpose of the written trade agreement is, not primarily to reduce to writing settlements of past differences, but to provide a statement of principles and rules for the orderly government of the employer-employee relationship in the future. The trade agreement thus becomes, as it were, the industrial constitution of the enterprise, setting forth the broad general principles upon which the relationship of employer and employee is to be conducted. Wages may be fixed by such agreements and specific matters may be provided for; but the thing of importance is that the agreement sets up a modus vivendi, under which employer and employee are to carry on. It may be drawn so as to be binding only so long as both parties continue to give their assent to it; but the mere fact that it provides a framework within which the process of collective bargaining may be carried on is of incalculable value in removing the causes of industrial strife. If reason and not force is to have sway in industrial relationships, such agreements should be welcomed by capital as well as by labor. They not only provide standards by which industrial disputes may be adjusted, but they add dignity to the position of labor and remove the feeling on the part of the worker that he is a mere pawn in industry subject to the arbitrary power of the employer.

[26] *Inland Steel* v. *N.L.R.B.* (109 F. (2d) 9 (1949) 7th circuit). It is of interest that this same circuit court has retreated from this decision in the later case of *Ft. Wayne Corrugated Paper Co.* v. *N.L.R.B.* (C.C.A. 7, Mar. 28, 1940), when it said:

"While under no statutory obligation to reduce its agreement to writing, the significance of employer's action in this respect may have a bearing on another issue. There are well-nigh inescapable inferences, to be drawn from the employer's posting of printed statements of its wages and labor terms and refusing to sign an agreement embodying these terms. These inferences bear on the charge of unfair labor practices. It is difficult, if not impossible, to avoid the conclusion that the employer did not wish to deal with, and would not recognize the labor union directly or impliedly, and this attitude accounts for its refusal, to sign any labor agreement with a labor union, although willing to post a written or printed memorandum of its labor and wage terms and schedules. This is indicative, not only of a hostile mental attitude, but is also repugnant to the spirit of the act, the heart of which is embodied in the right of the employees to negotiate with their employer, collectively. This right of the employee creates an obligation on employer's part not only to recognize collective bargaining as such, but also collective bargaining where employees are represented by a union. This obligation is not fully met where the employer refuses to act if its action recognizes a union. At least this is an inference which may be considered along with all the other evidence on the controverted fact issue of unfair labor practices."

[27] III, 384, 394. 395.

[28] III. 393.

[29] Cf. Senator Wagner's letter to the New oYrk Times dated June 16, 1937.

[30] III, 395, column 3.

[31] II, 361—The Railway Labor Act contemplates a written agreement.

And in the *Art Metals case*, *supra*, Justice Learned Hand said:

> The argument on this point rests upon the admitted truth that the act does not force the parties to come to any agreement at all; for, although an employer must honestly negotiate with his employees collectively, that is as far as he need go. But if, the argument runs, he is forced to make it a term of any oral agreement that it shall be put into writing, he loses that absolute freedom in negotiation which he had at common law, and which Congress meant to preserve to him. *Inland Steel Company* v. *N. L. R. B.* (108 Fed. (2) (C. C. A. 7). It is indeed true, and for that matter a truism, that a stipulation in an oral contract that it shall be put into writing is one of its terms, and that if an employer must put it in, he is not free pro tanto. But he is no longer wholly free anyway; before the act he was not obliged to bargain with his employees collectively; he was at liberty to refuse to negotiate with them at all, or otherwise than severally. The act impaired that freedom; it meant to give to the employees whatever advantage they would get from collective pressure upon their employer; and the question here is what are the fair implications of that grant. They should include whatever is reasonably appropriate to protect it, and no one can dispute that a permanent memorial of any negotiation which results in a bargain, is not only appropriate, but practically necessary, to its preservation; it is hardly necessary to observe that without it the fruits of the privilege are exposed to the sport of fugitive and biased recollection. The purpose of a contract is to define the promised performance, so that when it becomes due, the parties may know the extent to which the promisor is bound; and it is the merest casuistry to argue that the promisor's freedom to contract includes the opportunity to put in jeopardy the ascertainment of what he has agreed to do, or indeed whether he has agreed to anything at all. The freedom reserved to the employer is freedom to refuse concessions in working conditions to his employees, and to exact concessions from them: it is not the freedom, once they have in fact agreed upon those conditions, to compromise the value of the whole proceeding, and probably make it nugatory.

Limitation on Reinstatement by Redefinition of "Employee"

The majority recommends that reinstatement be denied any employee who is shown by a preponderance of the testimony willfully to have engaged in violence or unlawful destruction or seizure of property in connection with any unfair labor dispute or unfair labor practice or in connection with labor organizational activities.

The majority does not pretend to base this amendment on any evidence adduced at the hearings, but declares that it merely writes into the law the doctrine of the *Fansteel case*, a Supreme Court holding that sit-down strikers were not entitled to reinstatement.[32]

Obviously it is not necessary to enact legislation to put into the law what the highest Court in the land has already declared to be there. In fact, it is a well-recognized judicial doctrine that failure to change a statute following a court decision interpreting its language is tantamount to a legislative acquiesence, or adoption, of the Courts interpretation. And conversely, to alter the statute after such a decision and to use broader language than that used by the Court, is to imply an extension of the Court's doctrine.

But, the majority declares, the Board has disregarded the Fansteel decision, and thus it is imperative that the doctrine be restated. This implies that the Board may repeal a court decision by disregarding it, a somewhat novel doctrine. Clearly, the reviewing power vested in the courts is sufficient to keep the Board within the bounds of the *Fansteel case*. But the majority's charge that the Board has ignored the Fansteel decision is without support. The sole authority they cite for that position is the case of *McNeeley & Price* v. *N. L. R. B.*,[33] in

[32] III, 394, 395.
[33] 106 F. (2d) 878 (C.C.A. 3, 1939).

which a Board order, entered long before the Fansteel decision, was modified by the Court, relying on the *Fansteel case*, which the Board then attempted to distinguish. In every case involving the reinstatement of sit-down strikers, which the Board has considered since the *Fansteel case*, it has followed that decision and denied reinstatement.[34]

And even before the *Fansteel case*, the Board refused reinstatement to employees guilty of conduct which the Board believed sufficiently serious to merit that extreme penalty.[35]

Although the majority ostensibly desires merely to restate the Fansteel rule, it not only fails to show that the Board's rulings have rendered this restatement necessary, but its amendment goes far beyond the Fansteel doctrine, which was limited to the case of a sit-down strike attended by considerable violence.

Indeed, the majority's amendment would so alter the Fansteel rule as to extend the law far beyond the position of the very court on which the majority relies.[36] It is typical of its distortion of the record and its biased approach to this entire matter that is quoted at length from a decision of the Court of Appeals for the Third Circuit which reversed a Board order, entered before the *Fansteel case* was decided,[37] but neglected to state that this same court in no uncertain terms has recently condemned such an extension of the Fansteel rule as is here contemplated.

In *N. L. R. B.* v. *Stackpole Carbon Co.*,[38] the court affirmed a Board order for the reinstatement of employees despite their participation in "little more than" a fist fight on the picket line. And in *Republic Steel Corporation* v. *N. L. R. B.*[39] the court said:

> In the *Fansteel case* the court was dealing with a case which involved a sit-down strike in which the strikers forcibly and unlawfully deprived their employer of possession of his plant. The court made it clear that unlawful conduct of that character deprived the participant of the right of reinstatement. We think it must be conceded, however, that some disorder is unfortunately quite usual in any extensive or long-drawn-out strike. A strike is essentially a battle waged with economic weapons. Engaged in it are human beings whose feelings are stirred to the depths. Rising passions call forth hot words. Hot words lead to blows on the picket line. The transformation from economic to physical combat by those engaged in the contest is difficult to prevent even when cool heads direct the fight. Violence of this nature, however much it is to be regretted, must have been in the contemplation of the Congress when it provided in section 13 of the act (29 U. S. C. A. sec. 163), that nothing therein should be construed so as to interfere with or impede or diminish in any way the right to strike. If this were not so the rights afforded to employees by the act would be indeed illusory. We accordingly recently held that it was not intended by the act that minor disorders of this nature should deprive a striker of the possibility of reinstatement (*National Labor Relations Board* v. *Stackpole Carbon Co., supra*).

Other courts have adopted the same approach and laid down the same principles.[40]

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[34] See Calmer Steamship Co., 18 N.L.R.B. No. 1; Reading Batteries, Inc., 19 N.L.R.B. No. 29; Lansing Co., 20 N.L.R.B. No. 41; Swift & Co., 21 N.L.R.B. No. 120; Beckerman Shoe Co., 21 N.L.R.B. No. 123.

[35] Matter of Standard Lime & Stone Co., 5 N.L.R.B. 106; Matter of Republic Steel Corp., 9 N.L.R.B. 219.

[36] *McNeely & Price* v. *N.L.R.B.*, 106 F. (2) 878 (C.C.A. 3, 1939).

[37] III, 384.

[38] 105 F. (2) 167 (C.C.A. 3, 1939) certiorari denied 60 S. Ct. 142.

[39] 107 F. (2) 472 (C.C.A. 3, 1939) certiorari denied Apr. 3, 1940.

[40] *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C.C.A. 9), certiorari denied, 304 U.S. 575; 99 F. (2d) 533 (C.C.A. 9), certiorari denied, 306 U.S. 646; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C.C.A. 2), certiorari denied 304 U.S. 576, 585; *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678 (C.C.A. 6), certiorari denied October 9, 1939; *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179 (C.C.A. 6); *National Labor Relations Board* v. *Hearst*, 102 F. (2d) 658 (C.C.A. 9).

The majority disclaims any intention to alter the law as declared by the courts on this issue. They offer an amendment, however, which would penalize "willful violence"—regardless of the degree of such violence or of the provocations thereof. This proposal plays directly into the hands of labor spies and agents provocateur. Indeed, by removing the protection of the law at this stage of a labor dispute, we would encourage the tactics of such people, intensify labor disputes, and make the increase of industrial strife virtually desirable in the eyes of short-sighted employers. The majority has argued that their amendment would not affect employees who resorted only to minor violence. But the meaning of the word "willful" as applied to conduct clearly includes all intentional acts, however minor in their nature, and regardless of the provocation which led to them.

We are no more sympathetic with violence in labor disputes or elsewhere than are the majority of this committee or the courts. But we recognize, fully as well as do they, that in the present state of industrial relations, legislation penalizing such violence must be carefully scrutinized to avoid upsetting the balance between the contending parties. We submit that in imposing so drastic an economic penalty on the employee who momentarily loses his temper on the picket line, and in imposing no economic penalty on the employer who both uses and provokes violence, the majority would upset this balance. Civil and, if warranted, criminal proceedings may be taken against individuals who violate the civil rights of others or disturb the peace. We submit that these penalties are sufficient, and should be enforced in the proper courts, without turning the Board into an over-burdened Federal police court, charged with administering local regulations.

Senator Wagner, speaking to the United States Senate on this amendment on March 13, 1940, said:

* * * I cannot believe that, as a matter of inflexible Federal law, a man should lose all right to earn his bread because of a minor scuffle on the picket line, which may well have already been punished under local law. No one would suggest that an employer lose his corporate franchise for a similar trivial act In the abstract this proposal is one-sided and unfair, and in its practical application it would make the Labor Board a glorified police court and clog its machinery with thousands of petty recriminations.

Members of this House who recall other struggles over progressive labor legislation of this nature will have no difficulty detecting in this proposal a great similarity to the notorious "coercion from any source" amendment sponsored by outspoken enemies of labor. During the consideration of the original act Congress rejected such an amendment for the same reasons we have advanced in opposition to this.[41] The record before the committee is utterly devoid of evidence that we should reconsider our earlier action in this respect.

Since, as the majority itself puts it,[42] there is no general dissatisfaction with the doctrine of the *Fansteel case*, it is our suggestion that this doctrine be accepted by leaving the statutory language on this point the same as it was when interpreted in the Fansteel decision. In the absence of any evidence in the record to support it, in the absence of any demonstrated need for its adoption, and in view of its patently undesirable consequences, we believe this amendment should not be adopted.

[41] Congressional Record, vol. 79, pt. 7, 74th Cong., 1st sess., pp. 7650, 7653–7661, 7668–7675, 9718–9719 9721 9731.
[42] III, 395.

The Proposal To Amend Section 2 (3) in Such a Way as To Exclude a Large Section of Industrial Labor by the Device of Expanding the Meaning of the Term "Agricultural Laborer"

The present act provides that the term "employee" shall not be construed as including any individual employed as an "agricultural laborer." The majority of the committee recommends that the following language be added to section 2(3) for the purpose of defining "agricultural laborer."

> For the purposes of this subsection, "agricultural laborer" means any person employed in performing "agricultural labor" as that term is defined in section 1426(h) of the Internal Revenue Code, as amended.

The purpose and effect of such a change is to exclude from the protection of the act a large number of workers who are employed in the advanced stages of processing and preparing for market agricultural products. These people work in establishments which are essentially industrial in character. Their problems and conditions of employment are virtually in all respects equivalent to those of any other factory workers.

It is conceded by the majority [43] that the type of establishment which would be excluded from the operation of the act is fairly illustrated by the North Whittier Heights Citrus Association, which was involved in the case of that name.[44] That concern is a corporation made up of some 200 citrus fruit growers, whose plant carries on the business of preparing, packing, and crating citrus fruit for shipment. The operations of this concern are extensive, involving, during the years 1936–37, the shipment of some 260,000 boxes of oranges, lemons, and grapefruit, about 70 percent of which went into interstate commerce. The employees of this plant work at unloading, washing, placing on conveyor belts, sorting, waxing, grading, stamping, and boxing the fruits. In no substantial sense can they be considered as having anything to do with farms or the actual process of farming, and it is impossible to find any reasonable line of distinction between these workers and persons engaged in work on any other normal factory assembly line. The Circuit Court of Appeals for the Ninth Circuit (109 F. (2d) 76) upheld the contention that these workers are properly subject to the act and correctly classified as industrial workers in the following language:

> When the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing it has entered upon the status of industry.

Commenting upon the evidence that the association had been guilty of espionage and flagrant discrimination against union workers, the court stated:

> In this status of this industry there would seem to be as much need for the remedial provisions of the Wagner Act, upon principle, as for any other industrial activity.

It should also be borne in mind that the reasons for amending the Social Security Act definition of "agricultural labor," which amended definition the majority proposes to add to the National Labor Relations Act, are not present in the field of labor relations. House Report No. 728 (76th Cong., p. 51), gives the reason for extending the exemption for agricultural labor as follows:

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[43] III, 394.
[44] See *Matter of North Whittier Heights Citrus Assoc.* (10 N.L.R.B. 1269).

In the case of many of such services, it has been found that the incidence of the taxes falls exclusively upon the farmer, a factor which, in numerous instances, has resulted in the establishment of competitive advantages on the part of large farm operators to the detriment of the smaller ones.

It is interesting to note that the only authority cited by the majority for the proposed amendment consists of the *North Whittier Heights Citrus Association case*, noted above, and *Matter of Growers and Shippers Vegetable Association of Central California, etc.* (15 N.L.R.B. 322). The comment of the majority is—

The committee has given much thought to the confusion which exists in respect to the jurisdiction of the National Labor Relations Board over the agricultural labor field in spite of the provisions contained in section 2(3) of the present National Labor Relations Act. By interpretation of the term agricultural laborer, it has been contended that the Board has tended more and more to encroach upon the rights of the traditionally free American farmer.

The majority's concern over the "traditionally free American farmer" has no application to the examples given by them. Those cases involved corporations processing farm products—an industrial operation—and did not present the case of the American farmer as we know him.

The two cases cited above, which are the only ones relied upon by the majority, have already given the term "agricultural laborer" a certainty of meaning which the majority claims to be seeking.

The circuit court of appeals in the *North Whittier Heights case* refused to consider an assertion by the petitioner that the Board did not make its order on findings of fact or on substantial evidence. The court answered this assertion by stating (p. 83), "We need not consider this point for the reason that petitioner does not point to any single instance in the record supporting the assertion." We feel that this same answer may be made to the proposed amendment of the majority, because not a single instance in the record is cited to support the amendment.

In the absence of any evidence that there is any sound basis for drawing a distinction between these employees and persons similarly employed in other industries, it appears arbitrary, unreasonable, and discriminatory to deny to these workers the protection of the act, and to abandon them to the unrestricted mercies of the labor spy, strikebreaker, hired thug, and other antiunion hirelings.

Separation of Functions—Creation of "Administrator"

The majority proposes that section 3(d) of the act shall provide for the appointment of an Administrator whose function it will be to carry on the investigative and prosecuting functions entirely separate and distinct from the judicial function of the Board proper.

Under the amendments proposed by the majority, the functions of the Board would be limited to holding hearings, making findings, and issuing orders (sec. 3 (a); sec. 10). The Board is also given power to hold and supervise elections (sec. 3(a)). As under the present act, the orders of the Board would have, in and of themselves, no force and effect but would be enforced only through application to the circuit courts of appeals with a right to review by the Supreme Court. In part, the amendment provides as follows:

It shall be the duty of the Administrator, as hereinafter provided, to investigate charges of unfair labor practices, to issue complaints if he has reasonable cause to believe such charges are true, to prosecute such complaints before the Board, to make application to the courts for enforcement of orders of the Board, and to exercise such other functions as are conferred on him by this act. The Administrator shall be made a party to all proceedings before the Board, and shall present such testimony therein and request the Board to take such action with respect thereto as in his opinion will carry out the policies of this act.

The majority justifies this procedural change by stating:

Thus, there could be none of that confusion and intermingling of functions that has so completely characterized the present Board. Thereby the committee feels that a true separation, in accordance with a genuine regard for the democratic principle, will be achieved.

In attempting to sustain its charge that the present procedure set-up of the Board has failed to bring about a proper separation of the judicial and administrative functions, the majority has pointed to isolated instances of indiscretions on the part of employees of the Board. Clearly, the complete record establishes that such isolated instances do not represent a fair judgment of the operation of the Board as a whole.

As an example of the manner in which the majority has distorted the evidence presented before the committee, it charges misconduct of attorneys in the Review Division in their summary and analysis of records in Board cases, by pointing to isolated instances in which attorneys in this Division had access to material in "informal files" in their possession. There is no evidence in the record that such material was ever used as a basis for decisions by the Board. Also, most of the examples cited by the majority have to do with representation cases, which are not adversary proceedings so far as the Board is concerned. Certainly, there is no justification for the sweeping denunciation by the majority [45] against the work of the division. In further support of its charge that there is "confusion and intermingling of functions," the majority relies upon the testimony of Mr. Freter,[46] a former employee of the Board. An examination of the evidence appearing in the record clearly shows that Mr. Freter's testimony was motivated by reason of ill feeling toward the Board, or employees thereof because of his discharge. His testimony was typical of that of a disgruntled former employee, and his testimony of alleged bias by the employees of the Board was evasive and unconvincing.

The report of the majority grasps at isolated instances of statements by Board employees which were persuasively shown to have been uttered facetiously, in presenting a picture of nonjudicious conduct on the part of trial examiners of the Board.[47] In another instance the appellation of a regional director as "judge, jury and prosecutor" was explained to have been based upon the lack of personnel in the field during the early months of the Board's existence, and the characterization by the majority of this statement as being indicative of the attitude generally of the employees of the Board, is clearly not borne out by the testimony.[48]

We believe that, in the present state of evidence adduced by the committee, no sound reason has been brought forth for the procedural

[45] III, 379, 380.
[46] III, 370.
[47] III, 377, 378.
[48] II, 119.

changes proposed by the majority and, on the contrary, such scanty evidence as is available in the record tends more to impeach the desirability of the amendments than to sustain them.[49]

The majority charges a break-down of the quasi-judicial function of the Board in an incident of Trial Examiner Dudley conferring with the secretary of the Board on a ruling of evidence.[50] The record shows that the Board overruled the trial examiner as to the admissibility of evidence as to the actions of a Board employee allegedly showing bias.[51] Dean Garrison testified that he believed this incident was "entirely proper and highly desirable.[52]

The majority apparently criticizes the Board for discharging certain employees,[53] and then elsewhere criticizes the Board for failure to take as severe disciplinary action as the majority thinks should have been taken.[54] The majority accepts the testimony of maladministration and bias of a former geional director,[55] but fails to point out the relevant factor that he was discharged because he permitted an attorney having cases pending before his office to pay his expenses of a trip from Cleveland to New York.[56] Furthermore, the majority seems to characterize as uniform Board policy those instances in which particular employees have violated Board instructions [57] without the Board's knowledge.

The majority supports its "separation of functions" amendments by stating: [58]

> **There is no criticism of the Board that has been more consistent on the part of litigants and the courts, than the failure to separate its administrative and judicial functions, which separation is the very cornerstone of our whole democracy.**

The majority fails to comment on the testimony of Dean Garrison, before the committee, noted above, and of the testimony of Mr. Padway, general counsel of the American Federation of Labor before the Senate Committee on Education and Labor,[59] both opposing the separation of administrative and judicial functions.

We do not believe that procedural matters are unimportant or that their significance can be dismissed lightly as being merely procedural. Important substantive rights hang upon matters of procedure and such rights may be as effectively withheld through procedural inadequacies as through substantive deficiencies.

The growth of the administrative process in the United States has been founded upon the inexorable requirements of new problems arising from the increasing complexity of our domestic economy. The first substantial application of the administrative process took place with the creation of the Interstate Commerce Commission some 50 years ago and, in 1914, the Federal Trade Commission Act set up an administrative procedure which substantially complies with modern concepts

[49] II, 496–498, Garrison.
[50] III, 377.
[51] II, 15, 16.
[52] II, 507.
[53] III, 382.
[54] III, 370.
[55] III, 382, Miller.
[56] II, 511.
[57] III, 380.
[58] III, 395.
[59] Part 4, p. 727. Hearings on National Labor Relations Act, May 2, 1939. Mr. Padway testified with Mr. Green, and Mr. Green's testimony was made a part of the committee's record (II, 281).

of the administrative function. Since that time, the growth of administrative regulation has been rapid and has extended to such fields as stock exchanges, securities, utilities, communications, aviation, and many other fields. Due to the historic inability of both the courts and Congress to cope with a certain zone of governmental action, the administrative process has established itself as the only suitable means of providing the flexibility, adaptability, specialization, and continuity necessary to deal with governmental problems of great complexity and constantly changing character. The administrative process has therefore filled a great need in the effective functioning of our working democracy and has established itself as an integral and indispensable part of our system of government. No serious scholar today advocates its outright abolition.

The administrative process possesses certain superiorities which have made it peculiarly able to cope with the necessities of this field of governmental action, among which is its ability to meet the requirements of individual litigants without the expense and delays inherent in the usual court procedures. The procedural amendments proposed by the majority of the committee would rob the National Labor Relations Act of many of these advantages without, in turn, any evidence having been adduced that these disadvantages would be offset by greater, or at least equivalent, advantages. In fact, the advantages to be attained by the amendments proposed by the majority are cloaked in impenetrable obscurity. We believe that these amendments would leave the Board shorn of indispensable attributes for administrative efficiency and leave it a pure anomaly in the governmental function. Labor is entitled to the same prompt and efficient attention to its needs as are petitioners before the Interstate Commerce Commission, the Federal Trade Commission, or the Communications Commission. We are unwilling to single out labor as the guinea pig for hasty and unconsidered experimentation, with the administrative procedure and we set out the following detailed reasons why we believe that these amendments should not be adopted.

We are in unqualified and ardent accord with the proposition that any exercise of the judicial function, whether by courts or quasi-judicial bodies, should be attended by the strictest observance of fairness, independence, and impartiality and we believe that every possible safeguard should be provided against bias and external influence. Every exercise of quasi-judicial administrative power should accord with the strictest principles of fairness and lack of bias. However, we believe that this result can be achieved without sacrificing the unity of purpose and coordination of function which is necessary if the administrative process is to operate speedily and effectively.

We call attention to the fact that, under the proposed amendment, the Administrator is vested with absolute discretion on the question of whether complaints will be issued on charges and that all proceedings subsequent to the issuance of the Board's orders are vested exclusively in his hands, subject to the mandate that he shall petition the court for enforcement of a board order upon the Board's request (sec. 10(e)).

The effect of this proposal is to substitute for the present unified administration of the act an uncoordinated and uncorrelated division

of functions, with no attempt to provide safeguards against this division maturing into a case of "a house divided against itself" with a consequent loss of effectiveness.

In any event, such a proposal would sacrifice the tremendous advantage of unity and continuity of administration with the resulting speed and efficiency achieved. The present procedure makes possible a uniformity of policy, a speed in operation, a coordination of the various stages of a case, and a general efficiency of administration—characteristics which are of the very essence of the administrative procedure. Such a procedure is particularly demanded by the field of labor relations, a field in which events move swiftly and suddenly and in which any substantial delay may well render the machinery of the act ineffective and impotent.

We further call attention to the fact that the motivating force in the administration of the act is to be vested entirely in the hands of an Administrator. No charges can be issued unless the Administrator decides to do so in his unfettered discretion. There is no appeal granted to the individual complainant from a failure or refusal of the Administrator to file a complaint and there is no machinery whereby the individual complainant may secure redress from the arbitrary and capricious refusal of the Administrator to proceed on a complaint. The forward motion of the entire administration of the act is utterly dependent upon the uncontrolled discretion of a single man and the majority's proposal sets up a potential autocrat over labor relations.

Bearing in mind the fact that the Administrator would be a purely political appointee, no safeguards of tenure or other guaranties of independence being provided, we question the wisdom of subjecting the fate of a program involving the welfare of the great masses of those who labor to the uncertainties and vicissitudes of the political scene. We concede that the arrangement would provide a more than ample guaranty against too zealous prosecution of the requirements of the act, but we submit that absolutely no provision has been made to guard against indifference or unwillingness to enforce labor's remedies under the act. We seriously question the wisdom of transferring the control of such administration and the protection of labor's welfare from a board protected by the independence of tenure to a single individual entirely dependent upon the shifting winds of politics.

The amendments recommended by the majority seek to establish what amounts to a labor court. However, the court is not invested with one of the most important attributes of a judicial body—namely the power to enforce its judgments. The proposed amendment would go further than the typical separation of functions in ordinary judicial proceedings by vesting the enforcement of the orders of the Board in the prosecutor.

The arrangement proposed is patterned after the relationship of the district attorney or prosecutor to the courts. Bearing in mind that the enforcement of the National Labor Relations Act is predominantly remedial, we question whether the necessities of remedial equity can be met by the machinery of punitive justice.

It must be observed, moreover, that the proposed amendments go even further than the typical separation of functions in ordinary judicial proceedings. Normally, where the "prosecuting" and "judicial"

functions are separated, the tribunal exercising "judicial functions" has the power of a court—that is, its decisions are enforceable and binding unless reversed on appeal. But here the Board, although limited to "judicial functions," would have the power only of an administrative agency. Its decisions and orders would still not be effective and could still only be enforced by securing a court order. Thus the amendments introduce all the inefficiency of separation of functions and yet withhold its single most important advantage.

That such a division of responsibility for enforcement of the law could not function efficiently in the labor field seems evident from the experience with section 7(a) of the National Industrial Recovery Act. Section 7(a) guaranteed to employees rights identical with those protected by the National Labor Relations Act. But the provisions of section 7(a) were to be enforced by the older methods of injunction and criminal proceedings. It is an acknowledged fact that the enforcement of section 7(a) broke down completely. Both the Senate Committee on Education and Labor and the House Committee on Labor, when reporting the bill that became the National Labor Relations Act, emphasized that the more traditional methods of enforcement had failed.[60] Both committees therefore recommended the abandonment of criminal penalties and the substitution of administrative procedure for enforcement. We feel certain that the experiment with "separation of functions" embodied in the proposed amendments would go far to make the National Labor Relations Act as difficult of enforcement as was section 7(a).

We think, further, that nothing in the record before the committee discloses any defects in Board procedure which requires remedy by a dangerous experiment here proposed. On the contrary, the record shows that the Board already maintains a separation of functions within its organization that is adequate to guard against the possibility of unfairness and yet still permits the advantages of a coordinated policy. The Board's trial attorneys who prosecute the cases, the trial examiners who preside at the hearings, and the review attorneys who assist the Board in the preparation of decisions, are each established as separate and distinct sections of the Board's staff.[61] Further, the Board's instructions impose the strict requirement that there shall be no fraternization between trial examiner and trial attorney.[62] Such instructions would appear to set up standards of conduct no different from those existing between an ordinary attorney and a judge. Likewise, review attorneys are under strict injunction not to communicate with or discuss cases with trial attorneys, nor, unless by special permission with trial examiners.[63]

Despite the elaborate inquiry conducted by counsel for the committee, and the examination by him of many trial examiners and review attorneys, there is no evidence in the record that these instructions have been violated, except upon such rare occasions as to be of little significance. Nor is there any showing in other respects that the administrative process as it has functioned within the Board, has resulted in any unfairness or lack of due process to parties appearing before the Board.

[60] S. Rept. No. 573, 74th Cong., 1st sess., pp. 4 and 5; H. Rept. No. 972, 74th Cong., 1st sess., p. 2.
[61] II, 556; I, 440; III, 199, 200; III, 213; II, 124.
[62] II, 9, 10.
[63] I, 430, 465; II, 561.

Amendment To Abolish the Board and Create a New Board

An amendment which the majority treats as related to the one just considered proposing that the judicial functions be separated from the administrative functions, is to abolish the present Board and to create a new three-man Board.

It may be that the record will justify disagreement with the present Board's decisions in occasional cases. It may likewise be found that the committee's investigation has disclosed instances of bias, overzealous and misdirected vigor and examples of defective administration by some employees of the Board. Many of the instances cited, however, were greatly exaggerated in the majority report, as a comparison of these passages in the report with the transcript of testimony will demonstrate and few, if any, involved members of the Board.

In our discussion we have pointed out examples of how the majority has distorted the evidence before the committee by omitting reference to testimony which threw entirely different light upon certain incidents. Viewing these incidents in their proper perspective and having in mind the important achievement of the Board in the courts and in pioneering a new field of law, we cannot agree that the record of the Board deserves such general condemnation. Certainly the testimony developed before our committee is not sufficient justification for the ripper amendment proposed by the majority.

We are, however, ready to recognize the fact that the propriety of certain policies of the Board is subject to widespread controversy and disagreement. We feel that harmony between the administration of the act and sections of the public to whom it directly applies can be promoted by adding to the present membership of the Board two new members with a fresh viewpoint. It will be expected that these additions will make it possible for the two additional experts to determine by direct and intimate contact with the problems of administration the soundness of present policies and to use their influence in directing the policies of the Board along the lines which accord with their findings and expert judgments. For the foregoing reasons we believe that our proposal of adding two members to the Board is the constructive approach to the problem and possesses the peculiar advantage of preserving continuity in the administration of the act.

Proposal To Prohibit the Board From Doing Statistical Work

The present act provides in section 4(a) that "nothing in this act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor." We think the proper interpretation of this provision is that adopted by the Board, that its staff should not duplicate any statistical work performed by the Department of Labor. The majority, however, proposes the following amendment:

> Nothing in this act shall be construed to authorize the Board or the Administrator to appoint or employ individuals for the purpose of conciliation or mediation or for statistical work.

Such an amendment would prohibit the Board from accumulating statistics of its own operations. It would abolish not only the Division of Economic Research but would preclude any other employee

from compiling those statistics which are an indispensable part of the public record of such an agency.

In suport of this amendment the majority refers to the testimony of Dr. Lubin, Commissioner of Labor Statistics of the Department of Labor, to the effect that "there are at least 20 economists out of the total number in excess of 200 employees in the Department of Labor engaged in activities similar to those performed by the Division of Economic Research of the National Labor Relations Board."[64] The majority also reports that Dr. Lubin testified that the Bureau of Labor Statistics had received many requests from the Board for statistical work and had never refused such requests, except where the staff was inadequate or the Board had wanted such work in too short a time.[65]

The implication clearly intended by the report of the majority is that Dr. Lubin testified that the Division of Economic Research was unnecessary and was in duplication of the work of the Bureau of Labor Statistics. The record does not support such an inference. Thus[66] Dr. Lubin was merely testifying as to the number of civil-service employees in his department when he stated that there were approximately 20 employees doing statistical work. On the question at issue here, Dr. Lubin testified that the Division of Economic Research of the Labor Board in no way duplicates the work of the Bureau of Labor Statistics. He also testified that "very definitely" it is necessary for the Board to have a staff of economists to analyze properly the statistics *furnished* by the Bureau of Labor Statistics and to perform other statistical work for the Board.[67] Other administrative agencies in the Government have such staffs, and such staffs are also not uncommon in industrial enterprises.

Certainly the evidence before the committee does not warrant this ill-considered amendment which would deprive the Labor Board of the counsel and advice of minds scientifically trained in economics. Granting that the most complete statistics are available in the Department of Labor, it still is necessary for the Board charged with the protection of the rights of labor to ascertain which statistics are needed for an understanding of the cases before it.

Apparently the real explanation for the amendment proposed by our colleagues was the testimony in the record with reference to the economic philosophy of Dr. Saposs, head of the Economic Research unit. If the excerpts from his writings which were read into the record are a fair example of his views we disapprove as strongly as our colleagues of a person entertaining such views holding an important position in the Government. We do not feel, however, that the abolition of a whole division performing a useful function is a logical solution of dealing with the problem of one office holder whose views are abhorrent to our committee.

The record[68] shows the importance of the economic data prepared by the division. The use of such material is inherent in the case of remedial legislation, such as the National Labor Relations Act, which deals with the incidents of economic and industrial life.

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[64] III—49, 66, 67, 68.
[65] III, 375.
[66] III, 375.
[67] III–228.
[68] III–228.

Section 8 (1) of the act provides that it shall be an unfair labor practice for an employer:

> To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

The majority proposes to add to this section a provision reading as follows:

> * * * but nothing in this section or in this act shall be construed or interpreted to prohibit any expressions of opinion with respect to any matter which may be of interest to employees or the general public, provided that such expressions of opinion are not accompanied by acts of coercion, intimidation, discrimination, or threats thereof.

This proposal is justified on the ground that "it is necessary to make certain that the act as written and administered shall not lead to any impairment" [69] of freedom of speech as protected by the Constitution and the Bill of Rights.

Clearly neither the National Labor Relations Act nor any act of Congress can deprive an employer of his rights under the Constitution. Section 8(1) of the act as it now stands must be interpreted, therefore, so as not to interfere with freedom of speech or freedom of the press as guaranteed in the Bill of Rights. The constitutionality of the Wagner Act in protecting the right of employees to self-organization and collective bargaining against the interference, coercion, and restraint of an employer is no longer in doubt. It does not, therefore, infringe the constitutional guarantees of free speech. The best evidence that the Board has not infringed such rights in its administration of the act is that in the hundred-odd decisions of the courts reviewing orders made by the Board, in no single decision has it been held that the Board by any order has abridged the constitutional right of free speech.

Consequently, if the majority, as it claims, is seeking to protect the employers' constitutional rights, it is again asking Congress to amend the act to include something already in it. It is clear that no issue of freedom of speech is involved. Certainly, the Supreme Court has demonstrated its ability to preserve the amplest exercise of free speech against all attempted legislative or administrative encroachment. [70]

It seems clear from the foregoing that the only purpose that could be served by this amendment to section 8(1) would be to make possible greater interference, restraint and coercion of employees in the exercise of their right of self-organization and collective bargaining, and not the protection of the constitutional right of free speech.

The majority has placed emphasis upon the right of the employer [71] to express his opinions.

It cannot be doubted that, by reason of the economic dominance of the employer over the livelihood of his employees, "expressions of opinion" by an employer, whether or not accompanied by acts or threats of coercion, would under certain circumstances seriously interfere with and restrain his employees in the exercise of their rights to

[69] III, 393.

[70] *Near* v. *Minnesota* (283 U.S. 697); *Herndon* v. *Lowry* (301 U.S. 242); *Grosgean* v. *American Press Co.* (297 U.S. 233).

[71] III, 395.

join a union or otherwise engage in union activity.[72] Expressions of opinion which do not amount to interference, restraint or coercion should be, and are, wholly permissible under the act.[73]

In an attempt to demonstrate the need for this amendment, the majority has cited specific statements[74] held by the Board to constitute interference under the provisions of section 7(1).

One example should suffice. The *Fanny Farmer Candy Shops, Inc., case* is referred to.[75] Here the employer was found to have stated he would be pleased to bargain collectively with a "group of your fellow workers."[76] The setting of this statement was that shortly after a national union had begun to organize the employees, and had informed the respondent that it represented a majority, the employees were given the afternoon off with pay to attend a meeting at which the employer made a speech. Coupled with the above statement was the warning that while the respondent would enter into a contract with its own employees, he would not sign a contract with "any" union. The contract with its own employees for which this speech laid the groundwork and which the respondent subsequently entered into, was a "yellow dog" contract.[77]

We do not pass judgment on the merits of the Board's decision in this case. Words cannot be considered in a vacuum. Their meaning and effect can only be understood in the light of the circumstances of each case—which are not discussed by the majority. We believe that the factual situation surrounding a given statement may determine whether or not there is mere expression of opinion or "interference" with the right to organize.

No standard is provided in the proposed amendment which would define such statements as permissible or not. The majority's references are an attempt to discredit the Board by implying that the isolated statements quoted do not constitute a violation of section 8(1). If this implication is unwarranted, the examples are without meaning.

The majority's reluctance to draw conclusions in terms of its amendment is grounded in the fear that the interpretation it expects, if known, would be sufficient to defeat the bill. In plain terms, the amendment has the effect of permitting an employer to "interfere" to a greater extent in the organization of his employees. It is not even a distant relative of the Bill of Rights.

There is no more reason to sanction "expressions of opinion" which interfere with or restrain self-organization than there is to sanction any other conduct by an employer having such an effect. We think section 8(1) states a plain and reasonable standard of conduct for an employer to follow and we are opposed to relaxing that standard to permit any sort of interference or restraint with the employee's right of self-organization, whether it be by word of mouth or otherwise. Almost every case involving unfair labor practices under section 8(1) involves this problem. To open the door to interference and restraint

[72] Compare the case of *Texas & New Orleans R. P. Co.* v. *Brotherhood of Ry. Workers* (280 U.S. 548).

[73] II, 289—Mr. Green testified "an employer permitted the right of free speech, *so long as what he says is not regarded as coercive or prejudicial.*" [Italics supplied.]

[74] See II, 301; III, 393, col. 2 and cases cited; III, 393, col. 3 and cases cited.

[75] III, 393.

[76] 10 N.L.R.B. 288.

[77] In *N.L.R.B.* v. *National Licorice Co.* (60 S. Ct. 569) (1940), the Supreme Court outlawed a similar "yellow dog" contract and specifically referred to the contract in the *Fanny Farmer case.*

in the manner here proposed might well lead to a breakdown of the entire guaranty of protection to self-organization.

We fail to see how this amendment "makes the act more effective."

Employer Petitions and Impediments to Elections

It is proposed to amend section 9(c) of the act as to provide expressly that an employer shall have the right to file an "application" for an election where two or more labor organizations in his plant each claims to represent a majority of the employees in the same bargaining unit.

We are in agreement with this proposal.

We think there are definite objections, however, to the provision sought to be incorporated in section 9(c) which would prevent the Board from holding an election upon the application of employees unless they could show a representation of at least 20 percent of the bargaining unit. In most cases such a limitation might be fair, but an inflexible rule is dangerous. For instance, if a rival union had a closed-shop contract with the employer, many of the employees might wish to change representatives at the expiration of the contract but might fear dismissal from the contracting union and consequent discharge if they openly advocated a change. Under such circumstances, it might not be reasonable to require the union desiring an election to show designations by 20 percent of the employees in the unit. There is no evidence whatever in the record that the Board has held elections upon an insufficient showing of membership, or that there are any possibilities of abuse under the present system. Were this requirement solely applicable to situations arising under the Garrison proposal we would understand and approve of its necessity. We can find nothing in the record indicating its desirability as applied to the ordinary case.

Removal of Board's Power To Determine the Appropriate Bargaining Unit Where There Is a Conflict Between Unions

We stated in our preliminary statement:

> At the present stage of our deliberations, we are inclined to favor the Garrison proposal for amendment to section 9 of the act, under which the Board would be relieved of the duty of determining the appropriate bargaining unit in cases in which two or more bona fide labor organizations are in substantial disagreement or conflict as to the unit.

However, upon more mature deliberation, we now entertain serious doubts as to the wisdom of the adoption of such a policy. An opportunity for obtaining additional evidence and pursuing a careful study of this important question will be afforded the committee by the recently authorized continuance of the hearings.

In support of our present views on the amendment proposed by the majority of the committee, purporting to carry out the Garrison proposal,[78] we submit the following:

Section 9(b) of the present act charges the Board with the duty of determining in each case what the appropriate bargaining unit shall be. The Board exercises this function in three types of cases:

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[78] II, 498–500.

(1) Under the provisions of section 9(c) requiring the Board to certify representatives for collective bargaining, before an election can be held and before the Board can certify whether or not the majority of employees in the unit favors a certain representative, it is necessary for the Board to determine what shall be the appropriate bargaining unit;

(2) Section 8(5) of the present act declares the refusal of an employer to bargain collectively with the representatives of his employees to be an unfair labor practice. Before the Board can proceed against an employer for refusal to bargain collectively with the representatives designated by the majority in an appropriate unit, the Board must determine what an appropriate unit is.

(3) Under section 8(3), it is an unfair labor practice for an employer to encourage or discourage membership in any labor organization by "discrimination in regard to hire or tenure of employment or any term or condition of employment." However, there is a proviso attached to the same subsection permitting an employer to make a valid closed-shop contract with a bona fide labor organization representing a majority of the employees "in the appropriate collective bargaining unit." Without the proviso, a closed-shop contract would be a violation of the first clause of section 8(3). Therefore, in order for the Board to decide whether or not a certain closed-shop contract is valid under section 8(3), it must first determine the appropriate bargaining unit.

Bearing these three types of cases in mind, we shall now consider the proposal of the majority which purports to embody the Garrison amendment. First, the majority proposes to add the following new subdivision to section 9:

> Whenever two or more representatives in applications filed in a proceeding under subsection (b) have each alleged with respect to conflicting bargaining units that a majority of the employees therein have authorized such representative to be their representative for collective bargaining, the Board shall make a finding to that effect and shall not have any power to determine the unit appropriate for the purposes of collective bargaining until such representatives have by written agreement settled the dispute between them as to the appropriate unit, or to determine any unit to be appropriate for such purposes which is not specified and agreed upon in such agreement as being appropriate for such purposes. For the purposes of this subsection "representative" does not include a labor organization established, maintained, or assisted by any action defined in this act as an unfair labor practice.

Second, the majority proposes to add a corollary provision to section 8(5), making it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, reading as follows:

> Except that such refusal to bargain collectively with any such representative shall not, unless a certification with respect to such representative is in effect under section 9, be an unfair labor practice in any case where any other such representative (not established, maintained, or assisted by action defined in this act as an unfair labor practice) has made a claim that it represents a majority of the employees in a conflicting bargaining unit.

Obviously, therefore, the proposals of the majority would operate to prevent the Board from deciding what the appropriate unit is in any of the three types of cases outlined above, when there is any dispute as to the appropriate unit between two or more labor organizations.

The implications and ramifications of Dean Garrison's suggestion are plainly far-reaching and not readily discernible on the surface.

Dean Garrison stated that he thought it impossible to find any formula on the bargaining unit which would be satisfactory to both the American Federation of Labor and the Congress of Industrial Organizations and that, therefore, the Board ought to be relieved of the burden of having to decide such cases. The effect of the proposal would be that there would not be an election nor collective bargaining until the unions involved could agree on a bargaining unit. Dean Garrison thought the result would be to force the rival unions into some sort of working agreement on the unit question and that, while the proposal would leave employers with no tribunal to settle disputes between rival unions, there would not be enough cases of disagreement to cause employers serious inconvenience.

Careful study of this proposal inclines us to believe that its adoption would be fraught with grave dangers. This is emphasized by a hypothetical application of the proposal to each of the three types of cases described above, in which the Board is now called upon to determine the appropriate unit.

(1) Under the proposal, the Board would not have power to hold an election or certify representatives whenever there was any dispute between the union involved as to the appropriate unit. In that event, neither the employer nor the unions would have access to any tribunal vested with authority to settle representation disputes. The probable result would be an increase in the number of strikes, in each of which the employer would be caught between the contending unions. It is also possible that the proposal would have a tendency to encourage minority groups to manufacture disputes over the unit, with the inevitable intensification of rivalry and ill-feeling. Indeed, there is danger that under the combined weight of these possible effects, the entire election machinery provided by the act would break down and cease to function.

(2) Under the proposal, an employer would be relieved of the requirement to bargain collectively with a union whenever another union could plausibly assert a dispute with respect to the unit. If union rivalry were intense, an employer would be altogether discharged from his legal duty to bargain collectively.

(3) The effect of the proposal on closed-shop contracts is unpredictable. Since the Board could not determine the unit whenever a dispute occurred, it would seem that neither the employer nor the union could ever prove that the closed-shop contract had been made with a majority in an appropriate unit, with the result that all such closed-shop contracts would be invalid under the other provisions of the act.

Consequently, the employer would be free to employ an illegal closed-shop contract in such manner as to force his employees into the union of his choosing. In brief, and depending upon the interpretation, all closed-shop contracts would be illegal, or even the most unfair closed-shop contract would be legal.

One further result may flow from this proposal. Because the employer need not bargain collectively when rival unions have sought certification, the growth of company unions to relieve the employer of his usual responsibilities may be expected. Employers have been ingenious in the past in using company unions for the purpose of evading their duties under the act. The stimulation of company-dominated unions for a new reason but with the old objective would

seem ironic at a time when the company-fostered union seems on the way out.

We think it clear that no final conclusion on Dean Garrison's proposal is possible in the absence of much more evidence than is available in the record before the committee. Until the views of all interested groups are obtained and studied we feel that the Congress should reserve judgment upon a far-reaching proposal of this sort. It would seem of particular importance that labor be given an opportunity to speak on this proposal. The employer and the public have nothing to gain from it. The amendment permits the Board to escape the conflict inherent in deciding claims of rival organizations and the locale of the conflict is transferred to the establishment of the employer. The employer is placed in the middle of a no-man's land. The public, of course, has everything to lose from strikes arising from this situation.

We believe that the majority has acted hastily in concluding that the problem of fixing the appropriate unit is insoluble and that the risks of industrial strife inherent in the Garrison proposal must be run. Instead of confessing complete inability to cope with the problem, we believe that objective consideration and study are warranted. We therefore, address ourselves briefly to the question of the appropriate bargaining unit when there is conflict between the craft and industrial union.

In our judgment the crux of the problem lies in the absence of guides in the present act for reconciling conflicting claims of craft unions and industrial unions in the same plant or employer unit. The situation arises when a particular occupational group in a plant has members in a different union from the one seeking to represent the entire plant. Such problems must be faced by the Board with only the meager guides contained in section 9(b):

> SEC. 9(b). The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and collective bargaining, and otherwise to effectuate the policies of this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

In other words, the only test is "appropriate for the purposes of collective bargaining." Every case therefore involves a question of judgment. Consequently, it is not strange that the application of this section of the act has created more controversy between the Board and labor organizations and more controversy among the members of the Board than any other provision of the act. In view of the vagueness of the legislative standard we are therefore amazed at the following statement by the majority:

> There have been many instances where both personal liberty and property rights have been infringed with reckless abandon under the present administration of the act in the selection of the bargaining unit in direct contravention of the intent of Congress. While shocked at some of these actions on the part of the Board, courts on numerous occasions have declared themselves powerless to interfere due to failure of the present act to provide judicial review of representation cases.[79]

As to what the "intent of Congress" was the majority is no more specific than the statute. As for those "numerous occasions" in which the courts have been shocked at Board decisions on bargaining units, no example has been cited: none has appeared in the record.

[79] III, 397.

The Supreme Court decision in *American Federation of Labor et al.* v. *N. L. R. B.* can hardly be the basis of this statement since all that was decided there was that the Court of Appeals of the District of Columbia had properly held that it had no jurisdiction to pass on the matter.[80]

There are a number of cases, however, in which the unit determinations of the Board have been before the courts in proceedings which vested the court with the duty of passing upon the correctness of the unit determination. In such instances the courts have upheld the units fixed by the Board (*National Labor Relations Board* v. *C. A. Lund*, 103 F. (2d) 815 (C. C. A. 8); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C.C.A. 2), 304 U.S. 576, 585; *International Association of Machinists* v. *National Labor Relations Board* (Serrick Corporation), November 20, 1940 (App. D. C.), 5 Labor Relations Reporter 335; and numerous other cases). There are no cases in which the courts have set aside Board decisions on the unit question, although the question has properly been raised in the foregoing and many other cases. How then can the majority say on numerous occasions the courts have appeared shocked? This seems to be another example of those inaccuracies in factual matters contained in the "recommendations and conclusions."

An interesting summary of the results of election cases where there were disputed jurisdictional contentions was furnished to the committee by the Board and we think in order to give a complete picture of this phase of the Board's operations reference to this should have been included in the report of the majority in view of the charge of partisanship contained therein. The record shows[81] that the Board up to December 1, 1939 had decided 301 cases in which the American Federation of Labor and Congress of Industrial Organizations were concerned over the appropriate bargaining unit. In 187 of these cases there was an agreement between two organizations on the unit with complete agreement in 131 of the 187 cases and substantial agreement in 56 of the 187 cases. In 114 of this total of 301 cases there was complete disagreement between the American Federation of Labor and the Congress of Industrial Organizations. In these 114 cases the contention of the American Federation of Labor was upheld in 51, the contention of the Congress of Industrial Organizations was upheld in 45. In 14 cases the contention of each was upheld in part and no decision was rendered in the other two cases. Prior to December 1, 1939 the Board had handled a total of 8,153 representation cases and had conducted 2,543 elections.[82]

We recognize that in many plants newly organized along industrial lines there are frequently to be found employees in particular occupations who for years have belonged to one of the skilled craft unions, and that arbitrarily to place such employees into a larger bargaining unit and thus require them to be represented by a new union may be productive of hardship. Frequently these employees have paid dues for years to some craft union, have acquired inchoate rights to insurance benefits and retirement pensions which they

[80] 60 S. Ct. 300. The language of the lower court (103 F. (2d) 933) is simply a restatement of petitioner's bill and was not directed at the merits, since the case was before it on a motion to dismiss.
[81] II, 381, 382.
[82] II, 356.

would lose if membership in the old union was given up. The preservation of the equities of such employees is a problem with which this committee should be properly concerned.

We do not believe the problem can be answered by providing that the Board shall not hold elections at all where labor organizations are in dispute with respect to the appropriate bargaining unit. Adoption of such an amendment would simply mean that in many plants there would be no collective bargaining at all and consequent labor strife. The approach adopted by Chairman Madden to this very controversial and important question is certainly worthy of profound study and consideration by this committee. We refer to the rule of decision which has come to be known as the Globe doctrine.[83]

The principle of this decision permits the craft, where it exists and has any substantial members, to vote separately with respect to the size of the unit. In other words, the members of the craft may determine for themselves by their own majority vote whether or not they desire to be represented by the union selected by the majority in the larger unit, including themselves. Thus, it places in the hands of both the craft and industrial union opportunity for self-determination regarding its own representatives.

The majority report contained a statement that the Globe Doctrine had resulted in many instances in enabling an industrial union to undermine and eventually destroy a craft union.[84] As will be noted from the foregoing analysis of the case, the rule announced produces precisely the opposite result.

The principle of the Globe Doctrine was consistently followed by a majority of the Board from its adoption August 11, 1937 until the decision of the *American Can Co.* case,[85] in which a majority composed of Board Members Leiserson and Smith with Chairman Madden dissenting held that the Globe Doctrine should not be applied where the industrial union had first obtained an exclusive bargaining contract.[86]

This was an important development, but again the Committee failed to investigate the practical effect of this decision on industrial relations. It may well be that had a real study of this problem been made, evidence would have been developed that would have shown the desirability of legislation on this point. In this connection, it is noted that the New York Labor Relations Act, contains a proviso similar to the Globe doctrine.[87] It is our belief that a study of the cases decided by the State board under this provision would be profitable, as the experience of the greatest industrial State of the country with regard to these problems would undoubtedly shed light on this difficult question.

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[83] *Matter of Globe Machine and Stamping Company*, 3 N.L.R.B. 294, decided August 11, 1937.

[84] III. 397.

[85] 3 N.L.R.B., 1252, July 29, 1939.

[86] II. 550.

[87] "SEC. 705. Representatives and elections: (2) The board shall decide in each case whether in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or any other unit: *Provided, however,* That in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining." (Cahill's Consolidated Laws of New York; 1937 Supplement, at p. 221.)

The Proposal To Amend Section 10(b) to Provide a Six Months' Statute of Limitations Upon the Filing of Charges

The majority proposes to add to section 10 (b) the following word:

> * * * the Administrator shall not have power to issue a complaint stating a charge of any unfair labor practice which has occurred more than 6 months prior to the date on which such charge was filed with the Administrator.

There is absolutely no evidence in the record showing the need for such a drastic limitation.

The majority states: "This merely codifies the Board's present practice." The record shows no such practice by the Board. The amendment would result in the denial to a worker of all rights under the act, including the right to regain his job, where his discharge was an unfair labor practice, if he waited more than 6 months to prefer charges, however justifiable the reason for the delay. As an example of the extremely short period of limitation proposed in this amendment, it should be noted that under applicable statutes certain property interests may be protected in courts of law after a lapse of not to exceed 20 years. We have been unable to find any statute of limitations which outlaws a claim in so short a period as 6 months. It is clear, we think, that a statute of limitations which fixed the virtually unprecedented limitation of 6 months for the filing of charges would be unfair and discriminatory. It would be a denial of equal protection of the laws to the property rights of labor. We know of no reason why labor's rights should be given such an ephemeral existence, or why workers should be singled out of all other classes for victimization.

The Proposal To Amend Section 10(c) To Limit Awards of Back Pay to a Period of 6 Months

Section 10(c) of the present act gives the Board authority, in certain cases, to order an employer to pay back wages to discharged employees against whom he has committed unfair labor practices. The majority proposes to amend this section by adding the following limitation:

> No order of the Board or of any court requiring the payment by an employer of money by reason of a finding that such employer has engaged in or is engaging in any unfair labor practice shall require such payment with respect to a period longer than 6 months, or with respect to a period which when added to any previous period with respect to which such payment was required either by the Board or by any court by reason of the same finding, is longer than 6 months.

The justification of the majority for this amendment is:[88]

> The employer is helpless in the face of the Board's delay, for there is no means whereby he can expedite proceedings under the present act.

Judicial and administrative processes are, in many cases, time consuming. In the case of the Board, this is partly true because of its concern in separating the judicial functions from the administrative functions of the Board, with the continuation and even greater safeguarding of which the majority has devoted a great part of its report.[89]

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[88] III, 397.
[89] III, 395.

This proposal, like the last, to which it is related, is manifestly unfair. Its effect would be to penalize labor, because the machinery of justice is time consuming and induces recalcitrant employers to drag out proceedings to the utmost degree.

We believe, of course, that cases before the Board should be disposed of as quickly as justice and due process will permit. We cannot agree, however, that the adverse effects of delay should all be borne by employees. They are the victims least able to bear them financially. The effect of the majority's proposal is to transform the adverse effects of delay into advantages for employers whose violation of law has been responsible for the employees' loss. There is no evidence in the record indicating that the adoption of the proposed amendment would speed up the Board's procedure.

The manifest unfairness of the short period of limitation proposed is graphically presented when it is shown that under the most favorable circumstances the proceedings, if all of the procedural steps which must be permitted were availed of, could consume more than 1 year.[90] These procedural steps may be summarized as follows: (1) The filing of charges; (2) investigation of the charges; (3) attempt at adjustment; (4) issuance of complaint; (5) hearing before the trial examiner; (6) preparation and filing of trial examiner's report; (7) filing of exceptions and briefs to the trial examiner's report; (8) oral arguments before the Board: (9) determination of issues by the Board; (10) preparation of Board's decision; (11) filing of case in circuit court of appeals; (12) printing of record; (13) oral argument before the court; (14) decision by the court.

The proceedings may be even further extended by as much as 6 months or more if the case is taken to the Supreme Court.

Preponderance of Evidence

The majority's proposal that the Board's findings should be based on a preponderance of the testimony merely states the rule under which the Board and other similar agencies now operate.[91] However, while the amendment is apparently unobjectionable, it is also quite unnecessary and may merely invite judicial constructions not intended by the majority. We perceive no evidence, either in the record, or elsewhere, that calls for an amendment of this nature.

The majority's proposal that the Board's findings of fact shall be deemed conclusive only if supported by substantial evidence likewise involves a mere repetition of the present provisions of the act, as interpreted in *Consolidated Edison Co.* v. *N. L. R. B.* (305 U. S. 197).

But the majority would also empower the courts to reverse Board findings if they hold them "clearly erroneous." This presents grave problems going to the heart of our American theory of the function of administrative bodies, and should not be adopted.

The whole theory of administrative law is based on the principle that in certain specialized fields of economic relationships, our ordinary law courts, competent though they may be, lack the peculiar qualifications needed to understand and hence deal properly with these

[90] II, 547, N.L.R.B. exhibit No. 122. This exhibit shows that the average time consumed from the filing of charges through the Board's decision is 312 days. Appeal to the courts extends this period.

[91] II, 557–565.

specialized problems. For that reason tribunals consisting of experts in the particular field were established to sift the complicated evidence and ascertain the facts of the particular dispute in question. The procedural rights of the contending parties were carefully safeguarded by the courts, which also continued to pass on questions of law and matters concerning the jurisdiction of the administrative agency. But the agency's findings of fact were declared binding on the courts if there was substantial evidence to support them. The reason was that the ability to make findings of fact was peculiarly within the exclusive province of the administrative agency. In fact one of the basic reasons for the creation of such agencies was because they are as expert in their findings of specialized facts as are courts in reaching their conclusions in their specialized branch—the law.

Now the majority proposes to let the courts overturn this expert body's findings if they are "clearly erroneous." This must mean something more than failure to find support in substantial evidence, though how much is left decidedly vague. Although it is impossible to prophesy how courts would construe this indefinite language, it clearly invites them to substitute their views for the Board's as to the facts proved by the testimony. Since the Board's findings must be based on a "preponderance" of the evidence, a court might declare "clearly erroneous" a finding which in its view was not based on such a "preponderance." This might permit the courts to weigh all the evidence in the case once again, and would nullify the majority's own amendment that substantial evidence to support a finding should render it binding. This proposal, contemplating a complete re-evaluation of all the evidence by the courts, flies directly in the face of past American administrative doctrine.

Now whether this doctrine should be altered may, perhaps, admit of argument, but no such argument was presented to the committee. The majority virtually confesses this when in its preliminary report [92] it makes no reference to court review of findings of fact except the single assertion that "criticism has been directed" to the present provisions.[93] This, may we submit by way of parenthesis, is merely a glaring example of the general procedure adopted by the majority of the committee, namely, the recommendation to the House of amendments for which there is no support in the record.

To give the courts power to overturn findings which they find "clearly erroneous" would not only reverse established administrative practice but would ignore our particular experiences in the field of labor relations which taught us that the problems presented were too specialized for ordinary court procedures before judges not expert in the field and led to the passage not only of this act but of the Norris-LaGuardia Act. The rights of labor and of private enterprise when they meet in seeming conflict present problems of a magnitude and of a delicacy which only those expert in the field can resolve justly and with full comprehension of the effects and implications of their decisions. To subject their conclusions on the facts to redetermination by a court would simply ignore the bitter lessons of a half century of labor conflict. That this is now well recognized by courts themselves

[92] III, 361–394.
[93] III, 389.

is shown by the unanimous opinion of the Supreme Court in *N. L. R. B. v. Waterman Steamship Co.*[94] The court said (pp. 495–496):

> In the act, Congress provided, "The findings of the Board as to the facts, if supported by evidence, shall * * * be conclusive." It is of paramount importance that courts not encroach upon this exclusive power of the Board if effect is to be given the intention of Congress to apply an orderly, informed, and specialized procedure to the *complex, administrative problems arising in the solution of industrial disputes.* As it did in setting up other administrative bodies, Congress has left questions of law which arise before the Board—but not more—ultimately to the traditional review of the judiciary. Not by accident, but in line with a general policy, Congress has deemed it wise to entrust the findings of facts to these specialized agencies. [Italics supplied.]

The question of the proper review of administrative tribunals is not one peculiar to the Labor Board. No reason is advanced by the majority for singling out this agency, nor does the sensitive field of labor relations commend itself as one suited to experimentation in new administrative techniques.

Rules of Evidence

The majority proposes to substitute for the present provision that the rules of evidence should not be controlling in hearings conducted by the Board, a requirement that these technicalities be observed "so far as practicable." In support of this amendment the majority cites[95] several cases in which the Board's orders have been set aside for failure to find support in the evidence; a memorandum by an assistant general counsel criticizing the Board's findings in one of those cases;[96] statements by Board employees of proper means of adducing all the pertinent testimony;[97] and testimony of a trial examiner that he felt compelled to admit hearsay evidence although he placed little weight on it.[98]

On the strength of that evidence in the record, we are asked to reverse a well-established rule of administrative procedure and substitute the vague concept that rules of evidence be followed "so far as practicable."

Whether administrative agencies generally should be bound by the rules of evidence is a question which has long been answered in the negative. If we are to reverse our established practice, we submit that we should do so only after due deliberation and the presentation of adequate arguments on both sides of the question.

This problem strikes at our entire theory of the administrative tribunal. The reason for not requiring the application of the rules of evidence goes to the very reason for those rules themselves. They are rules of exclusion, designed to keep otherwise pertinent matter from lay juries on the theory that their untrained minds would attach undue weight to relatively unsubstantial proof or would be unduly prejudiced by irrelevant matter attending otherwise pertinent testimony. In other words, the theory of our evidentiary rules is that more harm than good will come of admitting certain relevant material to a lay jury.

But that reason, obviously, does not apply to administrative tribunals which are trained in considering and properly evaluating just

[94] 60 S. Ct. 493 (1940).
[95] III, 390.
[96] II, 688–689.
[97] II, 117, 343.
[98] II, 63.

such matter. It was pointed out by Chairman Madden,[99] and concurred in by Dean Garrison,[100] that our leading authorities on evidence, such as Dean Wigmore of Northwestern University and Professor Morgan of Harvard University, favor the further relaxation rather than the extension of the rules of evidence.

Dean Wigmore, writing in Seventeenth Illinois Law Review, page 264, has this to say:[101]

> * * * any attempt to apply the jury-trial rules of evidence to an administrative tribunal acting without a jury is an historical anomaly, predestined to probable futility and failure * * * the system is not applicable either by historical precedent or by sound practical policy * * *
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> * * * When the tribunal is composed of experienced professional men, habitually inquiring day after day into the same limited class of facts (as happens with most administrative boards), an expert weighing of evidence can generally be counted upon. The cautions represented by the exclusionary jury rules can and will be applied by such a tribunal in weighing the evidence, without actual exclusion of it * * *
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> * * * And if there is any part of administrative activity to which this independence of formal rules can most readily be conceded, it is the task of weighing evidence and deciding facts. * * * The great ultimate process of reaching a conviction is not one for which we can offer the administrator any sure guide Why not trust his expert intelligence and good faith? Let us remember that the greatest part of the community's industrial, commercial, and financial activity already functions on a solid basis of fact determined without any formal rules of proof. Let us, here too, put our trust in men and minds, rather than in rules.

The only active suport in the record for the majority's recommendation is a statement made some time ago by Mrs. Herrick,[102] who testified that she has since changed her mind.[103] Surely, a matter involving such a reversal of policy should not be enacted on the basis of a record in which all the rather meager testimony on the point supports the opposite conclusion.

Nor should such an amendment—if we desire to make it at all—concern solely the Labor Board. Other governmental agencies of a similar nature are similarly authorized to disregard the technical rules of evidence. Why should one seeking to prove a case before this board be hamstrung by technicalities any more than one apearing before the Interstate Commerce Commission, or Federal Trade Commission, or any similar agency? And we might suggest that the sensitive field of labor relations is not the wisest place to experiment with new techniques, especially those adopted without full investigation and in the teeth of the advice of leading scholars in the field.

Furthermore, the record of the Board does not warrant the charge implied by the majority that its disregard of the technical rules of evidence has led it to make unsubstantial orders. Even if the charge were correct the majority's proposal would not affect either the basis of the Board's orders or court review thereof. The present requirement that the Board's orders be supported by substantial evidence is ample safeguard against abuse of the present law since the courts have held that uncorroborated hearsay or rumor is not substantial evidence.[104]

It is a well-known fact that the Board's record before the courts is an admirable one. Indeed, its record before the Supreme Court is

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[99] II. 402.
[100] II. 507.
[101] II. 403.
[102] I. 342.
[103] I. 343.
[104] *Consolidated Edison Co.* v. *N.L.R.B.* (305 U.S. at 203).

superior to that of any other administrative tribunal operating under a similar provision as to evidence.[105]

The proposed amendment invites confusion, protracted discussions on the record at each trial, and increased litigation by using the shadowy language that the rules of evidence shall govern "so far as practicable." Presumably, the rules are always "practicable" in the strict sense of the term. If the modification is intended to have any effect, it wil be, at best, a highly confusing one.

The majority asserts that this amendment will overcome inequalities of treatment, reduce expense to respondents, and restore public confidence. But the record is bald of any material connecting the rules of evidence to those arguments. In another connection and quite without regard to the rules of evidence problem, the reasons for a lengthy record and for recent success in reducing the size of records were explained by Chairman Madden.[106] Of course, at first glance the exclusion of evidence might seem a way to shorten transcripts of hearings, but anyone familiar with court practice knows that more time and space can be consumed in arguing technical questions of admissibility than would be used if the evidence were admitted for whatever it is worth. And this would be doubly true under the majority's nebulous "so far as practicable" proposal.

A final objection, relating to the practical application of the proposal, should be emphasized. The provision as to admissibility of evidence which the amendment would make applicable, is as follows:

> All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the State in which the United States court is held.[107]

Thus, under the proposed amendment, there would be no uniform law of evidence applicable to all Board hearings, but varying rules depending upon the State in which the Board's hearing happened to take place. As a result the Board's attorneys, and particularly its trial examiners, would be forced to familiarize themselves with the rules of evidence in many jurisdictions. This would impose an intolerable burden on the Board's staff and would greatly accentuate the technical dangers already pointed out.

The Proposal To Provide Court Review of Certifications of Bargaining Representatives

The Circuit Courts of Appeals do not have jurisdiction to review a certification issued by the Board in a representation proceeding.[108]

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[105] See N.L.R.B. Exhibit 63–67, II, 390–394.

[106] II, 359.

[107] 28 U.S.C. 723, c, rule 43a.

[108] *American Federation of Labor* v. *National Labor Relations Board.* (60 S. Ct. 300.) The Supreme Court held: "The statute on its face thus indicates a purpose to limit the review afforded by sec. 10 to orders of the Board prohibiting unfair labor practices, a purpose and a construction which its legislative history confirms.

"* * * The reports of the Congressional committees upon the bill which became the Wagner Act refer to the long delays in the procedure prescribed by Resolution 44, resulting from application to the Federal appellate courts for review of orders for elections. And in considering the provisions of sec. 9(d) the committee reports were emphatic in their declaration that the provisions of the bill for court review did not extend to proceedings under sec. 9 except as incident to review of an order restraining an unfair labor practice under sec. 10." This in the face of the majority's statement (III–398) that review of certification cases "was contemplated by Congress for the protection of the rights of employees guaranteed by this act."

It is proposed [109] that there be court review of such a certification, in the same manner that Board orders in unfair labor practice cases are subject to court review.

Under Public Resolution 44, (73d Cong., 2d sess.), creating the "old" National Labor Relations Board, provision was made for review of Board election orders by the circuit courts. The result was that, during the year of its existence, the old Board was unable to conduct a single election which the parties chose to contest in court proceedings. Because of this clogging of the functions of the old Board, when the present act was passed Congress saw fit to provide that there should be no court review of board certifications standing alone. We feel there is no evidence in the record to warrant the delay which would inevitably accrue from court review of certification in representation cases.

In his testimony before the committee, Dean Garrison referred to another problem which might result if the proposed amendment were adopted. He said: [110]

> To subject the Board's decision in these unit cases to court review instead of eliminating them altogether would, in my opinion, make matters, if anything, worse. I do not think the judges are qualified, in the main, to pass upon the sort of questions that are involved in these representation cases. They are not legal questions; there are no precedents for them. They are questions which turn upon the most delicate considerations of labor policy, industrial policy, which require a profound knowledge of labor-union practices, of the history of collective bargaining, and so on. Judges, in the main, do not possess that fund of knowledge, and I fear that if you got this American Federation of Labor—Congress of Industrial Organizations tangle over representation into the courts by way of review from the Labor Board, you would only have a worse situation of confusion and bickering than you have now.

Incidentally, the majority is inconsistent in advocating both judicial review and the Garrison amendment, previously referred to. Should that amendment be adopted it would eliminate the main reason, if there be any, for the amendment here discussed because the Board would be without jurisdiction to certify where rival unions were involved.

Subpenas

The majority proposes to amend the present law which provides for the issuance of subpenas at the Board's discretion [111] by making such issuance a matter of right, with power resting in the Board to revoke the subpena on cause shown by the subpenaed party. This would run contrary to the general practice of administrative bodies, as is well illustrated by the rules of the Federal Trade Commission,[112] the Interstate Commerce Commission, and the Securities and Exchange Commission,[113] each of which requires a showing of relevancy by the applicant before issuing a subpena duces tecum.

The majority defends its proposal on the grounds that the persons subpenaed may appeal to the Board to revoke it if the matter required is irrelevant. But this encouragement for fishing expeditions is not made less objectionable because it kindly permits the victims to engage counsel and undergo the expense of getting the subpena revoked.

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[109] Sec. 10(f) of the proposed amendments.
[110] II, 499.
[111] The majority's reliance on the criticisms contained in the *Inland Steel case* is another example of the biased nature of the report, since the record reveals that 2 years ago the Board changed its rules tot meet the objections that were subsequently raised by the court to a previous practice by the Board. (II, 22, 510.)
[112] 16 C.F.R. 2.16.
[113] 17 C.F.R. 201.4g.

Miscellaneous Amendments Affecting the Procedural Provisions of the Act

(a) the requirement of 15 days' notice of hearing

The present act provides that upon the issuance of a complaint the Board shall fix a hearing not less than 5 days after service of the complaint. The majority proposes to fix this period at 15 days (sec. 10(b)). We have no objection to this amendment, if provision is made for voluntary waiver of such notice by the parties.[114]

(b) the requirement that the relief granted in the board's order be limited to the relief requested in the complaint

The majority proposes an amendment to section 10(c) of the act providing that when an employer is found guilty of unfair labor practices, and the Board orders some affirmative action, such action must be limited to the relief requested in the complaint.

Such an amendment would, so far as labor cases are concerned, resurrect the highly technical law of writs which flourished in the earliest days of the common law. When the more intelligent sytsem of equity impinged upon the ancient law of procedure, the latter began to crumble and give way to the more enlightened practice of modern courts. There is no evidence in the record to justify the implication that labor alone should again be clamped in the stocks of outmoded systems of pleading. Moreover, the proposal is in conflict with the long trend of development of the law of procedure recently confirmed by the rules promulgated by the Supreme Court.

This proposal is an interesting study in contradictions. By one amendment the majority would incisively separate the "administrative" and "judicial" functions of the Board. Here, however, the majority would take away from the Board the pure "judicial" power to adapt the relief to the case, and vest it in the simon-pure "administrative" Administrator, by limiting the relief to that requested in the complaint which, under the majority amendments, would be framed and issued by the Administrator.

(c) the proposal that recommendations of the trial examiner, if no exceptions are filed, become the order of the board

The majority proposes another amendment to section 10 (c) providing that the trial examiner, or other person taking the testimony, must issue a proposed report, together with a recommended order, and that, if no exceptions are filed within the time provided, "such recommended order shall become the order of the Board and become effective as therein prescribed."

The record does not contain evidence as to the number of cases in which no exception has been taken to the findings of the trial examiner. It would seem probable, however, that such cases are rare. If that assumption is correct, the proposal of the majority would be nugatory.

Our study of this proposal has suggested that its practical effects would remove final responsibility from the Board and vest it in inferior officers. By this amendment the Board could be barred from exercising

[114] The rules of the Board provide for at least 10 days, but in the average case, the administrative practice is 15 days, N.L.R.B. exhibit No. 122, II, 547.

a wise revisionary power over its subordinates. Since the Board may now, if it desires, adopt the examiner's recommendations as its order, we perceive no reason for this proposal, nor is any explanation volunteered by the majority.

Certification of Representatives

The majority proposes to add to section 9(c) of the act a provision reading as follows:

> Such certification shall be effective for 1 year from the date of the entry of such order.

While this provision does not seem particularly objectionable, we think the matter is better left to administrative determination by the Board. Again the record contains no evidence that the matter is at the present time a serious problem.

Amendment To Consider Largest Unit as Appropriate Unit for Bargaining

The majority proposes that the power of the Board to determine the appropriate bargaining unit should be limited by the provision that such unit—

> shall in no case be larger than the largest unit claimed in an application filed by employees or representatives in the proceeding.

This proposal seems to us undesirable as opening the way to a possible gerrymander by labor organizations. Thus, it might happen that a plant includes certain groups which plainly should be included in the bargaining unit but which the labor organization or organizations involved wish to exclude because they have no membership therein. Under the proposed amendment the Board would be deprived of the power to establish a unit which, under the circumstances, would plainly be proper. The majority of the committee has often appeared to be solicitous of the rights of minorities. The desire of a union to achieve a majority within a given unit may well be destructive of the rights of minorities or even majorities to have bargaining representatives.

On the whole, we see no reason for prescribing a rigid rule of the sort suggested. There is no evidence in the record that there is any serious problem, or indeed any problem at all, involved.

We think it preferable that legislative action be based on the evidence before the committee.

II. A SURVEY OF THE WORK OF THE BOARD

We believe that an impartial report of our investigation of the National Labor Relations Board would not be complete without setting forth the very real accomplishments the Board has been able to achieve in the face of employer opposition and congressional inquiry. No individual instances af alleged or actual misconduct should obscure the facts appearing in the record which we set forth below for the consideration of the House.

A. Volume of Work

The Board's records show that it has handled, up to December 1, 1939, 25,034 cases involving 5,696,234 workers.[115] Of these, 2,536 were strike cases, involving 419,264 workers. The Board has averted 798 strikes, involving 186,799 workers. It has conducted 2,543 elections, in which 1,200,414 valid votes were cast. Up to December 1, 1939, the Board has rendered 1,439 formal decisions, covering over a million pages of testimony [116] and constituting 18 volumes of reports of about 22,000 pages.[117] In 1938, the testimony taken by the Board exceeded in number of pages the combined total of the Interstate Commerce Commission, Securities and Exchange Commission, Department of Agriculture, Board of Tax Appeals, Federal Trade Commission and the Federal Communications Commission. In 1939 the pages of testimony taken about equalled the total of the Interstate Commerce Commission and the Securities and Exchange Commission.[118] It has handled 54 matters in the Supreme Court of the United States, 518 in the Circuit Courts of Appeals, and 120 in the District Courts of the United States.[119]

The great bulk of this work has been handled in the last 2½ years, following the Supreme Court decisions in April 1937, upholding the constitutionality of the act.

This huge volume of work accomplished by the Board and its staff is important not only as showing the competence of the staff, but as revealing the over-all picture against which individual instances of alleged improper action must be judged.

B. Achievements of the Act and of the Board

1. Informal Disposition of Cases

The record of the Board in disposing of cases without the formality and necessary expense of hearings attests its efficiency and its intelligent desire to avoid the inevitable friction involved in litigation. Most of the cases disposed of informally were settled by agreement among the parties. The promotion of such amicable settlements is shown by the figures to be one of the principal functions of the Board's staff. During the period from October 1, 1935, to June 30, 1939, 12,619 unfair labor practice cases [120] were disposed of. Of these, 11,469 cases, or 91 percent, were disposed of informally; 6,086, or 48.3 percent, by settlement; 1,968, or 15.6 percent by dismissal; and 3,274, or 26 percent by withdrawal. Only 9 percent proceeded as far as the issuance of a formal complaint. In the same period, 6,169 representation cases were handled. Of these, 4,813 cases, or 78 percent, were handled informally; 2,919, or 47.3 percent, by settlement; 571, or 9.3 percent, by dismissal; and 1,285, or 20.8 percent, by withdrawal. Only 22 percent went so far as the issuance of a Board order for investigation of representatives.[121]

[115] II, 356, exhibit N.L.R.B. 13.
[116] II, 358, exhibit N.L.R.B. 15.
[117] II, 360, exhibit N.L.R.B. 19.
[118] II, 359, exhibit N.L.R.B. 16.
[119] II, 360, exhibit N.L.R.B. 20.
[120] An unfair labor practice case is so counted as soon as a charge, under oath, is filed, with the Board alleging commission of unfair labor practices. A representation case is so counted as soon as a petition for investigation of representatives is filed with the Board.
[121] N.L.R.B. Exhibit No. 40.

2. BENEFITS SECURED TO EMPLOYEES

During the last year, in 923 unfair labor practice cases involving 134,326 workers, unions were recognized as the result of Board efforts, and 769 collective agreements were signed. In 903 cases, notices informing employees that they had the rights guaranteed under the Act, were posted by employers. In 245 cases employers ceased dominating and interfering with labor organizations of their employees, and a total of 7,738 workers were reinstated after discriminatory discharges, of whom 3,003 received $658,523 in back pay.[122]

3. EFFECTS ON ORGANIZATION OF WORKERS AND COLLECTIVE BARGAINING

Under the protection of the act labor organization has made rapid strides since the legislation went into effect. Increases in membership have been registered by both of the main branches of the labor movement.

In 1935 the American Federation of Labor executive council reported a membership of 3,045,347. An authoritative estimate placed the total membership of other unions then at 578,000, making a total union membership of a little over 3,600,000.

In 1939, the American Federation of Labor executive council reported a membership of 4,006,354. The same year the chairman of the Congress of Industrial Organizations stated that it had a membership of over 4,000,000 The Department of Labor estimates the present total union membership at between eight and eight and one-half million.[123]

This was accompanied also by a rapid increase in the number and coverage of written collective agreements. The increase in agreements has occurred particularly since 1937. Thus in steel, before 1937, there were very few agreements. In 1937 more than 350 were reported, and in 1938, 500. In the rubber industry in 1932 less than 100 workers were covered by agreements; now more than 40,000 are, of whom more than 80 percent were covered since April 1937. In flat glass 21,000 workers are now covered. In aluminum agreements cover 6 plants employing 17,000 workers. In automobile more than 500 agreements were made in 1938. In the electrical equipment industry more than 400 agreements have been made, of which 300 are with the International Brotherhood of Electrical Workers (American Federation of Labor). The International Association of Machinists (also American Federation of Labor) reports over 4,000 agreements in the machinery industry.[124]

Not only has there been an extraordinary increase in such agreements, but more recently a significant change in their character has been noted. The National Industrial Conference Board Management Record for July 1939 reports that, as compared with 1937 agreements, 1939 agreements—

> in general * * * indicate a more serious acceptance of collective bargaining.

Their duration is indefinite, rather than being limited to 1 year, and they appear to be attempts—

> to cover situations that arise in day-to-day plant operation rather than contracts entered into under duress and couched in such vague terms as to make misunderstanding inevitable and amicable administration difficult.[125]

[122] II, 375. N.L.R.B. Exhibit No. 38.
[123] N.L.R.B. exhibit No. 21.
[124] II, 361 ; N.L.R.B. exhibit No. 22.
[125] N.L.R.B. exhibit No. 23.

Credit for these trends in collective bargaining, it seems to us, can be attributed largely to the act and the Board's administration of the act. It is almost entirely since the validation of the act by the Supreme Court and the consequent commencement of effective application that these trends have appeared.

4. EFFECT OF THE ACT UPON OTHER RIGHTS OF EMPLOYEES

The important effect of the act in making effective the civil liberties of employees, and in securing similar benefits, can best be stated in the words of Senator Wagner who, in a letter to the New York Herald Tribune, said: [126]

> Finally, no appraisal of the merit of the National Labor Relations Act is complete without mention of those values which cannot be measured in statistical terms. To increasing millions of wage earners, the act is bringing increasing enjoyment in their daily working lives of freedom of expression, of the press, of assembly, and of ballot. To increasing millions of wage earners, it is guaranteeing a voice and a place in our industrial system which has been too long neglected or denied. The significance of these values must be apparent in the present trend of world events.

5. THE EFFECT OF THE ACT UPON INDUSTRIAL STRIFE

While no evidence on the matter was introduced by counsel for the committee, the effect of the act upon industrial strife has been the subject of considerable controversy. It will readily be admitted that, in a field where the varying factors are so complex, the precise effect of the act cannot be precisely traced. Yet we believe that the evidence introduced upon this subject by the Board points to several significant facts.

Because of the injunction campaign, and the widely fostered belief that the act was unconstitutional, it did not come into effective operation until after the Supreme Court decisions of April 12, 1937. In 1938 there was a decrease, from 1937, of 42 percent in the number of strikes, of 63 percent in the number of workers involved, and of 68 percent in the total man-days of idleness due to strikes.[127] In the first 10 months of 1939, it declined to 40 percent of the total for the same period of 1937.[128] The same trend continued in November and December of 1939,[129] despite the fact that during these years the number of men organized into unions was about three times as great as in the pre-1935 period,[130] and despite a rising trend of business activity during the greater part of 1939.[131] And while the number of strikes was greater in 1938 and 1939 than in 1935 and 1936, their severity diminished, since the number of workers involved and man-days lost was less in 1938 than in any year since 1932 and 1931, respectively.[132]

Similarly, since the validation of the act, the number of sit-down strikes declined from a high of 170 in March 1937 to only 6 in the entire year 1939.[133]

The sharp increase in business activity in the latter months of 1939 was not accompanied by a similar increase in industrial strife.[134] Also,

[126] II, 375, exhibit N.L.R.B. 39.
[127] II, 363, exhibit N.L.R.B. 25 and comments thereon.
[128] II, 364, exhibit N.L.R.B. 26.
[129] II, 364.
[130] II, 365.
[131] II, 366.
[132] II, 366, 374.
[133] II, 366, exhibit N.L.R.B. 30.
[134] II–371, exhibit N.L.R.B. 32.

it is highly significant that there was a drop of 48 percent in number of strikes in those industries to which the National Labor Relations Act applies from 1937 to 1938, and of only 29 percent in other industries, a decrease of 66 percent in number of strikers in the former group and only 52 percent in the latter; and a decrease of 71 percent in man-days idleness in the former classification and only 51 percent in the latter.[135]

There has been an even more impressive diminution in the number of strikes called to achieve the purpose protected by the act—the right of organization. Until April 1937 the number of strikes called for organizational purposes almost uniformly exceeded the number of cases filed with the Board; since that time, Board cases have uniformly exceeded strikes for such purposes, in a ratio varying from 10 to 1 to 4 to 1.[136] Similarly, the number of Board cases has been greater than the total of strikes for all purposes [137] and the number of workers involved in Board cases has almost uniformly exceeded the number of strikes since April 1937.[138]

These trends are rendered still more significant by the fact that during the existence of the act there has been an enormous increase of union membership, as noted above.

In the light of the foregoing we are definitely of the opinion that the act has, since its validation in the middle of 1937, been a significant factor in reducing industrial unrest. In our opinion the Act will continue to play an increasingly prominent role in the promotion of harmonious labor relations as it comes to be accepted more generally throughout industry.

C. The Trend Toward Compliance

One of the most significant facts revealed by the history of the Board's operations has been the definite trend toward increasing compliance with its terms.

This is evidenced by the proportion of representation cases and unfair labor practice cases filed with the Board each year. In 1936 unfair labor practice cases constituted 81 percent of all Board cases; in 1937, 71 percent; in 1938, 65 percent; and in 1939, about 65 percent. The tendency thus is to use the facilities of the Board more to settle questions of representation and less to remedy unfair labor practices.[139] Similarly, the number of new cases filed with the Board has dropped off appreciably, from an average of 785 per month in 1937, and 666 in 1938, to 531 in 1939.[140]

D. The Board's Litigation Record

The Board's record in the courts is an impressive one. Up to January 20, 1940, the Supreme Court reviewed decisions of the Board on the merits in 16 cases; in 12 the Board's position was sustained in toto, in 2 the Board's order was modified, and in 2 it was set aside. Of the 12 decisions upholding the Board in full, 9 involved reversing orders of circuit courts of appeals setting aside Board orders. In

[135] II–372, exhibit N.L.R.B. 33.
[136] II–429, exhibit N.L.R.B. 34.
[137] II–429, exhibit N.L.R.B. 34.
[138] II–374, 433, exhibit N.L.R.B. 35.
[139] II, 375, exhibit N.L.R.B. 37.
[140] II, 354, exhibit N.L.R.B. 12.

6 other cases in the Supreme Court involving injunction or procedural questions, the Board was sustained in full. In 15 cases, by refusing to grant writs of certiorari, the court left in force decisions of circuit courts of appeals enforcing board orders; in only 2 cases did the court, by refusing certiorari, leave in force circuit court decisions setting aside Board orders. In 12 of the 22 cases actually decided by the Supreme Court, the decision sustaining the Board reversed the lower court.[141]

This record contrasts with the record of the Interstate Commerce Commission, which in the 10 years following its first case in the Supreme Court was reversed 10 times, never wholly upheld, and partly sustained twice;[142] and with that of the Federal Trade Commission, which, in a similar period, was sustained in 3 cases, partially sustained in 1 case, and overruled in 11 cases.[143] The Board's record in the Supreme Court is better than that of any Government agency which has ever been established.[144] Its record for affirmances in the Supreme Court is better than that of the Circuit Courts of Appeals for the Second,[145] Third,[146] Sixth,[147] and Seventh[148] Circuits—four courts selected at random for purposes of comparison.

In cases finally disposed of in the circuit courts of appeals, Board orders have been sustained in full in 40 cases, modified in 24, and overruled in 19.[149]

All questions of law and all issues of the fairness of the proceeding are subject to full review by the courts. While, as in the case of all administrative agencies, the Board's findings of fact are conclusive if supported by evidence, the courts have interpreted this to mean that the Board's findings must be supported by substantial evidence, and the courts have in fact exercised considerable latitude in appraising the testimony in the record.[150]

Further, there is no reason to suppose that the cases which have been reviewed by the courts are not fair samples of the Board's work. The fact that employers against whom an order has been issued can, and very frequently have, sought review of the order on their own initiative, eliminates the possibility that the cases taken to court have been selected in such a way as to show results favorable to the Board.

For these reasons we believe the Board's litigation record is particularly significant. It is indicative that the Board has observed the limits of its statutory power.

III. ANALYSIS OF MAJORITY REPORT

In the foregoing survey we have attempted to set forth briefly the undisputed evidence in the record as to the accomplishments of the Board. Without diverting from our main purpose, which is to indicate that the evidence in the record does not justify the amendments proposed by the majority, we, nevertheless, feel it necessary to analyze

[141] II, 389–393, exhibit N.L.R.B. 63.
[142] II, 393, exhibit N.L.R.B. 64.
[143] II, 393, exhibit N.L.R.B. 65.
[144] II, 394.
[145] II, 394, exhibit N.L.R.B. 70.
[146] II, 395, exhibit N.L.R.B. 71.
[147] II, 394, exhibit N.L.R.B. 67.
[148] II, 394, exhibit N.L.R.B. 69.
[149] II, 390, exhibit N.L.R.B. 63; II, 395.
[150] See *National Labor Relations Board* v. *Waterman Steamship Co.*, decided by the Supreme Court Feb. 12, 1940.

in some detail the findings and conclusions of the majority in regard to a series of petty or incidental aspects of the Board's administration.

We do not condone or excuse any conduct, whether because of excessive zeal or for any other reason, which has failed to conform to American standards of conduct. We believe, however, that such instances of alleged or actual misconduct have been magnified beyond their actual importance so as to serve as a smokescreen for the emasculatory amendments which the majority has recommended. It is because this aspect of the majority's report will be used in justification of ripper amendments that we find it necessary to present evidence in the record which has been omitted from the majority report. We deplore the fact that during the many weeks of investigation, counsel for the Committee submitted only evidence derogatory to the Board and its administration. We regret that the majoriy report persists in this error.

A. Administrative Practices of the Board

1. BLACKLISTING

a. Government contracts.—The majority report states that the Board engaged in "an unwarranted attempt * * * to impose extra-legal sanctions on employers." [151]

Because of the space devoted in the majority's report to a practice opprobriously termed "blacklisting," we wish to state our position on this matter. We believe this to be another attempt of the phrase makers to conjure up in the minds of the public a "bogey man." We believe that a distinction should be made by Government contracting agencies between those businessmen who violate the law and those who comply with it. Any other position results in putting a premium on violation and a penalty on compliance, and permits flagrant law violators to obtain the benefits of profitable Government contracts. Accordingly, we cannot condemn the practice of the Board in this regard, particularly since there was no applicable ruling prohibiting it, and there was a belated interpretation by the Comptroller General of an 1861 statute phrased in broad general terms.

We now set worth the facts developed before our committee. The record indicates that, in three cases, the Board either sought or participated in consideration of a policy of withholding Government contracts from employers violating the National Labor Relations Act. In two of these cases, the employer had already been found guilty of violating the National Labor Relations Act, and in the third case a complaint had been issued.

One of these cases involved the firm of Remington-Rand, Inc., exponent of the notorious "Mohawk Valley Formula" for smashing strikes.[152] The Board had found this company guilty of serious violations of the law [153] and the courts subsequently upheld the findings of the Board in all important respects. In connection with this case, the Social Security Board wrote to the American Federation of Labor

[151] III, 362, 363.
[152] III, 12, 13, 14, 21.
[153] N.L.R.B. exhibit 209 110, 56

union involved, that its policy was "to avoid making purchases from Remington-Rand, Inc., so long as it engages in the unfair labor practices of which it has been found guilty by the National Labor Relations Board." [154] Because Remington-Rand had neither complied nor shown any intention to comply with the Board's decision, the Board recommended to the Procurement Division [155] that contracts be withheld but this recommendation was not followed.[156]

Although authority to take such action is neither specifically included or precluded by the National Labor Relations Act, the Board's actions were based on a series of rulings of the Comptroller General [157] which were regarded as precedent.[158] These rulings upheld the validity of the President's Executive order of March 14, 1934, requiring that no bids for Government contracts should be considered unless accompanied by a certificate of compliance with the applicable National Recovery Administration code or with the President's reemployment agreement.[159]

The three cases mentioned are a complete record of the Board's "blacklisting" activities. Since the decision of the Comptroller General holding that there is no delegated authority for withholding Government contracts from firms alleged or found to be violating the National Labor Relations Act, the Board has taken no further action along this line.

It is interesting to note that Mr. Joseph A. Padway, counsel to the American Federation of Labor, made the following statement on this subject: [160]

> It can hardly be denied that this ruling of the Comptroller General which happened to be made in the very case of the Remington-Rand, Inc., is thoroughly inconsistent with the exercise of the administrative prerogative of the Federal agencies of the Government as supported by numerous holdings of the courts and as reflected in previous actions of the Federal as well as the State Governments. Although the fact that this ruling of the Acting Comptroller General constitutes a significant instance of assumption of legislative power by an administrative agency, the important point is that an effective remedy of this situation must now be supplied by congressional legislation.
>
> We believe that it should be the policy of the Federal Government to require, from persons obtaining the benefit of Government contracts, obedience to its laws.[161]

b. Reconstruction Finance Corporation loans.—The remainder of the evidence on the subject relates to an arrangement between the Reconstruction Finance Corporation and the Board, under which the Reconstruction Finance Corporation sends the Board a weekly list of loans tentatively authorized and the Board informs the Reconstruction Finance Corporation of any complaint proceedings that may be pending against any borrowers listed. This arrangement does not

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[154] III, 56; N.L.R.B. exhibit 203.
[155] III, 62; committee exhibit 889.
[156] III, 136; committee exhibit 915.
[157] III, 22.
[158] At approximately the same time, Assistant Secretary of Labor McGrady asked the Procurement Division of the Treasury if it were possible to withhold contracts from the company (III, 80, 138, committee exhibit 915).
[159] III, 22.
[160] Hearings on S. 3390 before a subcommittee of the Committee on Education and Labor, United States Senate (75th Cong., 3d sess., p. 15).
[161] Ibid. p. 19, Senator Wagner, testifying in favor of legislation to reverse the Comptroller General's ruling said, "Had he (the Comptroller General) ruled in accordance with the views that I hold, that he had (the) right to ascertain whether there had been a violation of the Federal Statutes, this proposed law would be entirely unnecessary."

fall within the scope of the Comptroller General's ruling on the contract question. On this subject, we quote the following excerpts from the testimony of Emil Schram, Chairman of the Reconstruction Finance Corporation.[162]

> It is absolutely necessary that we do that, and whether we ask them (the Board) for the information or if it is not available from them we would have to get it in some way or another, just as we get information on all lawsuits, civil suits, or any other pending information that might affect the credit of the borrower.
>
> * * * * * * *
>
> Up to the present time the number of cases and the necessity for withholding disbursement has been so negligible that we have really not paid a great deal of attention to it.

Mr. Schram also testified that this arrangement was similar to that in effect with a number of agencies, including the Wage and Hour Division of the Department of Labor, the Bureau of Internal Revenue, the Securities and Exchange Commission, and the Federal Power Commission.[163]

No evidence appears in the record to indicate that this was illegal. Altogether, the Board supplied information in eight or nine cases and requested withholding of disbursement in four.[164]

We feel once again that much ado has been made of very little. As Senator Wagner has said in this connection: "No sound reason appears why those receiving the benefit of Government contracts, loans, or grants should be permitted at the same time to defy the letter or the spirit of this fundamental and valid statute.[165]

2. BOYCOTT PROMOTION

The majority cites evidence of certain conduct of Edwin S. Smith, a Board member, in connection with the *Berkshire Knitting Mills case* which the majority charges "amounted to aiding and abetting of a 'boycott'." [166] We believe a fair statement of the evidence for the judgment of Congress requires us to fill in certain omissions in the majority's presentation.

The criticism of the majority revolves around the propriety of a letter written by Mr. Smith to Mr. Kirstein, following a letter written to Mr. Smith by union officials about the strike situation at the Berkshire Mills.[167]

Before setting forth Mr. Smith's letter in full, we call attention to the evidence in the record that at the time of Mr. Smith's action, a 3 weeks' old strike against the Berkshire Knitting Mills was in progress; that this plant employed about 6,000 workers; and that the company's policies of increasing hours and cutting wages threatened the stability of, and a general wave of price-cutting throughout the industry.[168]

There was also evidence that Mr. Smith had previously been employed by the Filene Department Store in Boston as employment manager and that Mr. Louis Kirstein, vice president of the Filene Store, was formerly a member of the old National Labor Board [169] and was

[162] III, 78.
[163] III, 78.
[164] III, 79.
[165] 83 Congressional Record, pt. 2, p. 1489.
[166] III, 363.
[167] I, 197.
[168] I, 197.
[169] I, 200–201, 223–3.

interested in the original code concerning wages and differentials in the hosiery industry which is still in effect by voluntary agreement and which the Berkshire company was charged by the union with violating.[170]

Because of certain significant deletions in the letter in the majority's report, we, in the interests of fairness, include the full text of Mr. Smith's letter to Mr. Kirstein:

DEAR MR. KIRSTEIN: Our Philadelphia office has been *interesting itself in an attempt to settle the strike* at the Berkshire Knitting Mills, but without success. I understood from the office that an attempt was to be made to appeal to some of the larger customers of the Berkshire Knitting Mills *to take up with the company the question of its wage scales* for the reason that its low-wage policy was tending to break down not only the wage structure, but the price structure throughout the industry. Berkshire's commanding sales in their field makes this, I understand, entirely possible.

Furthermore, there is a clause, I believe, in the union's contract with other manufacturers which provides that wages may be lowered unless the wage scale over a certain portion of the industry is maintained at a certain level. I was told that you were one of the persons whom the union was going to address *on this matter* and volunteered to write you a letter myself. You are certainly much more familiar than I am with the conditions in the hosiery industry and would, I know, be anxious *to avoid the disruption* which would occur in the retail as well as the manufacturing field if a general wage- and price-cutting program were launched in this industry.

I do not know whether you will care to make *any approaches on this matter to the Berkshire management*, nor do I know what volume of business Filene's does with Berkshire. I do most certainly feel that *any stand which you might adopt* would be listened to with greater respect by the Berkshire Co. I am enclosing a letter from John Edelman, research director of the Hosiery Workers' Federation, which gives some interesting facts *regarding the company*.

I hope you and your family are well and that the store is enjoying a prosperous fall season. Sincerely yours.[171] [Italics supplied.]

On October 28, 1936, Mr. Kirstein replied to Mr. Smith's letter of October 26, 1936, stating that he was partly familiar with the matter but wanted confirmation of the pro-Hitler and other charges concerning wages and hours against the company made in Mr. Edelman's letter of October 23, 1936.[172] Mr. Smith transmitted this request for further information to Mr. Edelman.[173] Thereafter, on November 9, Mr. Kirstein's secretary wrote to Mr. Smith, requesting an answer to Mr. Kirstein's previous letter,[174] and Mr. Smith replied that he had telephoned Mr. Edelman who had promised to supply the information within a few days.[175] On November 12, 1936, Mr. Edelman replied to Mr. Smith enclosing the material on the strike requested by Mr. Kirstein, and describing, among other things, a meeting called by the Governor of Pennsylvania, at which were present the Governor, representatives of the company, the union, the Textile Labor Relations Board, and the State bureau of industrial relations. The upshot of the meeting, according to Mr. Edelman, was that the company admitted having an advantage in labor costs over its competitors and also positively refused to meet with representatives of the employees to discuss a settlement of the strike.[176] On November 13, 1936, Mr. Smith enclosed this letter of Mr. Edelman and its supporting material in a letter to Mr. Kirstein.[177]

[170] I, 223.
[171] I, 198.
[172] I, 199.
[173] I, 199.
[174] I, 199, 203.
[175] I, 202.
[176] I, 202.
[177] I, 210.

The majority report states that "included in the supplementary material (sent to Mr. Smith by the union) was a strong appeal by the union to boycott hosiery manufactured by the Berkshire Mills."[178] The material enclosed consisted of some 16 items[179] *covering some 40 to 50 pages of printed matter*[180] alleged by the union to be in substantiation of its charges against the company. *One sentence* in one of these 16 items called upon consumers not to buy hosiery made by the Berkshire Co. Another sentence asked consumers to inquire from their storekeepers where the hosiery they wished to buy was made, and a *third sentence* set forth a list of names of union-made brands of hosiery. There is no other reference to a boycott in the supplementary material furnished by the union.

We should like to indicate that the record shows this material was sent to Mr. Kirstein only after requests on October 28, 1936, and November 9, 1936, for further confirmation of the union's charges.

Mr. Smith testified that his interest in communicating with Mr. Kirstein was in connection with an attempt to settle the strike, which a number of Government officials were then attempting to do; that he took no responsibility for the supporting material furnished by the Union except to transmit it at Mr. Kirstein's request without comment; and that he did not desire to assist in and had no intenion of suggesting a boycott of Berkshire products.[181]

In connection with the majority report's criticism of "conciliation activities," the record contains evidence to the effect that in the transitional period following the passage of the act, both labor organizations and employers, who were familiar with the procedures developed under the old National Labor Relations Board, continued to ask the regional directors of the present Board for assistance in strike cases. The regional directors continued for a time to perform incidental mediation services such as had been part of their previous work under the National Recovery Administration. The testimony indicates this practice has been discontinued.[182]

We offer this evidence for the purpose of rounding out a fair picture of this incident in Mr. Smith's 6 years of service on the Board.

3. LOBBYING

a. Amendments.—In supporting its charges of lobbying in opposition to proposed amendments to the National Labor Relations Act, the majority has lumped all of the Board's activities in this respect in one indistinguishable mass. We believe it helpful in understanding these activities to point out that they fell into three distinguishable classes.

(1) Endeavoring to secure witnesses who would appear before the Senate committee in opposition to amendments; (2) two cases of regional directors suggesting or requesting expressions of opposition to amendments from labor organizations and others; (3) preparing material on amendments and answers to criticism for presentation to the Senate committee by Board officials. In the latter instance, the Board acted pursuant to permission granted by the Senate commit-

[178] III, 364.
[179] I, 203–210.
[180] I, 225.
[181] I, 225, 230, 230A–230B.
[182] I, 201, 213, 214, 230, 230A.

tee.[183] The bulk of the Board's activity fell into this class,[184] and was not unlike the activities of the Board in preparing and presenting material before our own committee.

The majority cites a letter from a Board official suggesting that certain litigation before the Board might be pushed ahead to make it convenient for an interested party to be in Washington at an appropriate time to testify before a Senate committee in opposition to proposed amendments.[185] This letter is an exhibit in the hands of the committee[186] and it is indicated thereon that it was never sent. Why an error of judgment, recognized as such before any action was taken by the Board, should be censured, we fail to understand.

A memorandum sent to all regional directors of the Board is also relevant to this question and we set it out herewith:[187]

> In preparation for hearings before the Senate Committee on Education and Labor on the various amendments to the act, we are getting up a list of representatives and counsel of employers, American Federation of Labor unions, Congress of Industrial Organizations unions, State commissioners of labor, other public officials whose work is directly or indirectly affected by the act, presidents and deans of universities and law schools, professors of law and labor relations, and labor-relations experts, who will make good witnesses and who are willing to testify.
>
> We should like to have you (1) send us immediately, the names of persons, in as many of the above categories as possible, who have already expressed a readiness to testify; (2) interview prospective witnesses to ascertain what their attitude is toward the act and toward amendments and send us a report thereon as promptly as possible; (3) send us, also, as promptly as possible, a list of such witnesses who definitely will appear at the hearing. Please suggest to prospective witnesses that they communicate with Senator Elbert D. Thomas, chairman of the United States Senate Committee on Education and Labor, Senate Office Building, Washington, D.C., informing him of their desire to testify, and also make certain that we are kept informed of each such communication.

Thereafter, Regional Director Miller wrote the secretary of the Board, Mr. Witt, for further instructions and the secretary replied:[188]

> We have not intended that you should talk to persons who might make good witnesses from the point of view of convincing them that they should testify. Our only thought has been that during the course of your work you would undoubtedly have come in contact with many people who would already have expressed their views to you. We have wanted to make sure that we get in touch with all such people. We have also wanted to be sure that you did not get in touch with American Federation of Labor people who had not already come forward themselves. It is very distinctly none of our business to convince American Federation of Labor people who are opposed to the amendments that they should appear as witnesses. If any of them are interested in doing so, our object is merely to see that they give their names to the Senate committee and also that they get relevant information.

b. Appropriations.—On the subject of lobbying for appropriations, we submit the following statements of Chairman Howard W. Smith during the course of the hearings before our committee:[189]

> We who have been here on the Hill some time recognize that all departments and independent agencies, have indulged in that pastime of trying to get more appropriations than the committee thinks they ought to have at times.
>
> * * * * * * *
>
> I think it is a matter of common knowledge that departments and agencies of the Government have a custom of doing a good deal of lobbying when their appropriations are at stake.

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[183] III, 100, 103.
[184] III, 206.
[185] III, 365.
[186] Committee exhibit 991.
[187] II, 697; III, 8–9.
[188] II, 696; III, 295.
[189] II, 700; III, 10.

We believe the evidence adduced on this point is in no way peculiar to the Board, as Chairman Smith has recognized. It is a general problem which we commend to the Congress for study and consideration.

4. SOLICITATION OF LITIGATION

The majority States that the Board has engaged in the "practice of soliciting litigation" and finds "an apparent desire on the part of the Board to compel American industry and labor to subject themselves to the Board's dictatorship." [190] It invokes the support of two cases—the *Inland Steel case* and the *Berkshire Knitting Mills case*. In any event we query whether two cases constitute a "practice."

a. Inland Steel case.—We set forth below relevant evidence omitted from the report of the majority.

The evidence reveals that the labor organization involved, and not the Board, initiated and pressed for proceedings in the *Inland Steel* case. Undisputed testimony of record indicates that a strike against the Inland Steel Co. had been called in protest against the refusal of the company on May 26, 1937, to enter into a signed agreement.[191] On June 1, union officials telephoned the Washington office of the Board requesting that a Board representative be sent to Pittsburgh to confer "in connection with charges which they thought they might file against one or more of the companies involved in the Little Steel strike." [192] The Board's then Assistant General Counsel, Mr. Witt, proceeded to Pittsburgh and conferred with union officials. The substance of the conference revolved around the technical procedure for bringing before the Board the issue of the Inland Co.'s refusal to enter into a signed agreement. The procedure discussed involved the presentation of a demand for exclusive recognition by the union coupled with an offer to prove its majority, and the filing of formal charges if the company should refuse.[193]

After the conference, action was initiated to start drafting a complaint [194] in anticipation that the company would refuse to sign an agreement and that charges would be filed.[195]

It is suggested by the majority report that the Board engaged in a conspiracy "to entrap the company into an inadvertent violation of the act." [196] We are inclined to doubt that the precipitation of a serious strike by the company's refusal to enter into a signed agreement can be described as an "inadvertent violation" or that the attorneys of Inland Steel were the easy victims of "entrapment."

The practice of giving asistance and advice on technical problems of procedure in filing cases is not peculiar to the Board. The record shows that it has been the practice for years at the Interstate Commerce Commission, United States Employees' Compensation Commission, and other agencies.[197] It is a well-known and common practice for attorneys to secure advice and assistance from clerks of courts on technical questions relating to the filing of pleadings before the

[190] III, 366.
[191] *Matter of Inland Steel Company*, 9 N.L.R.B. 783, 795, 796.
[192] I, 283.
[193] I, 283–286.
[194] I, 283.
[195] I, 285.
[196] III, 366.
[197] I, 286–287; II, 514.

respective courts, although such clerks ordinarily are not specifically authorized to render such assistance.

The majority report attributes to the Board a sinister motive in setting this case for early hearing. We think it should be noted that prior to the Pittsburgh conference mentioned above, a serious strike involving 60,000 men was in progress due to the refusal of the Inland Co. to enter into a signed agreement. A few days before the conference 10 strikers had been shot to death and scores of other persons wounded in the Chicago Memorial Day massacre before the Chicago plant of the Republic Steel Corporation, also involved in the Little Steel strike.[198] The strike was settled on July 1, 1937, after the proceeding before the Board had commenced.[199]

We submit to Congress, Chairman Madden's query:

> Was it the intention of Congress that the Board and its agents should sit as blank-faced bureaucrats waiting for persons who might need the protection of the act to analyze their rights under the act to consult lawyers and other experts as to what rights, if any, they might have under the act * * * or to give a sympathetic consideration to persons, employees, or employers, who are troubled by problems which arise under the act.[200]

b. Berkshire Mills case.—The majority report charges the Board with being "guilty of soliciting charges" in the *Berkshire Mills* case.[201] The evidence of record, however, fails to sustain this charge and the majority itself admits in its report that "the union had evidenced its intentions as early as October 1936 of filing charges"—a date prior to the action which the majority alleges constituted "solicitation." [202]

The majority report takes exception to the action of the Board in postponing the hearing in the *Berkshire* case at the request of a union which was then considering a general strike.[203] Board officials testified that this was done for two reasons: (1) Because of calling witnesses and presentation of evidence in a Board case requires cooperation of the charging party and the failure of such cooperation would make almost impossible the satisfactory conduct of a hearing; [204] and (2) the constitutionality of the National Labor Relations Act was then still in question and the union doubted the effectiveness of a hearing by the Board in substitution for its traditional economic weapon of the general strike as a means of settling the controversy.[205]

The majority report criticizes the Board on the ground that, although a final decision of the Board was issued on November 3, 1939, finding the Berkshire Co. guilty of unfair labor practices, since that time "the Board has made no move to enforce its decision," [206] and ends with the conclusion that "*this is very significant as the Board thereby demonstrates its realization of the weakness of the case it solicited.*" [Italics supplied.] We set forth below from the files of our committee a letter relating to this very matter:

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[198] I, 283, 284.
[199] *M[illegible] Steel*, 9 N.L.R.B. 783, 797.
[200] Madden, II, 514.
[201] III, 367.
[202] I, 212.
[203] III, 367, 368.
[204] I, 221.
[205] I, 218, 221.
[206] III, 368.

FEBRUARY 14, 1940.

Mr. EDMUND TOLAND, Esq.,
General Counsel, Special Committee To Investigate the National Labor Relations Board, Washington, D.C.

DEAR MR. TOLAND: On November 9 and 11, 1939, two petitions to review an order of the National Labor Relations Board in the *Berkshire Knitting Mills case* (C–385) were duly filed in the United States Circuit Court of Appeals for the Third Circuit. Under section 10 (f) of the National Labor Relations Act it is the Board's duty to certify the transcript of the entire proceedings for filing with the circuit court. On November 22, 1939, the files in this case were taken in possession by the special House committee. On February 6, 1940, we last requested the return of these files in order that the Board might perform its statutory duty of certification. As yet we have not received the files.

It would be appreciated if the immediate return of these files could be arranged.

Yours very truly,

ROBERT B. WATTS,
Associate General Counsel.

Copy to Hon. JOHN BIGGS, Jr., United States Circuit Judge, Philadelphia, Pa.

It would appear from the foregoing letter that the committee itself and not the Board was responsible for any delay.

B. BOARD POLICIES AND INTERPRETATIONS OF THE ACT

1. INVENTION OF REMEDIES

The majority accuses the Board of "inventing" several remedies not contemplated by the act, namely, reinstatement or men never employed, reinstatement of employees guilty of violence, the ordering of back pay in the absence of an allegation of discriminatory discharge, and the holding of run-off elections.

The Board is charged with "inventing" these remedies, "admittedly without authority of law." The record shows [207] that it was testified on behalf of the Board that it relied on section 10 (c) of the act which provides that in unfair labor practice cases, the Board, in addition to a cease and desist order, may require the employer "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act.[208]

The Board's policy with respect to reinstating men whom the employer refused to hire because of union activity is at present being contested in the courts. Since the case of *Waumbec Mills* v. *N. L. R. B.* (15 N. L. R. B. 37) has already been argued before the Court of Appeals of the First Circuit, we deem it best to withhold judgment on the merits of the argument.

As the issue of reinstating employees who are found guilty of willful violence is dealt with under the amendment proposed for that situa-

[207] III, 383.

[208] See also Report of the House Labor Committee, Report 573, 74th Cong., 1st sess., p. 21. In *H. J. Heinz* v. *National Labor Relations Board* (C.C.A. 6), decided Apr. 3, 1940, the court said: "The act nowhere in terms confers upon the Board the power to require an employer to post any notice, yet its power in this respect is now well established. See *National Labor Relations Board* v. *Greyhound Lines* (303 U.S. 261), and *National Labor Relations Board* v. *The Falk Corporation* (decided on January 2, 1940)." An order to post notices promising to cease and desist was upheld. Also compare Supreme Court decisions in *N.L.R.B.* v. *Pacific Greyhound*, 303 U.S. 272; *N.L.R.B.* v. *National Licorice Co.*, 60 S. Ct. 569; and *Newport News Shipbuilding & Drydock Co.* v. *N.L.R.B.*, 60 S. Ct. 203, in which the court approved Board orders adapting remedies to the circumstances of the individual cases.

tion, we shall not discuss it here except to mention that the charge of "inventing" remedies seems hardly applicable to a policy approved by the courts as based on the act. The alleged instance in which the Board ordered back pay in the absence of a charge of discriminatory discharge is that of the *Indianapolis Glove Company* case. Reference to the Board's decision, reported at 5 N. L. R. B. 231, will reveal that the complaint did charge discriminatory discharge under section 8 (3), and that the respondent had sufficient notice as to the possibility of a back-pay order resulting from the finding of a violation of section 8 (1) of the act.

The majority in accusing the Board of going beyond the act in ordering run-off elections, sets its interpretation of the act at variance with that of the Supreme Court, which had the doctrine before it in *International Brotherhood of Electrical Workers* v. *N. L. R. B.* (60 S. Ct. 306), a case decided in favor of the Board.[209] The majority, moreover, suggests no other method of dealing with the situation presented when no union has a majority on the first ballot.

The fact that Board orders under section 10 (c) have been generally upheld by the courts should be sufficient answer to the majority's charge that the Board has "invented" remedies not contemplated by the statute.

2. APPROPRIATE UNIT

We have discussed the question of the appropriate bargaining unit at some length in our analysis of the proposed amendment embodying the general principles of the Garrison proposals. We turn at this point to the charge that the Board has exceeded its power in determining the appropriate unit.

It should be recalled that section 9 (b) of the act specifically vested the Board with the power *to determine* the appropriate unit. When Mr. Green testified in support of the Wagner Act,[210] he said:

> If employees and employers are not able to agree as to what constitutes the bargaining unit, I believe the National Labor Relations Board should decide what the bargaining unit should be.

It is difficult to understand how this responsibility of the Board may be characterized as "greater authority than was written into the law by Congress."[211]

Dr. Leiserson has testified that the differences of opinion which have been reflected in the decisions of the Board are not indicative of any improper action:[212]

> It is natural and healthy that the members of a quasi-judicial body should disagree on important problems, just as courts disagree. Such disagreement is a basic condition for progressive improvement. * * * Most of the dissents occur in connection with representation cases and revolve around the question of the appropriate bargaining unit. That the problems raised by this question are extremely complex and bound to develop diverse views is evident from the fact that there have been as many separate concurring opinions as there have been dissenting opinions. * * * When the Labor Relations Act was passed in 1935 we had a united labor movement, and if that condition had continued the difficulties of the Board in handling representation disputes would have been serious enough. But they would never have reached the proportions and they would not have

[209] Sec. 9 (c) includes authority to "take a secret ballot of employees or utilize *any other suitable method to ascertain such representatives.*" [Italics supplied.]
[210] II, 595.
[211] III, 385.
[212] I, 6.

developed the bitterness of feeling that has come since the split between the American Federation of Labor and the Congress of Industrial Organizations. * * *

It is indicated by the majority that the Board has acted arbitrarily in determining the proper unit by "gerrymandering." [213] We do not think that this represents a serious approach to this difficult problem. We believe Dr. Leiserson sets forth the situation realistically: [214]

But the people that do not like any particular unit that is fixed by the Board decide that is gerrymandering. That is what it looks like when you have to decide how many people you are going to put in that particular voting district. This whole problem is a voting district, and when you combine two, or separate two, or separate one, the people who object to it say that is gerrymandering.

Any election board or any authority that has to settle the question may upset precedents, and if it acts improperly, it can do improper things; if it acts properly, as was intended, then, obviously, it is the thing that the law intends. Now, I am not saying that it is improper in the sense that the other members of the Board, or even the court—I would not be surprised if the court upheld the majority. I do not say that the court would do anything improper. It is just a matter of difference of opinion as to what is practical and sound in dealing with these labor relations questions.

* * * But you have to have some authority to determine. There is no way out of that.

There is no evidence that the Board's decision have been anything but an honest effort to work out a reasonable solution for a very difficult problem.[215]

The further criticism is made that the Board has exceeded its authority in representation cases, by interfering in jurisdictional questions within the same national union.[216]

Evidence to the contrary is contained in the decision of the Board in Matter of Aluminum Co. of America and Aluminum Workers No. 18104, where the Board said: [217]

It is preferable that the Board should not interfere with the internal affairs of labor organizations. Self-organization of employees implies the policies of self-management. The role that organizations of employees eventually must play in the structure established by Congress through that Act is a large and vital one. They will best be able to perform that role if they are permitted freely to work out the solutions of their own internal problems. * * * In fine, the policy of the National Labor Relations Act is to encourage the procedure of collective bargaining and to protect employees in the exercise of the rights guaranteed to them from the denial and interference of employers. That policy can best be advanced by the Board's devoting its attention to controversies that concern such fundamental matters.

Further implications of biased action (in this case, in favor of the Congress of Industrial Organizations) in determining the appropriate

[213] III, 385.
[214] I, 71.
[215] The record shows that, as of January 1, 1940, Mr. Edwin S. Smith had disagreed with the majority of the Board only 59 times out of a total of 1,499 decisions; that in some 652 representation cases, he had dissented only 48 times; and that in 114 such cases, the total number of cases involving a dispute between the American Federation of Labor and the Congress of Industrial Organiaztions as to the appropriate unit, he had dissented from the majority of the Board only 24 times, these dissents relating to the application of the Globe doctrine. The record also shows that, in all cases involving the application of the Globe doctrine as between the American Federation of Labor and the Congress of Industrial Organizations, Mr. Smith has in his dissenting, concurring, or other opinions, agreed with the contentions of the American Federation of Labor 26 times, and with the contentions of the Congress of Industrial Organizations 29 times, that he has on occasion dissented from the position of the majority of the Board in favor of the positions taken by craft unions, both of the American Federation of Labor and unaffiliated unions, and that he has dissented from the majority of the Board to uphold the contentions of American Federation of Labor unions, in both unfair labor practices and representation cases. (II, 594–615.)
[216] III, 386.
[217] II, 422–35 et seq.

unit on an industry-wide basis is contained in this statement by the majority: [218]

> The Board's ruling on the appropriate bargaining unit in certain coal cases prevented the employees from severing their connection with the union in spite of the prevalent feeling of many of the employees that they are in bondage, according to the same witness' testimony. Some 85,000 employees of the American Federation of Labor were thus deprived of their collective-bargaining rights.

It should be noted that the record also contains the decision of the Board in the case of *Alston Coal Company* (13 N. L. R. B. 683), where the Board pointed out that the American Federation of Labor, too—

> has bargained on an association-wide basis. In Illinois where it was organized in 1932 district No. 1 of the Progressive (the American Federation of Labor) has negotiated contracts with the Coal Producers Association of Illinois. These contracts have been adopted by operators in Illinois who are not members of the Coal Producers Association of Illinois, but whose employees are members of the Progressive. Approximately 160 locals of the Progressive and approximately that number of mines in Illinois are covered by contracts negotiated between district No. 1 of the Progressive and the Coal Producers Association of Illinois. As we have hereinbefore stated, approximately 90 percent of the operators within the territorial jurisdiction of the Operators' Association are members of it. The fact that it has for 36 years been negotiating contracts with the United (the Congress of Industrial Organizations) in behalf of these operators and the further fact that nonmembers of the Operators Association whose employees are members of the United, have been adopting and agreeing to abide by those contracts indicate that the operators as well as the employees have considered collective bargaining on an association-wide basis is desirable. Bargaining and making contracts on such a basis has helped to stabilize the coal-mining industry and place the mines on a fair competitive basis, a condition which would be very difficult of achievement if separate contracts were negotiated with each operator. We see no reason to depart from the practice of the parties as evidenced by these contractual relations prevailing over a long period of time." [218a]

3. DELAY

It is unquestionably true, as the majority report states, that frequent criticisms have been made of delays that have occurred in the handling of cases by the Board.[219] We feel the majority has not given due consideration to the tremendous volume as well as the difficulties, of the cases handled and decided by the Board. The omission of any consideration of these matters is hardly consistent with a fair appraisal of the problem of delay.

It must also be recalled that the campaign of opposition to the act which was carried on in 1935, 1936, and early 1937, brought the operations of the Board almost to a standstill. Labor organizations learned that it was useless to file charges or ask for elections when the only likely result would be the commencement of injunction proceedings by the employer to prevent action by the Board. As a consequence, numerous potential cases were not filed with the Board and its staff remained small.

Upon the validation of the act by the Supreme Court in April 1937, the pent-up cases were released and the Board was at once deluged with work. The number of cases increased overnight almost tenfold. The Board then started to build up a staff to handle the rush of busi-

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[218] III, 386.

[218a] See also testimony of Chairman Madden that Progressive Mine Workers of America had on file only 3,067 membership cards, II, 556 and N. L. R. B. Exhibit 142.

[219] III, 387–389.

ness. While training a staff, and before the new group was ready to handle current business, a large backlog of work piled up.

At the present time the Board is handling representation cases on a current basis. That is, they are handled promptly in the field and analyzed by the Board's Review Section almost immediately after the hearing closes. In the last 2 months of 1939 they were disposed of on an average of 32 to 36 days after the close of the hearing.[220] Unfair labor practice cases are still subject to some delay, but here, too, there has been great improvement. In the year 1937–38 the average time for disposition of such a case from charge to decision was 389 days. In 1938–39, it was 210 days, a decrease of about 44 percent.[221] And the decrease has occurred in almost every step of the proceeding. Since the number of cases has reached a level or is even tending downward at the present time, there is reason to believe that the Board's progress in eliminating the backlog will continue and the problem of avoidable delay will be solved within a short time.[222]

It is, of course, essential that the rights of both workers and employers may be adjusted in accordance with the statute with as little delay as possible. That the Board is aware of the problem is indicated by the statement of its Chairman: [223]

> I think in our work, just as in any other judicial work, delay practically destroys the effectiveness of our work and that every effort should be made to eliminate the delay without affecting the soundness and accuracy of the work.

However, as the Chairman pointed out: [224]

> The key to the problem of delay would be that we have more work than we could do promptly. Since April 12, 1937, when the Supreme Court decision validating the act was rendered we have had an enormous backlog of cases which was more than our staff was adequate to handle. Beginning in the latter part of 1938, I should say, we began to make substantial progress in cutting down this backlog and eliminating delay. We have made increasing progress in that direction.
>
> That increasing progress is due to the enlargement of the staff, to the greater experience and competency of the staff, so that at the present time there is no serious problem of delay in representation cases. In other words they are handled substantially currently and are turned out promptly and as rapidly as they come in, unless there is some matter in the particular case that makes it difficult of decision, in which case we take whatever time is necessary to deliberate it before adequate decision.

The Board introduced into evidence a number of compilations indicating not only the cutting down of delay in the disposition of all types of cases, but also comparing time consumed in the disposition of Board cases with those of other agencies of the Government and and of the district courts.[225] This testimony leads to the conclusion that, notwithstanding the huge number of cases which came to the Board after the constitutionality of the act was definitely established real progress has been made in eliminating delay. The record shows that the Board situation compares favorably with that of other bodies which have had a much longer time in which to bring their work to a current basis.

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[220] II, 546, N. L. R. B. exhibits Nos. 120, 121.
[221] II, 546, N.L.R.B. exhibit No. 122.
[222] II, 549.
[223] II, 550.
[224] II, 545.
[225] II, 546–549.

We do not believe any useful purpose is served by the efforts of the majority to prove the obvious,[226] that there has been delay in the disposition of a number of cases, if by "delay" we mean that a good deal of time has necessarily been consumed.

The majority attempts to show that the delay has operated unequally as between the American Federation of Labor and the Congress of Industrial Organizations. There is much testimony to the contrary in the record which has been entirely ignored by the majority.[227] The Chairman of the Board testified—

> That in the A. F. of L. case, of which there were 2,835, the average number of days from the filing of the charge to the closing of the case was 33 in settled cases, whereas with the C. I. O. the average number of days was 36 in 2,679 cases. Of the dismissed cases, the time for the A. F. of L. was 62 days and the time for the C. I. O. was 73 days. In the withdrawn cases the days were 60 and 70, respectively. Of those otherwise disposed of, the days were 45 (A. F. of L.) and 73 (C. I. O.), respectively. * * * These figures are based upon 5,076 cases for the A. F. of L. and 4,886 cases for the C. I. O.

He then went into the disposition of representation cases without formal action,[228] testifying that there was no substantial difference in the time consumed as between American Federation of Labor and Congress of Industrial Organizations cases of this character. The exhibit cited [229] covers 4,813 cases (including cases of unaffiliated unions) disposed of between October 1, 1935, and June 30, 1939. There is also in the record [230] a table showing the time elapsed at the various stages of proceedings in unfair labor practices cases in which formal action was instituted and in which decisions were rendered between October 1935 and June 30, 1939. The table shows that American Federation of Labor cases in this category have been disposed of on the average in less time than Congress of Industrial Organizations cases. Further, National Labor Relations Board Exhibit No. 46 [231] shows the average (median) number of days consumed at various stages of representation cases in which formal action was instituted. It indicates a somewhat more rapid disposition of American Federation of Labor cases than Congress of Industrial Organizations cases of this type.

The majority [232] mentions the following cases in which Mr. Green criticized the Board for delay: Johns Manville Co., the Electric Vacuum Cleaner Co., Bishop & Co., Consumers Power Co., the American France Line Co., the National Casket Co., the Moore-Lowry Flour Mills, the Lansing Co., and the Mount Vernon Car Manufacturing Co., totaling nine cases, the chairman of the Board [233] gave the committee detailed explanations of the proceedings in these cases, to which we call attention of the Members of the House, without ourselves going into the details in this report.

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[226] III, 388–389.
[227] II, 380.
[228] II, 381; N.L.R.B. exhibit No. 44: II, 445.
[229] N. L. R. B. exhibit No. 44.
[230] II, 445; N. L. R. B. exhibit No. 45.
[231] II, 446.
[232] III, 388–389.
[233] II, 380–382, 555; III, 146 (ex. No. 1012).

C. Performance of Duties of Board Employees

1. ADMINISTRATION OF PERSONNEL

The majority impliedly indicts the general personnel of the Board in the statement that "The committee believes that certain examples of incompetency and partiality on the part of the Board employees should be pointed out as indicative of the Board's handling of its personnel."[234] In support of this statement, the majority cites cases of three former and two present employees of the Board, claiming the evidence to show incompetence and bias on their part. Among these was an ex-employee suspected of and reprimanded for "strong union sympathies" and pro-Congress of Industrial Organizations bias[235] an ex-employee of the Board and former member of the Harvard faculty[236] who wrote a book favorable to Congress of Industrial Organizations but whose removal because of the views expressed therein was protested both by the attorneys for the American Federation of Labor union in a case on which he had sat as trial examiner[237] and by a Congress of Industrial Organizations official;[238] an employee who had tried to obtain a position with the Congress of Industrial Organizations[239] and was subsequently discharged by the Board; and two present employees of the Board concerning whom there is highly involved and conflicting evidence[240] which conflict we do not attempt to resolve.

The majority also relies upon testimony of an ex-Board employee charging the Board's personnel with bias favoring the Congress of Industrial Organizations.[241] When requested, to specify examples and cases of bias, he was unable to name a single case.[242] He also testified that he "had never been satisfied with the treatment he had received" from the Board in being dismissed[243] for incompetence."[244] Other testimony given by him was clearly discredited[245] and we are not disposed to accord any weight whatsoever to his testimony.

We leave it to Congress whether to accept these five cases as evidence that the personnel of the Board in general is biased.

Before proceeding to a discussion of the performance of the various departments of the Boards staff, it should be emphasized that Dr. Leiserson's criticism of the operation of the Board has been

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[234] III, 368.
[235] Howard, II, 509. It is significant that Howard's superior who commended his work was accused of anti-CIO bias.
[236] Walsh, III, 368–369.
[237] II, 678–679; also compare II, 681 where Chairman Madden said: "It might be interesting to the committee to know that at the very time that we had Mr. Walsh on our staff we had a permanent and regular trial examiner, a Mr. Waldo Holden, who had come to us straight from the office of William Green. He was a research man in the A. F. of L. office. He had been studying law, had partly completed a law course. We knew that he knew a great deal about labor and that he knew something about law. We didn't suppose that because he knew Mr. Green and had worked in Mr. Green's office he would thereby be disqualified from dealing impartially with labor situations, and so we did make him a trial examiner. We kept him as a trial examiner for a couple of years, until he in due course resigned to go back to practice law in Vermont."
[238] II, 681.
[239] II, 685–687.
[240] Philips, III, 369; I, 243–246, 268–270, 276–278, 280; Davis, II, 311–319; III, 212.
[241] Freter—I, 363.
[242] I, 363.
[243] I, 364.
[244] II, 664.
[245] I, 362; III, 199; III, 662–663.

confined almost exclusively to the secretary's office. During the course of his testimony Dr. Leiserson summarized his position as follows:[246]

> Mr. TOLAND. Now, Doctor, you may make the explanation that you desire.
>
> A. After I had been with the Board for a month or so, I naturally tried to become acquainted with all the work of the Board, and I was impressed that in the litigation division, for instance, and the trial-examining division, and out in the field, we had on the whole excellent organization, with the proper arrangement of the hierarchy of managers, the people that know least at the bottom; a little above them, that know more; and people at the top, who knew how to direct them and train them in their work; and that is true of most of the departments of the work of the Board.
>
> Q. Would you tell us the exceptions, Doctor?
>
> A. I feel the main exception to be the secretary's office. You may get the impression from these memoranda—and that is what I want to clear up—that these criticisms apply to a large portion of the Board's staff. Actually, the secretary's office is not an executive office for all of the work of the Board. The legal work is entirely separate, handled under Mr. Fahy's general direction; under Mr. Watts, all the trial work; and the review work under Mr. Emerson. I think that they have worked out excellent arrangements for handling their business. They keep control of it, they direct it and manage it, and when the regional attorneys out in the field get in difficulties, as it is inevitable that they will, they report or phone to Washington, and they get straightened out and get the proper instructions.
>
> But the handling of our cases in the preliminary stages, they go through the secretary's office, where, all together this stuff that we have been reading here refers altogether to about six people, that is all, out of the total of 900.

We think it should be stressed that there is no evidence in the record which indicates that the differences of opinion between Board members, either over the secretary's office or over any other issue, has created such friction or dissension within the Board as materially to impair its effective operation.

2. EXECUTIVE OFFICE—SECRETARY AND SPECIAL EXAMINERS

A considerable section of the majority report was devoted to what our colleagues refer to as "'irregularities' of a serious character * * * revealed by the testimony concerning the operations of the secretary's office." This section of the report thus conveys the impression that the committee made a detailed study of the internal administration of the Board as directed by the secretary, Mr. Witt, which enabled it to make conclusions that there existed irregularities in procedure, incompetency, bias, and failure to seek instructions from the Board on important matters.[247]

Reference to this section of the majority's report, however, reveals that so far as it concerned Mr. Witt, it is documented almost entirely by a number of memoranda written by Leiserson, criticizing the conduct of the secretary and his assistants in particular cases, and culminating in a recommendation that Mr. Witt be relieved of his duties as secretary. This recommendation was not followed by the Board. Evidence subsequently furnished the committee by Chairman Maden showed that each of the items which were the subject of Dr. Leiserson's criticism had been investigated by the general counsel, Mr. Fahy, and that in his judgment these allegations could not be sustained. There were also read into the record letters from the two former chairmen of the Board, Dean Garrison and Solicitor

[246] I, 16.
[247] III, p. 371.

General Biddle, as well as three former Board members, Professor Millis, Mr. Carmody and Mr. D. W. Smith, expressing commendation of Mr. Witt's work during the period of their respective terms. The committee made no general survey of the work of the secretary's office, nor was there any trial on the merits with regard to the specific issues raised. About all that the committee really learned was that one Board member regards the present secretary as unfitted for his post and has made scathing criticisms of his work, but that his appraisal is at variance with that of the other two members. Little or no evidence was brought out which would have enabled us to make any finding as to whether Dr. Leiserson's position possessed validity.

Although the majority makes similar criticisms of the work of two special examiners who conducted investigations of regional offices under the direction of the Washington office, a large part of the evidence on which these were based comes from a former director of the Cleveland office who was dismissed by the Board for misconduct.[248] We think his testimony was thoroughly discredited. Other evidence consisted of a complaint of another regional director to the chairman expressing resentment over the character of an investigation into the affairs of her office,[249] and other Leiserson memoranda, one of which related to an investigation conducted in the Los Angeles office.[250] The criticism contained in the latter memoranda appears to be the only one for which there was corroboration before this committee.[251]

There is no doubt that these incidents prove the existence of serious friction within the "family circle" of the Board,[252] but it seems to us that they prove little more than that. In view of the difficulty of legislating harmony into the affairs of an administrative agency, we submit that the addition of two members to the Board who will bring a fresh point of view to bear on these personnel problems is the most that Congress can do on the basis of this showing.

Since we are of the opinion that the amendments recommended by the majority are the principal subjects for the concern of the House, we do not propose to go into these incidents in further detail, nor do we wish to be understood as agreeing with either Mr. Madden or Dr. Leiserson with regard to these personnel difficulties. In view of the publicity which this phase of the investigation received, however, we have cited other portions of the record which complete the picture the majority has seen fit to leave half drawn.[253]

3. FIELD EXAMINERS

The majority criticizes Grant C. Cannon, a field examiner in the St. Louis regional office, as having made statements showing bias in favor of the Congress of Industrial Organizations.[254] The four witnesses on whom the majority relied testified that their conversation with Cannon took place in St. Louis in April 1937, although the testimony indicated that Cannon did not arrive there until May. The

[248] II, 511.
[249] Committee exhibit 14, I, 12.
[250] Committee exhibit 49, I, 45.
[251] Committee exhibit 46, I, 42, 60. See, however, the Los Angeles incident, discussed infra.
[252] III, 371.
[253] See particularly II, pp. 408–415, inclusive, 531 ff. N. L. R. B. exhibits 87, 89. For reference to C. I. O. memorandum see II, 693. For explanation more fully explaining conduct of investigations see II, 415–461, 509–510, 530, 568–569.
[254] III, 382.

first of the four to testify was unable to identify Cannon although he was in the hearing room at the time. Cannon himself testified that he had no memory of any such visit, and denied that he had made such statements at any time.[255]

The majority report also discusses at some length the testimony of Mr. Freter, a former field examiner in the Indianapolis office, who was discharged for inefficiency.[256] We think that the entire testimony of Mr. Freter is unworthy of serious consideration. When he testified, he appeared to be a biased and inaccurate witness.[257] Documentary evidence was introduced contradicting his accusations against the Indianapolis regional office.[258]

The majority report comments on the fact that Mr. Freter was recommended for consideration in the review division by the acting regional attorney of the Indianapolis office. The letter of the acting regional attorney stated that Mr. Freter was not "quite as stable as a field examiner should be." However, Mr. Freter was not considered qualified by the review section and despite his efforts to secure employment there, he was rejected.[259] Mr. Freter's testimony, cited by the majority report, that he was told by Mrs. Stern, assistant secretary of the Board, that he was discharged because of family background," was denied by Mrs. Stern [260] who stated she knew nothing of his family background. The majority report admits that Mr. Freter "testified the remark was meaningless."

4. TRIAL EXAMINER'S DIVISION

a. Personnel.—Although originally there were both permanent trial examiners and trial examiners engaged in a per diem basis there is now only 1 trial examiner employed on a per diem basis, the remaining 38 being regular and permanent employees.[261]

For the permanent staff, an attempt was made to secure individuals with at least 5 years of trial experience in the field of the law, or its equivalent, and preferably with a background of experience in labor relations. Pratt testified it was seldom that applicants could be found who possessed both the legal qualifications and the desirable background because "the field is new." [262] Pratt pointed out [263] that experience in the actual conduct of hearings, arbitration cases, and experience before quasi-judicial agencies was considered as the equivalent of legal experience. We do not find any justification in the record for the sweeping charge that "persons totally unqualified for any legal position were selected to perform an important judicial function."

The majority's report states that the chief trial examiner was deeply interested in determining whether applicants for the position as trial examiner had the "right viewpoint." [264] The conclusion is drawn in a manner to imply that the "viewpoint" desired was an improper one. The record before the committee shows that Mr. Pratt, the chief trial examiner, was asked if he had made statements about appli-

[255] II, 100.
[256] III, 382 ; II, 664.
[257] I, 361–365.
[258] II, 663.
[259] I, 365.
[260] III, 199.
[261] II, 124, 140.
[262] II, 439.
[263] II, 139.
[264] III, 378.

cants that they had "the right viewpoint" and he replied, "I may have done so." [265] He denied that he required applicants to be "in favor of the unions" [266] and explained that he attempted to employ individuals in sympathy with the purposes of the National Labor Relations Act as declared by Congress in the "findings and policy" of the statute.[267]

b. Functions of trial examiners.—The efficiency with which the Board's trial examiners have discharged their duties is apparent from an examination of the record. From November 1935 to September 15, 1939, the Board decided 392 cases in which intermediate reports had been previously issued by the trial examiner. In 228 of these cases the Board followed the recommendations of the trial examiner. In the remaining 104 cases, 89 were sustained in part. In only 25 of the total did the Board reject in full the findings of the trial examiner. Thus the Board and the trial examiners were in complete agreement as to questions of law and fact in 73.5 percent of the cases considered.[268] When considered in the light of the extraordinary number of Board decisions enforced by the courts,[269] the fact that the trial examiner and the Board have so often reached the same conclusion, attests to the ability of the trial examiners.

c. Conduct.—The majority's report relies upon isolated statements of trial examiners to sustain the criticisms made of the trial examiners generally. It is significant that many of the statements relied upon were made by individuals who are either no longer in the employ of the Board, or are no longer acting in the capacity of a trial examiner. Of the seven trial examiners who, together with the chief trial examiner, testified before the committee, only four trial examiners are referred to in the majority's report. Of these four, only two are currently acting as trial examiners, namely, Dudley and Whittemore. Of the remaining two, one, Mapes Davidson, is no longer in the employ of the Board, and the fourth, William Seagle, is no longer acting as a trial examiner. It is further significant that the criticisms of the majority refer to but five cases heard by these trial examiners and to two additional cases heard by Charles Wood, a trial examiner no longer in the employ of the Board. The trial examiners called as witnesses conducted in excess of 300 cases, and it is significant that in but 7 instances did the majority consider that there was ground for criticism.

The majority report has taken one trial examiner to task for allegedly concluding, together with the Board trial attorney in a case presided over by him, that the Board hearing would have a definite effect on the company's employees in that "It may stimulate their courage, nourish their self-confidence, permit them to dare vision a time when they can demand social justice for themselves." [270] The letter, from which this quotation was extracted goes on to say that the witnesses—

*** * * are impressed by a half dozen thugs who use physical persuasion. * * * An 18-year-old witness—fired for refusing to join the "good fellowship"—(an organization found in the intermediate report to be company-dominated) * * * had come to [the Board attorney] blinking tears. Two of the "thugs" last night in a restaurant pulled a knife, drew it across his throat and told the kid they would use it * * * as soon as the Government officials left town. One of the men**

[265] II, 139.
[266] II, 139.
[267] II, 139.
[268] N.L.R.B. exhibit 73, II, 528.
[269] N.L.R.B. exhibit 73, II, 528.
[270] III, 377.

referred to shot another, during an election brawl this summer. But Hamrick's sheriff didn't even arrest him. The other knifed his sister not long before and received a 2-year suspended sentence. * * *

This account is similar to one contained in an article appearing in a local newspaper which was introduced in the committee's record.[271] The individual who threatened the Board's witness was also called to testify at the Board hearing and substantially admitted the story as related by the trial examiner and in the newspaper account.[272]

In the face of such terrorism, the trial examiner's comment appears human.

The majority also criticizes this trial examiner for citing a newspaper article in his intermediate report on this case, dealing with the rates of homicide and illiteracy in the county where the hearing was held. The trial examiner explained that counsel for the Board at the hearing had requested that the trial examiner take judicial notice of the material referred to and the sole objection of the respondent to the procedure was based upon a challenge to the relevancy of the material.[273] The trial examiner explained that the evidence was cited to give an accurate and clear picture.[274]

The majority report extracts portions from letters addressed by another trial examiner to the chief trial examiner as proof of the "absence of a properly judicial frame of mind." [275] Among others, quotations are given to show that this particular trial examiner did not observe "the scrupulous impartiality always to be preserved by such officers" when he advised the attorney for an intervening American Federation of Labor union that "he could call as many witnesses as he pleased but that [the trial examiner] would regard it as the vilest sort of obstructionism" if he were to do so. The report of the majority significantly fails, as it did with respect to other quotations from the testimony of this witness, to acknowledge the authorship of these remarks. The letters from which these quotations are taken were written by Mapes Davidson, a trial examiner of the Board who is no longer in its employ.

Dudley is also criticized for writing a memorandum to the chief trial examiner stating that he feared the respondent intended to call a regional director (Dorothea de Schweinitz) to the stand during the course of a hearing to establish her bias in favor of the Congress of Industrial Organizations.[276] The trial examiner wrote in part "It will be difficult for her to withstand the hammerings of Mr. Bartlett (respondent's attorney) particularly if you make it impossible for me to protect her by ruling this inadmissible." [277] The majority failed to note the trial examiner's testimony that the accusation of Congress of Industrial Organizations bias, although bad in itself, if true, could not be decided in the hearing before him because there was no issue of such bias in the case. The only issue in that case was explained to be whether or not the company had violated the National Labor Relations Act.[278]

In charging that "conduct unbecoming a judicial official of a Government agency toward counsel of a respondent is disclosed by the

[271] Exhibit 531, II 80
[272] II, 81.
[273] II, 83.
[274] II, 82.
[275] III, 376, 377.
[276] III, 376.
[277] II, 27.
[278] II, 27–29.

testimony of another trial examiner," [279] the majority report fails to disclose provocative circumstances that preceded the allegedly injudicial remarks.[280] For example, it was testified that respondent's attorney had insulted the trial examiner in open court. The attorney for respondent was testified to have "leered at the witness and said, 'You are feeling kind of "fratty" with the trial examiner, aren't you,' " [281] upon the trial examiner's having sustained an objection to a question put to the witness. The trial examiner also testified that on one occasion respondent's counsel attempted to imply that one of the attorneys in the case was having improper sexual relations with one of the witnesses in the case.[282] Chairman Madden criticized the actions of the trial examiner [283] and he was later relieved of his duties as trial examiner and assigned to review work in the trial examiner's division.[284] It may also be pointed out that with respect to this particular trial examiner, the Circuit Court of Appeals for the Seventh Circuit stated in its opinion in the *Jefferson Electric Company* case (102 F. 2d) 949):

> Intervenor's counsel also contends that this instance of excluded evidence and the questioning by the trial examiner of witnesses for petitioner and intervenor indicate an unfair and biased conduct of the hearing. We have carefully studied the record, which to us reveals that the trial examiner was fair in his behavior toward the parties in this tripartite controversy.

As evidence of incompetence nad misconduct, the majority report cites the *Bercut-Richards Cannery* case [285] as one in which the Board was "compelled to set aside an entire record and direct that a rehearing be held because of the bungling activities of the trial examiner." The majority report fails to point out that the trial examiner, after completing the hearing in the case, was relieved of his duties as a trial examiner and shortly thereafter resigned.[286] The majority report also states, "Referring to the *Inland Steel* case tried by the same trial examiner, the chief trial examiner testified that he agreed with the opinion of the Circuit Court of Appeals for the seventh Circuit that the conduct of the trial examiner was not fair and impartial." [287] The testimony [288] shows that the chief trial examiner did not so testify, but testified merely with reference to the *Bercut-Richard Cannery* case.

The majority report also cites a dictum from the opinion of Judge Major in the *Inland* case, to the effect that the case illustrates the danger of continuing in one agency the functions of an administrative body.[289] It should be poited out that this is the only instance (out of 99 decisions of the circuit courts of appeals and 16 decisions of the Supreme Court of the United States) [290] where the courts have so criticized the administrative procedure provided by the National Labor Relations Act. The *Inland* case, in the seventh circuit, and the *Montgomery Ward* case, in the eighth circuit, are the only instances in which a court has deemed it necessary to set aside an order of the

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[279] III, 376.
[280] II, 40, 48.
[281] II, 41.
[282] II, 42.
[283] II, 42.
[284] II, 43.
[285] II, 123.
[286] II, 131.
[287] III, 377.
[288] II, 129.
[289] III, 377.
[290] National Labor Relations Board exhibit 20, II, 360.

Board because of prejudicial conduct of the trial examiner. In the *Montgomery Ward* case the eighth circuit stated:

> In other cases of labor disputes coming before this court, examiners have evinced an understanding of the grave responsibilities of their position and duties. They have endeavored to meet these responsibilties and accord their hearings. It is unfortunate that there should be exceptions. This is one exception.

See also, *Wilson & Co., Inc.* v. *N. L. R. B.* (103 F. (2d) 243), in which this same circuit court after the Montgomery Ward decision said:

> The Board accorded a full hearing upon exceptions to the report of the examiner. We find no ground for the complaint that the company was not accorded a fair hearing either by the examiner or by the Board. * * * We have read the entire record. We are impressed that the examiner was entirely fair. We have no doubt of his intention to be fair and we think that his conduct of the hearing was commendable. Whether he may have erred as to some matters of evidence is not controlling since we find no evidence excluded which would be vital to either of the main issues.

4. Chief trial examiner: The majority's criticism of the office of the chief trial examiner deserves special consideration. At the outset, the majority considers the background of Chief Trial Examiner Pratt on the ground that it "is of real significance in a consideration of his frame of mind prior to appointment to an office judicial in nature." [291] The majority then states that "Pratt was formerly regional director of the Kansas City office of the Board," [292] and discloses nothing further as to his qualifications. A complete examination of the record, however, discloses that Pratt is a graduate of Yale (A. B., 1925); has an LL. B. from Yale (1927); became a member of the Missouri bar (1927); practiced as an attorney in Kansas City, Mo., from 1927 to October 1934; and became regional director of the Kansas City office of the predecessor Labor Board in the fall of 1934. He continued in that capacity after the creation of the present Board. During his tenure as regional director in Kansas City with the present Board, he also served as trial examiner in approximately 12 cases, all of which arose and were heard in regions other than Kansas City.[293] Pratt also acted in the capacity of an attorney for the Board.[294]

In discussing the proposed amendment to create an Administrator and effect a separation of judicial and administrative functions, we have mentioned the reliance by the majority on certain facetious remarks of Pratt. (See supra.)

The majority also criticizes Pratt on the ground that he allegedly "conducted investigations in a number of cases before written charges were filed." [295] An examination of Pratt's full testimony shows he testified that investigations were made before charges were filed to investigate jurisdictional matters to see if there was any merit to the case, and thus to lessen the work of the Board and the industrial strife involved.[296]

The majority report further criticizes Pratt on the ground "that he thought he had said that he had 'two strikes on the respondent in every case that starts.'" [297] Pratt testified that "when I made that statement, I was undertaking to try to tell some trial examiners how

[291] II, 377.
[292] III, 377.
[293] II, 105, 106.
[294] II, 106.
[295] III, 377.
[296] II, 107.
[297] III, 377.

a regional director felt when he had enough evidence to request the issuance of a complaint." [298]

He also testified, "I was trying to get [to the trial examiners] the distinction between what they should feel and how the regional director felt about it." [299] The testimony also was to the effect that the regional director had this attitude because of the careful investigation made prior to the issuance of a complaint, and his own feeling that the case was a meritorious one.[300]

5. Supervision of trial examiners: The majority's report states that an examination of the telegrams sent and received by the office of the chief trial examiner "reveals an almost complete dependence by the trial examiners upon the instructions of the head of this division." The majority's report then states that "there has been unwarranted interference of the administrative into the judicial function by the office of the chief trial examiner acting as a super-review authority." [300a] An examination of the record discloses that Chief Trial Examiner Pratt, although he made repeated requests to be given an opportunity to explain the telegrams referred to,[301] he was not given such opportunity, and when a statement of explanation was offered committee counsel objected to the offer.[302] It would appear unfair to rely upon partially developed evidence in this instance. We see no evil in an effort to have the practice of the trial examiners as uniform as possible with respect to questions of procedure involving Board policy.

The majority's report has charged that in the exercise of the general supervision of the work of all trial examiners, Pratt not only is "responsible for keeping their decisions in line with Board policy," but in fact even modifies the trial examiners' reports "as to conclusion of fact and law, without having participated in the hearings." [303] The majority has cited no cases, and our examination of the record reveals no evidence to support the conclusion that Pratt modifies conclusions of the trial examiners who heard the case.[304]

6. Fictitious hearing dates: The majority report makes much of "phoney hearing dates" in connection with hearings before trial examiners.[305] The testimony discloses that in one instance a regional director advised Pratt, chief trial examiner, that he knew the respondent would request an adjournment which the regional director desired to grant and suggested that a date be set in the complaint which would not actually be used.[306] The chief trial examiner maintains a schedule of hearings and "if he can, if he has a trial examiner available, assigns a trial examiner to the hearing." [307] It would appear that the hearing schedule must be as accurate as possible to obviate unnecessary travel by trial examiners. Since the regional director knew that the respondent contemplated requesting a continuance, it seems to have been sound administrative practice for the chief trial examiner to act on

[298] II, 115.
[299] II, 115.
[300] II, 398, 399.
[300a] III, 378.
[301] II, 141, 142, 178.
[302] III, 236.
[303] III, 378.
[304] See testimony to the effect that the trial examiner who hears a case remains the final judge of all conclusions of law and fact with respect to such case (II, 13; II, 126, 171, 399, 559).
[305] III, 377.
[306] Committee exhibit 183, I, 248.
[307] II, 399.

that advice in arranging his schedule. The regional director testified that in this particular case this respondent requested and received three adjournments.[308] It is not clear why the committee should criticize the Board's effort to avoid the expense of needless travel by the trial examiner in view of the regional director's advice that the respondent desired and would request the adjournment.

The majority report also states that "the same regional director had suggested to the board that 'he be permitted to issue a complaint with a phoney hearing date' " and that the Secretary of the Board (Mr. Witt) commended the suggestion.[309] The case referred to was settled by stipulation and was never called for hearing. It was testified on behalf of the Board that the respondent company had agreed to a settlement of the charges pending against it but insisted that it receive a complete release from the Board, and that legal reasons necessitated the issuance of a complaint and the setting of a hearing date.[310] It appears to be a mere technicality, and no rights were prejudiced thereby.[311]

7. Transferring cases to Board without intermediate report: The majority's report refers to the "snatching" of cases—the transfer of cases to the Board without an intermediate report—and characterizes it as "interference with the judicial function of the trial examiner." [312] The instances of this practice shown in the record before the committee disclose that in the *Washougal Woolen Mills* case the trial examiner had incurerd the strong distrust of the regional office and the union involved.[313] In two other cases it was testified that the reports of a trial examiner "were so poorly drawn that it was simply impossible to use them. In fact, it was difficult to even understand what findings he had made." [314] In one case referred to in the majority's report (Stromberg Carlson Telephone Manufacturing Co.) the record is to the effect that after the conclusion of the hearing the parties settled certain issues involved in the case. As to these issues there was no necessity to prepare an intermediate report. The trial examiner wrote an intermediate report covering the remaining issues.[315]

It should be noted that the Board's rules and regulations expressly provide for the transfer of cases to the Board without intermediate report (art. II, sec. 37). Chief Trial Examiner Pratt testified that the ability to exercise this power served as an incentive for trial examiners to do a workmanlike job and did not curb the free exercise of the trial examiner's judgment.[316]

5. REVIEW DIVISION

The majority devotes over two pages of its report [317] to criticism of the Review Division of the Board. It is interesting to note that the first week of testimony was devoted solely to questioning members of the Review Division who were women. No explanation is given

[308] I, 248.
[309] III, 377.
[310] I, 250.
[311] Committee exhibit 184, I, 249, 250.
[312] III, 378.
[313] II, 150–158.
[314] II, 170.
[315] II, 41.
[316] II, 161.
[317] III, 379, 381.

by the majority for this action in singling out the women attorneys for investigation.

a. Functions.—In general, it is the function of the Review Division to summarize and analyze the records in Board cases, to report thereon to the Board, and to prepare tentative drafts of decisions in accordance with the instructions of the Board.[318]

b. The extent to which the Board delegates its judicial functions to the Review Division.—Under the statute, it is of course the duty of the Board to make the findings of fact itself. It cannot delegate this power to anyone. It does however utilize the Review Division to analyze records, sift and report the evidence.[319] The testimony shows that the review attorney when requested may make recommendations to be passed on by the Board members.[320]

The record shows that the drafting of decisions is pursuant to directions given in conference by the Board itself.[321] It appears that, except in isolated instances, no part of the draft decision, except the purely formal part stating the procedural steps taken, is prepared before the conference with the Board.[322] Occasionally a review attorney may, upon the discovery of evidence in the record not previously reported to the Board, tentatively draft part of a decision in another way for consideration of the Board. This change is called to the attention of the Board members.[323]

This action would not seem to warrant the characterization of the majority that "the review attorney clamly proceeded to substitute her own independent judgment for that of the Board." [324]

An examination of the volume of work performed by the Board [325] indicates the necessity of the utilization by the Board of the Review Division. This system has been adopted by other agencies exercising judicial powers,[326] by judges of busy courts,[327] and by busy law office.[328] This question was passed on by the Ninth Circuit Court of Appeals in the *Biles-Coleman Lumber* case [329] as follows:

> It is obvious that such an administrative body, with scores of cases for its decision, many involving complicated questions of fact and often intricate questions of law, properly will rely upon its employees for assistance in their preparation. The administrative duties imposed on the Board by the Congress could not proceed otherwise.

Other circuit courts of appeals have also passed upon this question and have upheld the procedure.[330]

The majority's report criticizes this system as follows:

> The fact that Dr. Leiserson, the member of the Board possessing the greatest experience in deciding the delicate situations arising from labor disputes, has refused to utilize this method in reaching his decision is a powerful indictment of the system.[331]

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[318] I, 382, 385, 386, 437; II, 557, 558, 559.
[319] I, 418, 437; II, 184, 265, 266, 273, 291, 298, 299.
[320] I, 386, 418, 437; II, 274, 302, 559.
[321] I, 387.
[322] I, 386, 392, 461; II, 191, 265, 266, 273; exceptions, II 292.
[323] I. 450.
[324] III. 380.
[325] N.L.R.B. exhibit 15.
[326] II, 265.
[327] II, 500.
[328] II, 500.
[329] 98 F. (2d), at 17.
[330] *Inland Steel Co.* v. *National Labor Relations Board* (105 F. (2d) 246 (C.C.A. 7)); *Cupples Company Manufacturers* v. *National Labor Relations Board* (103 F. (2d) 953 (C.C.A. 8)).
[331] III, 381.

The majority neglects to refer to the testimony of Chairman Madden as to the manner in which all Board members, including Dr. Leiserson, make use of the Review Division.[332]

c. Relationship of the Review Division to the Trial Examiners' Division.—The majority's report implies [333] that the Board relies too much on the Review Division and too little on the trial examiners' intermediate reports. The findings and recommendations of the trial examiner as embodied in his intermediate report are, of course, reported to the Board by the review attorney.[334] The majority neglects to refer to testimony that the trial examiners' findings and recommendations are reported to the Board [335] and that the Board never departs from its determination without being aware of that fact.[336]

d. Qualifications of the Review Staff.—The majority report states that "the committee was much impressed with certain of the recommendations found in the personnel files of the Board." [337] The majority appears to condemn a recommendation that an applicant had a "strong social consciousness." [338] We do not believe a lack thereof is a necessary qualification for government service. The majority also cites [339] a recommendation that an attorney would "make a swell fellow because he has the right instincts," [340] without mentioning that the recommendation added "and is a good lawyer," and that the recommendation came from one of the assistants of Mr. Dewey, District Attorney in New York.[341]

The majority report also criticizes another review attorney [342] because certain representatives of the Board were not in agreement with the general counsel of the Board as to his qualifications. We do not perceive why the head of the legal branch of the Board should be bound by suggestions of representatives outside that branch. Another criticism is directed at the transfer of an attorney to the Review Division after his work as a trial attorney had been found unsatisfactory.[343] We find no basis for condemnation of the Board because it gave an employee another trial in a different type of work after he had failed in his first assignment.

The majority also criticizes the Board for employing youthful and inexperienced review attorneys. We think that Dean Garrison's testimony [344] (not referred to by the majority) is a convincing reply to this charge:

> That is the kind of work which a young lawyer without much or any experience in legal practice is perfectly competent to perform, if he is a man of brains and accurate habits of work.

The majority also failed to refer to the evidence that Supreme Court justices' secretaries [345] and attorneys in other Government agencies [346] are of similar age and experience. The record also shows the difficulty of securing experienced, first-rate attorneys for this class

[332] II, 562.
[333] III, 380, 381.
[334] I, 419.
[335] I, 419.
[336] II, 564.
[337] III, 379.
[338] II, 241.
[339] III, 379.
[340] II, 267.
[341] II, 267.
[342] III, 379.
[343] III, 379.
[344] II, 500.
[345] II, 500.
[346] II, 561.

of work at a salary which the Board's budget will permit.[347] The record also shows the method of training new review attorneys, and the supervision of all review attorneys' work.[348]

e. Allegation that the Board decides cases upon facts outside the record.—The majority's report implies that the Board in making decisions has relied upon facts outside the formal record of the case.[349]

It should be pointed out that the chairman of the Board testified that, with certain proper exceptions,[350] information not in the record was never used in making decisions, and the evidence before the committee does not indicate that it was so used.

The majority in charging that "the review attorneys continued using the informal files [of cases] after March 30, 1939, as before" [351] relied upon the testimony of one attorney who said she had seen a letter to the Board found in the informal file, urging expedition in the decision of a case assigned to her.[352] It appears that there would be no impropriety in the review attorney seeing a letter of this type, and it would seem to be permissible under the March 30 instructions. There is no evidence that the review attorneys continued using the informal files after March 30, 1939, as they had before that date, as charged by the majority.

The majority report stated that the review attorneys discussed cases with trial examiners. The record shows occasional instances of this character.[353] We do not consider this of significance since the trial examiners and the review attorneys are part of the judicial, as distinguished from the prosecuting, staff of the Board. Despite the majority's sweeping statement that "review attorneys unhesitatingly discussed cases with trial attorneys" [354] examination of 16 review attorneys produced only two instances of such action, both in representation cases,[355] which are not adversary proceedings so far as the Board is concerned.

In stating that "frequently, the Division of Economic Research was called upon for supplementary, nonlegal material" [356] and in magnifying the use of off-record material in determining cases,[357] the majority has pictured the Board as lightly disregarding its records for scraps of information picked up here and there from outside sources. The record shows that the "off-record" information fell into the following classes: (1) matters of which courts would normally take judicial notice; [358] (2) information as to whether or not a union which had previously sought an election still desired to present its petition, in view of new charges of unfair labor practices; [359] (3) a determination, where examination of the record raised the question whether the parties served with notice included all necessary or interested parties,

[347] II, 500, 561.
[348] I, 383; II, 559; III, 214.
[349] III, 380.
[350] III, 210, 211.
[351] III, 380. On March 30 instructions were issued that the review attorneys should have access only to those parts of the "informal files" which an employee of the secretary's office determined should be called to their attention, such as information on settlements, informal requests for oral argument, etc. (I, 387, 428, 430, 528, 537).
[352] I, 388.
[353] I, 436, 447, 448, 459, 465.
[354] III, 380.
[355] I, 459, 532.
[356] III, 380.
[357] III, 380.
[358] I, 612, 617; III, 209.
[359] I, 536; III, 211; III, 199.

to learn if the proper procedure was followed;[360] (4) inquiries in a few cases where the record appeared inconclusive, to determine from the regional office whether further evidence was available on the question of the reopening of the record,[361] which evidence was not used unless the record was reopened and new evidence introduced.[362]

(*f*) *Alleged misconduct of review attorneys.*—The majority comments at length on the presence of certain challenged ballots in the *Sorg Paper Co.* case.[363] The report concludes its recitation of this incident by stating:

> The discovery of computations appearing in the penciled notes revealing an effort to determine the precise point at which the C. I. O. union had a majority, strongly indicates an unjudicial interest on the part of the review attorney in the success of a favored union.[364]

We can find no evidence in the record to justify this charge of favoritism. An examination of the decision in the case reveals that the exast way in which the chalenged votes were case could have had no effect on the outcome of the case. The evidence shows that it was for that reason that none of the ballots were opened.[365]

6. REGIONAL OFFICE EMPLOYEES

(*a*) *Regional directors.*—Of the many hundreds of employees, past and present, who have been employed in the regional offices of the Board since its inception, the majority report criticizes, expressly or by implication, certain actions of three former and four present regional directors, and one field examiner.[366]

The majority criticizes Mr. Pratt, stating:[367]

> Whenever a complaint is issued by him, he stated that he was thoroughly convinced of the guilt of the respondent, even *before he heard any part of the employer's side of the case.*

The latter part of the statement attributed to Mr. Pratt, italicized by the majority in its report, finds no support in the record, and the majority has cited none. The other portion of the quoted statement has been commented on by us elsewhere.[368]

The majority also attacks the Board's record of having obtained settlements in almost 50 percent of its cases, without the necessity of a hearing by stating:[369]

> on occasion they were obtained where the case against the employer was not adequate.

Apart from the fact that, in the instance cited by the majority, the evidence shows that a settlement was not obtained and that the case did go to a hearing,[370] it appears proper to all parties to attempt to settle, rather than to litigate, doubtful cases.

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[360] I, 526, 528; III, 210.
[361] I, 459, 460; III, 209.
[362] III, 209, 210.
[363] III, 380.
[364] III, 380.
[365] I, 540; III, 211.
[366] III, 381.
[367] III, 381.
[368] Analysis of amendment to create an administrator.
[369] III, 381.
[370] I, 26.

The majority also states that—[371]

> One regional director (Phillips) pointed out to employers the expense attached to going to hearings in order to induce a settlement of the case. Frequently complaints of this practice have been made to the committee.

There is no evidence in the record of frequent complaints to the committee. Phillips also testified that he never mentioned the cost of a hearing as a means of settling the case, unless he was certain that a hearing was to be held.[372]

(*b*) *Notice to employers.*—As the majority report states,[373] the Board's offices do not send copies of charges to respondents when they are filed. The record shows, however, that when the charge has been substantiated and formal action taken on the charge, a copy of it is served upon the respondent.[374] In addition, employers are informed at the time the charge is filed of the substance of the charges.[375]

The majority report asserts that—

> In some instances the policy was brought out that every method was to be used to prevent employers from knowing they were being investigated.[376]

This assertion is based solely upon the testimony of former Field Examiner Freter.[377] Mr. Freter's testimony was clarified by that of his superior, Mr. Cowdrill, who explained that Freter was an employee on probation and unfamiliar with the procedure for handling cases.[378] We have eelsewhere [379] disposed of the credibility of this witness.

The majority also states that it is Board policy never to notify employers that cases are closed but merely that "further action * * * is not contemplated" by the Board.[380] Chairman Madden testified [381] that is the practice of the Board to give definite notice to respondents of disposition of cases.

(*c*) *Elections.*—In criticizing the conduct of elections by the regional offices, the majority report refers only to the *F. E. Booth case* and quotes a memorandum of Dr. Leiserson criticizing the San Francisco office in the handling of the case.[382] The record [383] contains a considerable amount of material on the case. It shows that the Board deemed it proper for the regional director to present all parts of the case, even if it contained charges of inefficiency of the Board agents. The Board was thus enabled to make a careful check upon the actions of its agents. There was admitted delay in this case occasioned partly by unavoidable circumstances. The record shows the Board repeatedly attempted to expedite the matter.[384]

(*d*) *Dismissal of certain regional directors.*—The majority asserts that a "remarkable contrast" in Board policy is afforded by a consideration of the circumstances surrounding the dismissal of two regional directors and the appointment and retention of "certain other employees referred to above." [385] The majority does not specify which employees are included in this latter category.

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[371] III, 381.
[372] I, 241, 242.
[373] III, 381.
[374] I, 345.
[375] I, 345, 241; II, 660.
[376] III, 381.
[377] I, 361.
[378] II, 660.
[379] Field Examiner's Section.
[380] III, 381.
[381] II, 510; committee exhibit 297.
[382] III, 382; see also N.L.R.B. exhibit No. 129, a board analysis of the case.
[383] I, 21, 22, 49; II, 620–624; committee exhibit 51; N.L.R.B. exhibit 129.
[384] II, 620, 621.
[385] III, 382.

To arrive at this conclusion of a "remarkable contrast," the majority apparently accepts the testimony of James P. Miller, former regional director of the Cleveland office, that his resignation had been obtained "ostensibly for his attendance at a dinner held in a region other than his own, but really for the reason that he 'insisted this act be enforced and administered impartially' especially in the treatment of independent unions." [386]

The record plainly shows that Mr. Miller's testimony is wholly unworthy of credence.

As to the reasons for the Board's request for Mr. Miller's resignation, Mr. Madden testified that reports had come to the Board that an attorney who had cases pending before the Cleveland regional office had paid the expenses of Mr. Miller's attendance at a dinner in New York. Mr. Miller's contention to the Board was that although he had gone to New York to attend the dinner given for some representatives of the Board's New York office and for representatives of a company which had had a case before that office, nevertheless he had repaid the railroad fare.[387] It should be noted that Mr. Miller himself claimed the railroad fare was the only expense which he repaid but admitted that the remainder of the expenses were borne by the attorney.[388] Mr. Madden testified that members of the Board did not believe Miller had repaid this money, and that they had come to this conclusion after interviewing both Mr. Miller and the attorney. Mr. Madden testified that Mr. Miller—[389]

> had allowed persons who had official business before him in his office in Cleveland to transport him to New York, to lodge him there, and to pay the very substantial sum involved in the expense of that * * *.
>
> It seemed to the Board that that was the grossest sort of impropriety and showed a lack of sensitiveness to the proprieties of the conduct of a public official, which was quite intolerable. * * * The consequence of the whole situation was that it seemed to us Mr. Miller was not a proper person to continue the work for the Board and so we asked for his resignation.

The majority report points out that Mrs. Herrick, who was also present at the dinner in New York, testified that she thought the dinner was a "good idea." The majority, however, apparently accepts the characterization of her attendance as an "indiscretion" and cites the fact that she was reprimanded for it by the Chairman of the Board. Considering the fact that the Board requested Mr. Miller's resignation on the ground that he had allowed persons who had official business before him in Cleveland to transport him to New York, to lodge him there, and to pay his expenses, and that it reprimanded Mrs. Herrick, who was in New York, and who merely attended a dinner there to celebrate the conclusion of a case in the NewYork office, we fail to see any justifiable ground for criticism for any "remarkable" difference in treatment accorded the two regional directors.

We conclude that, while Mr. Miller attempted to represent himself as a devoted public servant, ousted by the Board because of his refusal to follow a partisan policy of hostility toward employers, and unaffiliated unions, the overwhelming weight of the evidence clearly establishes him as a biased, untruthful, and disgruntled ex-employee,

[386] III, 382.
[387] II, 511.
[388] II, 230 S; I, 230 T.
[389] II, 511–12.

discharged by the Board for cause, whose testimony is not worthy of belief by the committee.

(*e*) *The Los Angeles incident.*—It is difficult to find any valid basis for criticism in this action of the Board. As soon as the complaints concerning the administration of the Los Angeles office were brought to its attention, it investigated and sought to rectify them. When the truth of the matter and the responsibility for the complaints were established to its satisfaction, on the basis of careful investigation, it took prompt action to improve the administration of the regional office by sweeping it clean and starting afresh with an entirely new administrative personnel. Such delay as appears in the completion of the investigation, arose because the Board was constantly shorthanded in its personnel, and because, until the facts were finally brought to light through the investigations that were made, the situation did not appear to be as critical as it appeared after the investigations were completed.[390]

7. INTERNAL UNIONISM

The majority report points out that the National Labor Relations Board employees have a union [391] and that it is a "vertical or industrial union." (It is not affiliated with the Congress of Industrial Organizations or American Federation of Labor.) We do not believe that Congress has any objection to Government employee unions, especially since Government employee unions are general throughout the Government service. The majority calls attention to numerous trivia,[392] omitting relevant evidence in the record [393] in connection with the activities of this union, and therefrom draws a nebulous analogy to a company union. We confess ourselves unable to grasp the analogy between this Government union and a company-maintained union and believe the comparison to be clearly strained.

IV. CONCLUSION

In rendering our separate report to Congress, we submit that no showing has been made before our committee that the National Labor Relations Act has not been effective in achieving the purposes set forth by Congress in its declaration of policy:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions (industrial strife and unrest) to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

No showing has been made before our committee that the Board has acted other than in the interests of these objectives. The evidence in the record that the act, as now written, is effective in accomplishing its purposes, is undisputed. The claims of the majority that its proposed amendments are directed to these same ends are repudiated by labor,

[390] I, 40 ff.; II, 508–509.
[391] III, 370.
[392] III, 370.
[393] III, 144.

This attack, for these amendments are an attack, should be recognized by the House—as labor has recognized it—as destructive of the hard-won rights of our working people. Industrial democracy must not again be disfranchised. The attack upon the National Labor Relations Act has failed in the courts. We submit that on the evidence this attack in the National Legislature must also fail.

Industry, labor, and the public have a very vital stake in the preservation of the means furnished by this act for the peaceful and rational settlement of industrial disputes.

We hope that the closing chapter of our investigation will be devoted to an objective study of the act and its administration. No law and no administration is perfect. All friends of the act and of industrial stability will welcome a study which is productive of improvement. They object, however, to the presentation of a distorted picture of the operation of the act, which magnifies beyond all reasonable proportion minor instances of alleged or actual misconduct on the part of a few individuals.

The act can best be perfected when the effort is motivated by a sympathetic understanding of its principles and objectives. Our committee can most fully realize this aim by adopting a more comprehensive and fundamental approach to its *fact-finding* objectives than it has hitherto employed. We strongly recommend such an approach, emphasizing a careful and exhaustive consideration of those important problems which have been productive of the most difficulty and controversy.

Serious problems have arisen as the result of the present unhappy division in labor's organizations. A thorough consideration of the appropriate unit question might yield much of immense value. Legislative recognition of labor's rights, although a great chapter in our code of laws, has imposed equally great responsibilities upon Congress. As a special committee of the House, we shall do well, indeed, if, when we render our final report we have proven equal to the responsibility placed in us.

We do not need to reiterate that the evidence before our committee was not, in the main, suggestive of a solution to the real problems. We make, therefore, at this stage of our inquiry but three important recommendations:

1. We recommend to the Congress the enactment of an amendment to increase the Board to five by adding two new members, a proposal which was rejected by the majority members of the committee. This would serve to bring a fresh viewpoint to the problems of the Board, whether of policy or personnel, and help to resolve fairly and equitably any disputed problems, without sacrificing the advantage of continuity in the administration of the act.

2. We recommend the enactment of an amendment making a statutory grant to employers of the right to petition for an election when they are caught between the cross-fire of rival unions.

3. We recommend that the bill submitted by the majority be rejected by Congress.

ARTHUR D. HEALEY.
ABE MURDOCK.

15. (Administrative Procedure in Government Agencies, Monograph of the U.S. Attorney General's Committee on Administrative Procedure, Part 5: National Labor Relations Board)*

SENATE RESOLUTION NO. 68

[Reported by Mr. Hayden]

IN THE SENATE OF THE UNITED STATES,
February 6, 1941.

Resolved, That the monographs published by the Attorney General's Committee on Administrative Procedure embodying the results of the investigations made by the staff of said committee relative to the practices and procedures of the administration of the Fair Labor Standards Act of 1938 (Wage and Hour Division and Children's Bureau); War Department; Social Security Board; National Mediation Board; National Railroad Adjustment Board; National Labor Relations Board; Civil Aeronautics Authority; Department of the Interior; United States Employees' Compensation Commission; administration of the internal revenue laws; Bituminous Coal Division, Department of the Interior; Interstate Commerce Commission; Federal Power Commission. Securities and Exchange Commission; Tariff Commission; and Bureau of Customs, be printed as a Senate Document; and that one thousand three hundred additional copies be printed for the use of the Joint Committee on Printing.

———— ————,
Secretary.

PREFACE

ATTORNEY GENERAL'S COMMITTEE,
ON ADMINISTRATIVE PROCEDURE,
DEPARTMENT OF JUSTICE,
Washington, D.C.

This monograph was one of a series of studies submitted to this Committee by the investigating staff working under the Director. The members of the staff are Walter Gellhorn, Director; and Ralph S. Boyd, Kenneth C. Davis, Robert W. Ginnane, William W. Golub, Martin Norr, and Richard S. Salant.

These staff reports represent information and recommendations submitted to the Committee. They are not an expression of committee findings or opinion. The Committee invited professional and lay criticism and discussion of the matter contained in these studies, both by written communications addressed to it at the Department of Justice

*Results of the investigations made by the staff of said committee relative to the administrative practices and procedures of several agencies of the Government.

Washington, D.C., and by oral presentation at hearings which the Committee held in Washington on June 26, 27, and 28, and July 10, 11, and 12, 1940.

The Committee on January 24, 1941, made its report, setting forth its findings, conclusions, and recommendations after consideration of all the material submitted to it, including these reports of its staff; the record of oral examination of administrative officers; and the briefs, statements, and testimony furnished by members of the bar and the public. These reports are made available in furtherance of this Committee's desire that the information submitted to it by its investigators shall be public.

The members of the Committee are Dean Acheson, Chairman, of the District of Columbia bar, formerly Under Secretary of the Treasury; Francis Biddle, Solicitor General of the United States; Ralph F. Fuchs, professor of law, Washington University; Lloyd K. Garrison, dean of the University of Wisconsin School of Law; D. Lawrence Groner, chief justice of the Court of Appeals for the District of Columbia; Henry M. Hart, Jr., professor of law, Harvard University; Carl McFarland, of the District of Columbia bar, formerly Assistant Attorney General; James W. Morris, associate justice of the United States District Court for the District of Columbia; Harry Shulman, Sterling professor of law, Yale University; E. Blythe Stason, dean of the University of Michigan School of Law; and Arthur T. Vanderbilt, of the New Jersey bar, formerly president of the American Bar Association.

Introduction

The stated purpose of the National Labor Relations Act of July 5, 1935,[1] which established the National Labor Relations Board, was to eliminate and mitigate obstructions to the free flow of commerce; this purpose, section 1 of the Act asserts, will be served "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." The policies embodied in the Act represented an amplification and elucidation of the notoriously ambiguous provisions of section 7 (a) of the National Industrial Recovery Act; and the Board was created to carry forward the activities of its predecessor of the same name, which had been disestablished as a result of the Supreme Court's invalidation of the National Industrial Recovery Act.

During the first 4 years of its existence, the Board handled a total of 22,550 cases, involving 4,931,031 workers. A disproportionately large number of these matters, it may be noted, were instituted after the Supreme Court upheld the constitutionality of the Act in the Spring of 1937,[2] a factor which has been perhaps the most prominent

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Note.—This monograph was submited January 1940, and finally revised April 1940.

[1] 49 Stat. 449, 29 U.S.C. secs. 151–166 (1935).

[2] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937). The number of charges and petitions received by the Board during its first 4 years, as given in its annual reports were: 1935–36, 1,065; 1936–37, 4,068; 1937–38, 10,430; 1938–39, 6,987.

cause of the major procedural problem with which the Board has been compelled to cope—the sluggishness of the administrative process.[3]

The statute

The core of the Act is section 7, which declares the right of employees to organize and to bargain collectively through representatives of their own choosing. Carrying forward this basic principle in section 8, which sets forth five unfair labor practices, or standards of conduct, for employers.[4] Departures from these norms subject the transgressor to no penal sanctions: provision is made only for administrative proceedings looking at an order of the Board which may provide that the offender cease and desist from the practices and "take such affirmative action, including reinstatement of employees, with or without back pay, as will effectuate the policies" of the Act.[5] The Board's orders, in turn, are not self-executing; no penalty attaches to a violation thereof; and the Government must resort by petition to the appropriate circuit court of appeals for enforcement of the order.[6] The sole sanction provided by the Act for the enforcement of the Board's orders in unfair labor practice cases, therefore, occurs after judicial review and takes the form of punishment for contempt, through further judicial process, in the event that the employer fails to obey the circuit court's command to comply.[7]

The only other proceedings contemplated by the Act are the investigations conducted by the Board, pursuant to section 9, to determine whether there is a representative selected by a majority of employees in an appropriate bargaining unit, and to certify the representative so selected as the exclusive bargaining agency for the employees in that

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[3] The average time interval between the filing of charges and the rendition of the Board's final decision rose from a low of 191 days in 1935–36 to a high of 389 days in 1937–38. See appendix A, infra p. 37. The burden placed upon the Board by the unparalleled volume of charges filed during 1937 has been shouldered in turn by the Regional Offices, the Trial Examiners' Division, and the Review Division. Only in the Review Division does a back-log of cases still exist, and even there a considerable diminution in the number of old matters has been effected. With the more expeditious handling which has recently been accorded cases by the Review Division, the average elapsed time was reduced, during 1938–39, to 210 days; and additional decrease during the current year also appears to be in the offing.

[4] Employers are forbidden to interfere with employees in the exercise of the rights guaranteed by section 7 [sec. 8.(1)]; to dominate or interfere with the formation or administration of any labor organization [sec. 8(2)]; to encourage or discourage membership in a labor organization by discrimination as to terms, tenure, or conditions of employment [sec. 8(3)]; to discharge, or discriminate against, an employee for having filed charges or testified against the employer in proceedings under the Act [sec. 8(4)]; or to refuse to bargain collectively with the chosen representatives of his employees [sec. 8(5)].

[5] Sec. 10 (c) of the act.

[6] Sec. 10(e) of the act. The circuit court of appeals also have jurisdiction, under sec. 10(f), to review final orders of the Board on the petition of "any person aggrieved" thereby. In the court proceedings, the Board's findings of facts, "If supported by evidence," are conclusive. Compare *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197 (1938).

[7] The statute expressly provides only a single monetary deterrent of unlawful conduct, namely, awards of back pay in cases involving violations of sec. 8 (3) of the Act. Since employers have nothing to lose by violating the provisions of the Act, except to receive an admonition to discontinue their activities, amendments to provide for more effective sanctions have frequently been advocated. Proponents for change have suggested that violations of the Act be made a crime; that Board orders be effective upon issuance; that discharged employees be awarded treble in lieu of merely compensatory damages; that persons violating the Act be foreclosed from contracting with the Government, and that all other forms of economic privileges flowing from the Government be withheld from them.

While none of these suggestions have eventuated in congressional action, the last one has to some extent become operative through a recent agreement between the Board and the Reconstruction Finance Corporation. The latter agency, acting under its general discretionary powers, contemplates the withholding of disbursements under an authorized Reconstruction Finance Corporation loan to any person who is violating the Act. The Board recommends the withholding of disbursements at the time it issues the complaint, and suggest the resumption of payments when compliance with the Act has been achieved, or, where there has been no violation, when that fact is established by the dismissal of the complaint.

unit.[8] The investigation and certification of representatives, which may involve the holding of an election among employees, is designed to smooth the course of self-organization and collective bargaining, by eliminating any doubt that may exist as to the presence of an employee's representative with whom the employer is required, by section 8 (5), to bargain.[9] No review of Board action in representation cases may be had under the Act until the Board enters an order in an unfair labor practice case "based in whole or in part upon facts certified" in a representation proceeding.[10]

In addition to its adjudicative functions in respect of unfair labor practice and representation proceedings, the Board is also authorized to issue rules and regulations "necessary to carry out the provisions" of the Act [sec. 6(a)] and to prescribe regulations governing confer-

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[8] The Board's functions in representation cases are similar to those of the National Mediation Board in investigating and certifying representatives under the Railway Labor Act, 45 U.S.C., sec. 152 (1935).

Congress has availed itself of the information and experience gained by the Board in these proceedings, by invoking the Board's assistance in the administration of the Fair Labor Standards Act of 1938 (29 U.S.C. A., secs. 201-210). Under section 7(b) of that act, an employer is exempt from the maximum hour provisions, if more liberal conditions than those required by the statute have already been embodied in a collective bargaining agreement with employees' representatives "certified as bona fide" by the Board. It is not essential, for a finding of bona fides, that the representative be certified as the collective bargaining representative under sec. 9 of the N.L.R.A.; nor does such a finding necessarily establish the right of the representative to be recognized under the N.L.R.A. as the exclusive bargaining agency of employees. Requests for certification have thus been granted, not only to organizations which have previously been certified by the Board under sec. 9 of the N.L.R.A., but also to labor organizations affiliated with an international or parent organization which itself, or another local of which, has been certified under sec. 9. Unaffiliated unions, not subject to employer domination or interference, have also been certified as bona fide, *Fourth Annual Report* (1940) 54–55.

See Statement of Position of the N.L.R.B. on Section 7(b) of the Fair Labor Standards Act (M–781b), pursuant to which the Board had acted up to Dec. 1, 1939, on some 170 applications for certification.

[9] The employer's duty to bargain under sec. 8(5) is not conditioned upon Board certification of a representative. Nor is Board certification necessarily a final disposition of the question of representation. The Board has refused to consider certification as *res judicata* against either the employer or another labor organization in unfair labor practice proceedings. See, e.g., Matter of *American-Hawaiian S.S. Co.* 6 N.L.R.B. 678 (1938); Matter of *Fedders Mfg. Co. Inc.* 7 N.L.R.B. 817 (1938). If the employer acquiesces in the Board's certification, however, and the defeated labor organization is unable to prevail upon the Board to issue a complaint based on the employer's failure to bargain with it, the certification may be, in effect, a binding determination which is possibly unreviewable in the courts. See *infra*, note 10.

[10] Sec. 9(d) of the act. In *American Federation of Labor* v. *National Labor Relations Board*, 60 Sup. Ct. 300 (1940), the Supreme Court held that a defeated labor organization could not obtain court review of a Board certification under sec. 10(f) of the act (*supra* note 6), since the certification was not a "final order" within the meaning of that section. Since the court refused to pass on the question of reviewability in a nonstatutory action, such as a suit for an injunction or a declaratory judgment, one may not assert unequivocally that some form of immediate review of a certification is impossible. Compare *Bank of Yorktown* v. *Boland*, 280 N.Y. 672, 20 N.E. (2d) 1023 (1939) (injunction restraining holding of election pursuant to order of State Labor Relations Board granted pending determination of suit for declaratory judgment to ascertain whether employer was subject to the State Labor Relations Act); see, also, opinion of the Court of Appeals in the *American Federation of Labor* case, 103 F. (2d) 933 (App. D.C. 1939). If a suit to compel the issuance of a complaint may not be maintained (*infra* note 28), it is not inconceivable that a defeated labor organization might be permitted to obtain review in an equity action. Compare *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U.S. 56 (1939).

Arguments in support of review of certifications upon demand of employees are presented by W. G. Rice, Jr., in *The Determination of Employee Representatives* (1938) 5 Law and Cont. Prob. 188, 191. The practical considerations militating against review are discussed at length in the Board's report to the Senate Committee on Education and Labor, 76th Cong., 1st sess., which is reported in the hearings before that Committee, pt. 3, pp. 583–587.

ences between employers and their employees during working hours [sec. 8(2)].[11]

Organization.—The Board is composed of three members, appointed by the President by and with the advice and consent of the Senate, who may not engage in any other professional or business activity during their overlapping 5-year terms. The President may remove any of the members, upon notice and hearing, for neglect of duty or for malfeasance in office.

The principal offices of the Board are in Washington, where about 485 of a staff of approximately 873 are housed. The balance of the Board's employees are scattered throughout the country in 22 Regional Offices, each of which is in the charge of a Regional Director who is assisted in legal matters by a Regional Attorney.

Adjudication

I. Unfair labor practice cases

Charges.—It appears to be reasonably clear, under section 10(b) of the Act, that the Board may not institute an unfair labor practice case until it has first received charges of violation.[12] While no limitations have been imposed, either by the statute or the Board's rules, on the classes of persons who may file charges, it has been very rare for anyone, other than the employees or labor organizations directly affected, to exercise the privilege.[13]

The Board has prescribed, and on request supplies printed copies of, a form of charge, which requires the complainant to present, among other things, "a clear and concise statement of the facts constituting the alleged unfair practices." [14] Four copies of the charge, including

[11] The only regulations which the Board has issued are those dealing with practice and procedure. These have been prepared by the General Counsel or other responsible officials, with the assistance of other members of the staff. The preparation of regulations is followed closely by the members of the Board, whose final approval is necessary prior to their issuance. The Board has not held public hearings on changes in procedural rules, nor regularly obtained the opinions of persons outside the agency by use of consultative techniques. The Board has been criticized in some quarters for its failure to consult with representatives of the labor movement prior to its recent adoption of the employee petition rule (*infra*, note 130). It is perhaps only fair to note, however, that that particular rule had been so much a topic of public debate, both in and out of congressional committee rooms, that the position of affected interests was well understood; hence, further hearings or consultations could have been of small utility in that particular instance.

[12] The Board rarely undertakes even an investigation until a formal charge has been filed. Occasionally, however, a field examiner may investigate an unfair labor practice in the absence of a charge. If he is inquiring into the merits of a representation case, for example, he may uncover an unlawful practice which he feels should be looked into immediately, rather than after a charge has been filed. This is most likely to happen if the field examiner is far away from the regional office, and a considerable expenditure of time and money would be involved if he were to return to headquarters before completing his examination of the situation. Under these circumstances, the examiner customarily requests the appropriate persons to fill out a charge on one of the printed forms which is part of every field examiner's equipment. Situations of this type arise most frequently in regions which have the greatest territorial coverage, and where it is generally necessary to send out an examiner to investigate a number of charges and petitions on a single excursion.

It is not unusual for the regional offices to receive informal charges, either orally or in writing. The practice is to undertake the investigation immediately, while a simultaneous effort is made to secure the filing of a charge which complies with the Board's rules.

[13] The exceptional cases have, for the most part, been situations in which a local subdivision of the American Federation of Labor or the Congress of Industrial Organizations has filed charges on behalf of a group of employees who have created a labor organization whose charter has not as yet been issued.

[14] Rules and Regulations, Art. II, Sec. 4: The regional staffs have been instructed to assist complainants in the preparation of charges. Many persons desiring to file charges are employees, or officers of labor organizations, who require some aid from trained persons, and whose financial condition makes it difficult for them to retain counsel.

a verified original, must be filed with the Regional Director for the region in which the alleged violations have occurred. On rare occasions, where employees are scattered throughout the country, or where basic questions of policy are involved, permission may be obtained to file directly with the Board.[15]

Investigations.—After a charge has been filed and docketed, the case is normally assigned within a few days to a field examiner for investigation.[16] Where the case appears to be a particularly difficult one, however, the Regional Director may assume personal responsibility for its development. The filing of the charge is not publicized, but the employer is always appraised thereof either by letter, immediately after the charge is received, or orally, during the course of the investigation.[17]

It has frequently been possible to dispose of charges without pursuing an extensive investigation. For the most part, these have been matters in which the necessary jurisdictional facts were absent, or where the employees were complaining of a reduction in wages or other comparable employer conduct which was not cognizable by the Board. Under these circumstances, regional officials have requested, and generally have obtained, the withdrawal of the charges. If the preliminary inquiry does not indicate any obvious insufficiency in the charge, however, the investigation is continued.

The field examiner's task, and the progress of the investigation, may vary considerably depending upon a variety of factors, including the complexity of the case, the exigencies of the situation, the attitude of the interested parties, and the location of the employer's place of business. To obtain a full understanding of the situation, it may be necessary for the field examiner not only to interview individuals immediately concerned in the case, but also to make a thorough study of documentary material bearing upon the issues.[18] Every possible source of information likely to shed light upon the particular case, including general background material such as the history of labor relations in the business, is expected to be exhausted. In order to shorten the time necessary to complete the inquiry, an attempt is usually made, soon after the investigation is under way, to arrange a joint conference,

[15] Rules and Regulations, Art. II, Sec. 36: An additional reason for permitting direct filing is the existence of friction between the regional office and the complaining parties or the employer involved. From October 1, 1935, to November 1, 1939, only 16 charges had been filed directly with the Board.

These cases are handled in the same manner as charges filed with regional offices. If a field investigation is required, the Secretary instructs the appropriate regional director or directors to perform the task; no separate investigating staff is maintained at the Washington office. Once the case is designated for hearing, the procedure followed is identical with that hereinafter described except that there is a greater likelihood that the trial examiner's intermediate report will be supplanted by proposed findings of the Board. See *infra*, note 93.

[16] Most of the field examiners, who average about 36 years of age, have now had 2 or 3 years' experience with the Board. Prior to their employment by the Board, many had been working in the field of labor relations either as employees of private corporations or of governmental agencies. Others had been lawyers, teachers, or students of economics, accounting, or law, and some had served as field investigators for public agencies concerned with nonlabor problems.

[17] The method of notifying the employer of the filing of charges varies from region to region. At the present time, an ever-increasing number of regional offices advise the employer immediately of the filing of the charge, the substance thereof, and the issues involved (i. e., the sections of the Act alleged to have been violated). See, in this connection, *infra*, note 35.

[18] It is sometimes necessary for the Regional Director, in cases involving difficult or novel questions of jurisdiction or labor relations, to enlist the services of the Board's Division of Economic Research. The economic data which relate to the charge are then accumulated either by the field examiner, in accordance with suggestions from the Division, or by a member of the Division's staff sent into the field to assist in the investigation.

A considerable amount of the prehearing work of the Division of Economic Research involves the analysis of the extent of the Board's jurisdiction over border-line industries which have not been the subject of court decisions. With increasing frequency, however, the Division has been called upon to ascertain facts relating to the jurisdiction of the Board over particular respondents in industries which have been held to be subject to the Act.

either at the regional office or at some location convenient to all the persons involved.[19] At this conference, which is attended by the employer, the persons who filed the charge, and the field examiner, an effort is made to ascertain all the facts by permitting each participant to state his position with respect to the issues raised by the charge. If necessary, the conference is adjourned to enable the parties to secure additional information or produce further witnesses.[20] The preliminary conferences serve several purposes; in some cases, the employer's answer to the charges are sufficiently convincing to lead the field examiner to request the withdrawal of the charges; in other situations, the controversy may be adjusted at the meeting or an understanding reached which permits an early settlement; in the remaining instances, the information obtained at the conference supplies, together with the charge, the framework for the subsequent investigatory process.[21]

Dismissals.—If the investigation reveals that there has been no violation of the Act, or that it is unlikely that unfair labor practices could be established at a formal hearing, the field examiner, as indicated above, suggests the withdrawal of the charge.[22] If the complainant refuses to withdraw, despite the urging of the field examiner, the Regional Director is authorized to decline to issue a complaint, a power which he exercises only after a review of the file, a conference with the field examiner, and, in some situations, a discussion of the case with the complainant. Approximately 43 percent of the charges which have been filed with the Board have been either withdrawn or dismissed in this fashion, prior to the issuance of a complaint.[23]

[19] The extent of the use of the conference method of investigation varies from region to region. It is not always possible in the regions covering extensive geographical areas, to arrange a meeting which satisfies the convenience of all the parties, including, of course, the Board's representative. The conceded advantage of conferences must, under these circumstances, be foregone, and the field examiner is required to resort to the more conventional unilateral investigatory techniques.

Even in the regions where conferences are almost invariably arranged, they occasionally, although with increasing rarity, are not feasible because of the animosity between the employee and the persons filing the charge. When such conditions exist, successive interviews are had with the pesron or labor organization involved and the employer or his representatives. It is the hope, when this method is employed, that a joint conference will ultimately be arranged for the purpose of arriving at an amicable settlement of the case.

[20] The conference procedure is entirely a voluntary matter for neither the field examiner nor any other officer of the Board have sought to compel the attendance of parties or witnesss at conferences although it is possible that, under section 11 (1) of the Act, authority exists to utilize subpenas prior to the issuance of a complaint. As a rule, the parties have been extremely cooperative, so that the field examiner has not been required even to consider the necessity for utilizing compulsory process.

In some 50 or 60 cases, employers have refused to make their books and records available where they were needed to establish the Board's jurisdiction or to complete the investigation of charges. It has been necessary, in these situations, to subpena the necessary materials, as is expressly permitted by section 11 (1) of the Act. See *infra* note 81. Before the regional director may issue a subpena during an investigation, however, he is required to seek Board approval thereof. The Board is extremely reluctant to resort to compulsory process prior to the issuance of a complaint, and has required its own approval of subpenas at this stage as a safeguard against abuse of the exercise of the subpena power.

[21] A formal transcript of the proceedings at conferences is rarely made, and then only on the request of the parties. The field examiner, however, takes generous notes, which, when reduced to memorandum form and incorporated in the case file, are of prime importance in determining whether formal proceedings should be instituted and, if a hearing is held in assisting the trial attorney in the preparation of the case for trial.

[22] The approval of the regional director, which is required by the Board's rules (Rules and Regulations, Art. II, Sec. 1), is generally obtained in advance by the field examiner in cases in which he has the slightest doubt that such approval will be given. No case has arisen, so far as it is known, in which the regional director has refused to accept a withdrawal at this stage.

[23] See the following table:

Year	Cases closed	Withdrawals	Dismissals
1935–36	635	157	110
1936–37	1,709	386	221
1937–38	5,702	1,454	1,098
1938–39	4,231	1,271	537
Total	12,277	3,268	1,966

When the Regional Director dismisses a charge, a form letter is sent to the complainant, advising him of the action taken and of his right to seek Board review of the Director's action.[24] The letter does not specify the grounds for refusal to issue a complaint, because of the Board's desire that no formal statement be made "limiting its jurisdiction." [25] The Board has taken the position that no public explanation should be offered when it declines to entertain charges for reasons lying primarily in the realm of administrative policy. The Board may, in the exercise of its discretionary power under the Act, refuse to issue a complaint, not only because it is of the opinion that the charges are lacking in merit, but also on the ground, for example, that the case is not suited to test a novel question of law, or that it is not sufficiently significant viewed in the light of all cases with which the Board is confronted, to warrant the expenditure of the time and money that would be involved in its development and decision.

The Board asserts, however, that the complainant is always able to ascertain the grounds informally by inquiring of the Regional Director. For the benefit of persons who might wish Board review of the dismissal and who might not know the informal method of ascertaining its grounds, the dismissal letter could, without serious danger of future embarrassment in administration, state the nature of the deficiency in the case, i.e., whether there is a lack of jurisdiction or merit, or both, and refer the complainant to the Regional Director for more detailed explanation.

If an application for review is made, the files in the case, including all supporting information furnished by the person filing the charge, and the records and memoranda of the investigation are forwarded to Washington where the matter is studied by one of the attorneys in the Litigation or Review Divisions.[26] A memorandum is prepared, approved by the attorney's immediate superior, and then presented orally to the Board by the Secretary or one of his assistants. The Board rarely finds it necessary to give extended consideration to these matters, and it is only in an exceptional case that the action of the Regional Director is disapproved.[27] No attempt has been made, up to the present time, to obtain judicial review of the Board's refusal

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[24] Rules and Regulations Art. II, Sec. 9. No time limit is prescribed by the rules for the filing of review petitions. This defect is cured by the dismissal letter, which advises the complainant that he has ten days in which to file his appeal with the Board. Extensions of time have been freely granted, and no petition has been dismissed for failure to file within the stated period.

Unfair labor practice matters are not closed until 4 weeks after dismissal or withdrawal, at which time the employer is advised that the case has been closed; in the interval, prior to the notification of the employer, the case may be reopened if additional evidence is brought to light.

[25] Memorandum from Secretary to Regional Directors (M–293) February 2, 1939, p. 2.

[26] There is no reason why the task of analyzing applications for review should not be handled in the office of the Secretary, who is one of the Board's principal officers. The issues involved are no different from those presented by requests for authorization (*infra*, pp. 8–10), and would seem to be susceptible of the same type of handling. The assistance of the Litigation or Review Divisions should be invoked only where difficult questions of law are raised; the determination of the questions of policy involved should be made, however, by the person most familiar with this aspect of the Board's work, that is, the Secretary.

[27] Of the 143 petitions for review which were filed with the Board during the year 1938–39, all but 7 were denied. The complaint is advised of the Board's action, which is not incorporated in a formal order; if the petition is granted, the regional director is instructed by memorandum to proceed toward the issuance of a complaint. Occasionally; further investigation by the regional office is required before Board action is taken.

to issue a complaint; whether such relief is available would seem at best to be extremely doubtful.[28]

Settlements.—If the investigation reveals that the charges, or some of them, are probably meritorious, regional officials are under standing instructions to make every effort to arrive at an informal settlement, agreeable to the parties, before recommending the issuance of a complaint.[29] The employer is rarely offered more favorable terms for closing the case than could be imposed by a Board order if, after hearing, all the apparently meritorious charges were sustained.[30]

When a settlement has been arranged, the attempt is always made to reduce its terms to writing. Provision is made for the withdrawal of the charge at such time as the employer has performed his obligations under the agreement, thereby enabling the Board to keep the case alive until compliance with the Act is an accomplished fact.[31] Occasionally a settlement agreement is submitted to the Secretary for his comments, but this is done only if the Regional Director is dubious about some aspect of the arrangement.[32] If a complaint has been authorized prior to the adjustment of the controversy, however, the proposed settlement must be sent to Washington for Board

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[28] Even the language of *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 (1939), which destroyed the so-called "negative order doctrine", leaves grave doubt as to whether the refusal to issue a complaint under the Wagner Act would be reviewable. Compare *Amalgamated Utility Workers* v. *Consolidated Edison Co.* 60 Sup. Ct. 561 (1940); *Federal Trade Commission* v. *Klesner* 280 U.S. 19 (1929); *United States ex rel. Chicago Great Western R. Co.* v. *Interstate Commerce Commission*, 294 U.S. 50 (1935).

[29] It is probable that there has been more dissatisfaction with settlements on the part of complaining unions than by employers. The regional directors frequently have a very delicate task to perform in convincing union organizers and officials that an adjustment is the most desirable way of handling a situation, and do not always succeed in satisfying zealous labor representatives that their appraisal of the matter is correct.

[30] Occasionally the negotiation of a settlement may necessitate the dropping of charges which have not been demonstrated by the investigation to be without merit, but which nevertheless might possibly fail of proof at a hearing. Edwin S. Smith, one of the members of the Board, recently described the duties of the field examiner in the following manner: "He should not, with a case which looks promising for trial, approve a settlement which leaves in the minds of the employees a feeling of discouragement due to their belief that the Act has been flouted and the damage inadequately repaired. On the other hand, he cannot, if his own estimate of the case is that it cannot be fully sustained, insist upon the last ounce of compliance with the charge. Above all he will be properly influenced by the consideration which I have stressed above that a voluntary adjustment by the employer, even if it effects only a partial righting of the wrong, is perhaps of more assistance to the union than his grudging acceptance of a court decree. Even if he must legally watch his step carefully in the future, the employer who has been defeated in the courts is left with a feeling that he has been worsted by the union and is in no mood to proceed easily to amicable relations with it." Address before Harvard Law School students, March 8, 1940, N.L.R.B. Release No. R–2728, p. 11.

Settlement agreements typically contain provisions for the reinstatement of discharged employees, disestablishment of company unions and the like. If the charge alleges a violation of sec. 8(5), provision is customarily made for the recognition of the collective bargaining representative of the employees or the submission of differences between the employer and his employees to arbitration. The members of the Board's staff have always been exhorted not to act as arbitrators and were recently instructed to avoid even the appointment of arbitrators. Letter from Secretary to Regional Directors (M–916) July 16, 1939.

[31] It should be noted that the case may be closed as adjusted even if the complainant refuses to withdraw its charge. Proof of compliance must be furnished by the employer and confirmation thereof secured from the union, in the form of a letter or otherwise, before the case is finally closed.

In the event that the employer does not perform his obligations under the agreement, the sole effect of the settlement is to delay the institution of proceedings against him. Unlike stipulations to cease and desist utilized by the Federal Trade Commission, the agreement does not necessitate the formal admission by the employer of any facts upon White House. See Bernstein, *op. cit.*, p. 126.
Board's task of establishing violations is not facilitated in any fashion.

[32] The Board has given the regional directors full discretion in the matter of preauthorization settlements. It should be noted, however, that a check is made on all cases closed in this matter to assure that the regions are not sanctioning settlements which are inconsistent with the policies of the Board. Closed case reports showing in detail the manner in which each pending matter was terminated, including a copy of the settlement agreement, if there is one, must be transmitted promptly to the Secretary's office, where they are scrutinized carefully.

approval. This variation in practice is a consequence of the Board's policy with respect to settlements. In order to facilitate the negotiation of a settlement during the investigation of charges, the respondent is rarely required to admit his guilt by stipulating to the entry of a Board order or a consent decree of a Circuit Court of Appeals. If the case has progressed to the point of authorization of a complaint, however, Board approval is not given to a settlement agreement unless it contains such a stipulation, or compelling reasons appear for its failure to do so.[33]

Since approximately one-half of all unfair labor practice matters were settled prior to the issuance of a complaint, while in another 43 percent the charges were withdrawn or dismissed, only about 8 percent of the total required the issuance of a formal complaint by the Board.[34]

Authorization of complaints.—In the cases which cannot be disposed of at a preliminary stage, the Regional Director is required to request the Board to authorize the issuance of a complaint. A form of request memorandum has been prescribed, in order to simplify the task of reviewing the case in Washington.[35] The report is customarily prepared by the field examiner and signed by the Regional Director; concurrence therein is required to be obtained from the Regional Attorney, who, if he doubts that a complaint should issue, may dissent from the Director's conclusions.

All requests for authorization are reviewed under the supervision of the Secretary, whom the Board has empowered to act on these matters. Many cases are readily disposed of by him and the Assistant Secretary,[36] but if it is unusually complex, or the Regional Director's report incomplete or unclear, the matter is referred to a member of the staff for the preparation of a memorandum analyzing the problems involved. It is said that, in perhaps half of the cases, it is necessary to send a questionnaire to the regional office in order to obtain additional

[33] Since a stipulation for a Board order or consent decree is permitted only if a complaint has issued, it is necessary where a formal order is agreed upon by the parties, to arrange for the authorization and issuance of a *pro forma* complaint before Board approval is given to the settlement.

[34] Of the 12,277 cases which the Board had finally disposed of up to July 1, 1939, 6,085 were settled and 5,234 were either withdrawn or dismissed (*supra*, note 23) prior to the issuance of a complaint. In the balance of the cases hearings were not invariably held, nor, if started, were they uniformly completed. Newly discovered evidence may require not only the refusal to issue a complaint, after authorization has been obtained, but also the dismissal of a complaint either before or during a hearing. Even more frequently, it is possible to arrange a settlement of the dispute at this late stage. Such adjustments, which are subject to Board approval, are generally signed by the respondent, the charging party, the Board's attorney, the regional director, and any intervener. During the first 4 years of the Board's existence, 76 charges were withdrawn, 56 dismissed, and 291 cases settled after issuance of a complaint but before the issuance of a decision.

[35] Instructions for preparing request memoranda are given in letters of Secretary to Regional Directors (M–538) June 1, 1938; (M 594) July 27, 1938. The report is not to be as detailed as a trial brief or a field examiner's report. The testimony of each witness need not be set forth; it is sufficient to state that credible evidence, direct or circumstantial, is available in support of the charges, with an indication of the regional director's opinion as to the strength of such evidence. Full information as to the employer and his business must be supplied for the determination of the jurisdictional question. A statement of the efforts made to secure compliance and the nature of the employer's defense must also be included. The Board, in this connection, has given specific instructions that special efforts be made to communicate with employers for the purpose of securing their version of the facts and exploring the possibility of settlement. Letter from Secretary to Regional Directors (M 412) February 18, 1938.

[36] The Board recently created, effective March 1, 1940, the position of Chief Administrative Examiner, an officer who is expected to assist the Secretary in the supervision of the handling of cases in their administrative phases.

information.[37] This frequently involves a further investigation of the matter, although in many situations the information is available, but has inadvertently been omitted from the authorization memorandum. The review may also reveal that some of the charges are supported by the evidence, while others are not; in that event, an authorization is given to issue a complaint only on those charges which appear to be sustainable.

On the basis of his subordinate's review of the case and, frequently, the opinions of the Litigation Division on problems of a purely legal nature and of the Division of Economic Research on the economic aspects of the matter, the Secretary determines whether or not a complaint should issue.[38] His authority does not extend to cases in which unusually difficult fact situations or novel questions of law or policy are involved; matters of this type must be submitted to the Board. The task of presenting these cases to the Board is the Secretary's, and it is rare that the Board does not dispose of them within a few minutes after he has completed his oral abstract. In an exceptional instance, one of the Board members may be designated to study the matter more fully, before final action is taken.

The infrequency with which requests for authorization have been denied [39] opens the entire authorization procedure to reconsideration, particularly in light of the time and effort that it entails.[40] That there have been compelling reasons for centralization is beyond doubt. When the Board first undertook its duties, the impending attack on the constitutionality of the Act and the general uncertainty as to the policies to be followed, justified close scrutiny to every stage of the

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[37] Some of the detailed information which is not contained in the regional director's report can be obtained from an examination of the Board's case file. Copies of all charges must be sent to the Secretary's office soon after they are filed, and weekly reports of their status must also be submitted. The major purposes of requiring the regional offices to supply this information is to enable the Board to answer any inquiry concerning a pending case without having to communicate with the field staff, and to check on the activities of the regional offices. The files are examined periodically to ascertain whether cases are being handled with sufficient dispatch; if the progress in any matter appears to be unnecessarily slow, the regional director is requested to proceed more rapidly.

In a case of particular importance or difficulty, the regional director may request the Secretary by telephone, telegraph, or letter for the latter's advice in connection with problems arising out of the investigation. Occasionally the Secretary may, in turn, seek the judgment of the Board members before instructing the regional director as to the manner in which he should proceed. Although these inquiries relate, for the most part, to settlement negotiations, the failure to adjust the controversy may in some instances necessitate the issuance of a complaint. Under these circumstances, of course, the Secretary has a much more intimate knowledge of the case than could ordinarily be gleaned from a perusal of the files.

[38] Difficult questions of jurisdiction, or the effect of an employer's change from a partnership to a corporate form, are typical of the problems referred to the Litigation Division. The advice of the Division of Economic Research is sought on jurisdictional and labor relations matters of novelty or complexity. See *supra*, note 18.

It is interesting to note, in this connection, that the Board has been held to have exceeded its jurisdiction in only one case. *National Labor Relations Board* v. *Idaho-Maryland Mines Corp.*, 98 F. (2d) 129 (C. C. A. 9th, 1938); cf. *National Labor Relations Board* v. *Bradford Dyeing Ass'n.*, 106 F. (2d) 119 (C. C. A. 1st, 1939), cert. granted 60 Sup. Ct. 386 (1940). It has itself dismissed complaints for lack of jurisdiction on only two occasions. *Matter of Yellow Cab & Baggage Co.*, 17 N.L.R.B., No. 38 (1939); *Matter of San Diego Ice & Cold Storage Co.*, 17 N.L.R.B., No. 30 (1939).

[39] During the year ended June 30, 1939, the Secretary or the Board denied 53 of the 553 requests for authorizations made by the regional directors. When a request is denied, the regional office is instructed to attempt to secure the withdrawal of the charge before refusing to issue the complaint.

[40] Even when the Secretary and his staff are not busily engaged in other regular or special tasks, it is unusual for an authorization to be given in less than a week's time. If the matter is referred to the Board it may be 2 or 3 weeks before disposition is made. In cases where additional information is sought from the regional offices, there is added to these normal time intervals the period which is occupied by the inter-office correspondence and the further investigation sometimes necessitated thereby.

administrative process.[41] Similar considerations motivated the continuance of centralized control after the Supreme Court upheld the validity of the statute. The tremendous influx of charges necessitated the elimination of unmeritorious cases in order to diminish the work load, a task which could be performed properly only by the central office, since Board policy was still largely unarticulated.

The situation is now considerably changed. Whereas there were only 2 volumes of Board decisions and orders covering the period from December 7, 1935, to July 1, 1937, there are, as of March 1, 1940, 19 volumes. With such a considerable body of precedents to guide them, as well as their more precise understanding of Board policy acquired as a result of their experiences with numerous requests for authorization, regional offices should be equipped to exercise broader authority to issue complaints, an authority which the Board is empowered to vest in them by section 10 (b) of the Act.[42]

Any decentralization of authority to issue complaints would, of course, require that Regional Directors be instructed to submit to Washington all cases in which novel or difficult questions of law and policy appear to be raised,[43] and that they be apprised regularly, by memoranda, not only of broad changes in Board policy, but also of specific types of cases which should be discussed with the Board prior to the issuance of a complaint.[44] A liberal sampling of case files by the Secretary's office would reveal any tendency on the part of a Regional Director to grapple with borderline situations without seeking assistance from Washington, and appropriate disciplinary action could readily be taken.[45] The proposed plan would preserve what is believed to be one of the major benefits of the present authorization method the diversion of the force of local pressures from the regions, where they are most keenly felt, to Washington, where their effect is negligible. Since the Board would still retain ultimate control over the issuance of complaints, regional officials could continue their present practice of referring disgruntled complaints to the Board as the body

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[41] In several of the early cases, notably those which ultimately reached the Supreme Court for the determination of the validity of the Act, the Board or one of its members presided at the hearings. During the formative period, furthermore, all complaints were required to be approved as to form by the Washington office before they were issued. The pressure of affairs has compelled the Board to discard this aspect of its supervision of the regional offices, but centralization of the authorization process remains. See, however, *infra*, note 90.

[42] Compare Rules and Regulations, Art. IV, Sec. 1 (c), authorizing the Regional Directors "to issue and cause to be served complaints * * * in accordance with Section 10 (b) of the Act."

[43] Several officials of the Board have expressed their opinions that no real diminution of burden would be accomplished by the proposed change because the cases which the regional directors would be required to submit to the Secretary would be the only matters which consume any time under the present system. As a result, it is said, the sole saving would be the relatively little time now spent in the consideration of the simpler cases. It should be observed, however, that the time so spent, while perhaps inconsiderable in any single matter, is, when the aggregate number of cases is taken into account, of some magnitude. The redemption of time devoted to virtually perfunctory efforts of this type would surely represent sound administration.

One need refer only to the Board's own experience in respct of authorization matters, to provide pragmatic support for this contention. While the Board has found but a few occasions to disagree with the Secretary's recommendations, and the vast majority of matters are disposed of rapidly, the total amount of time which has been devoted merely to listening to the Secretary's presentation of the simpler cases, has been rather substantial. To the extent that the Secretary's doubts as to Board policy are removed, the number of matters submitted by him, and hence the time spent by the Board in disposing of them, is reduced. The preservation of the Board's energies in this respect should be paralleled in the Secretary's office, where only matters as to which the regional directors are in doubt should be considered.

[44] There would, of course, be no net saving of time and expense if hearings were held in any quantity of cases in which Board policy would have dictated nonaction.

[45] A further check, which will be available for an indefinite period, is provided by the supervision by the Litigation Division of the preparation of cases for hearings. *Infra*, note 90. If the regional office has determined to proceed with a case involving a novel question of law, but the Litigation Division believes that it is not an ideal test case, this advice could be relayed to the region in time to avert any error.

responsible for the refusal of the regional director to proceed with a case.

A further problem is presented by the number of instances in which further investigation has been necessary after authorizations have been requested. In part this is a personnel problem. But in many cases in which the Secretary's office requested further investigation, the data were already at hand in the regional office. What was faulty in these instances was the Regional Director's request for authorization to issue a complaint. Here, rapid disposal was handicapped by inadequacies in interoffice communications, rather than by inadequacies connected with the handling of the matters themselves.[46]

Complaints.—After the issuance of a complaint has been authorized, the legal staff of the regional office proceeds to draft a complaint predicated upon the filed charges and the results of the field examiner's investigation.[47] The complaint specifies the alleged violations of the Act, and contains a notice of the time and place of hearing. A copy of the charge is attached to the complaint, and a copy of the Board's rules and regulations is furnished at the same time. Service is generally personal but, in some situations, has been effected by registered mail sent to the principal office or place of business of the respondent or other parties to whom notice is given.[48]

While the respondent is generally well aware, by virtue of the conferences held during the investigation of charges, of the ultimate issues to be tried, there have been numerous instances in which complaints were drafted in such general terms that the trial examiners were compelled either to grant requests for bills of particulars made by respondents [49] or motions to amend the complaint made by Board at-

[46] It should be borne in mind, furthermore, that the field attorneys who draft complaints and prepare cases for hearing rarely begin their examination of the files until after the Board has authorized proceedings. Under the proposed plan of decentralization, the actual issuance of the complaint would not occur until after the legal staff had made its analysis of the case, a study which they are peculiarly competent to perform. See, in this connection, *infra*, note 90.

[47] The field investigation frequently discloses unlawful activities which differ considerably from those alleged in the charge. In this event, or if additional unfair labor practices have occurred after the charge was filed, the complainant is given an opportunity to file an amended charge which will correctly reflect the entire situation as it exists at the time the complaint is drafted. The Board is extremely careful, both before and during trial, to make sure that the charge, as amended or supplemented, covers every unfair labor practice alleged in the complaint or any amendments thereto. This practice is a consequence of the ambiguous meaning of the following provisions of sec. 10 (b) of the Act; "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have power to issue * * * a complaint stating the charges in that respect * * *" While the statute might be construed as limiting the Board's jurisdiction to those matters specifically alleged in the charge, the formal amendment of the charges is now uniformly made, upon the discovery of additional violations, in order to avoid any possibility of having the Board's order upset on a procedural ground. See, e. g., *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. (2d) 97 (C. C. A. 2d, 1938), where the Court reversed a Board order directed against a successor company to the original respondent, on the basis of an amendment to the complaint made during the hearing, because no charge had been filed against the successor company. But cf. *National Licorice Company* v. *National Labor Relations Board*, 60 Sup. Ct. 569 (1940), where it was held that amendments to the charge need not be obtained before the Board may deal "with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board."

[48] Where unions or other parties have appeared by attorney, either at the time the charge is filed or thereafter, all formal notices and orders are sent to counsel. Memorandum from Secretary to Regional Directors (M–3) February 6, 1936.

[49] Bills of particulars, which may be requested pursuant to the Board's general motion rules (Rules and Regulations, Art. II, Secs. 14–16), have most frequently been granted where the complaint alleged that the respondent "by his agents, servants, and employees" or "by the above and other acts" had committed specified unfair labor practices, and the respondent desired to obtain the names of his agents, or a more precise indication of the nature of the "other" acts. Particulars are generally not furnished when they would necessitate the disclosure of the identity of Board witnesses, as, for example, where the complaint alleges coercion of employees, members of the complaining union. Whenever the trial examiner denies a motion for a bill of particulars, he advises the respondent that if his ruling occasions the surprise of the respondent during the hearing, a continuance will be granted. It is said that there have been very few instances in which the respondent has subsequently requested a continuance, the adjournment of hearings generally being necessary only when amendments of the complaint are made. See *infra*, note 50.

torneys during the hearing.[50] Although the parties are adequately protected, where particulars are furnished or denied or the complaint amended, by the granting of continuances during the trial,[51] the filing of imperfect complaints is unquestionably one of the factors which has militated against the Board's acquiring a reputation for orderly and expeditious hearings.[52]

Answers.—Respondents have a statutory right to answer a complaint.[53] Too rarely have they heeded the Board's request that the answers "contain a short and simple statement of the facts which constitute the grounds of defense;" [54] not more than one out of every five pleadings contains anything other than blunt denials of all the allegations of the complaint. The inutility of at least some of the answers, however, may be partially attributed to the complaints to which they are addressed; the failure to be sufficiently explicit in the complaint is justifiably met by general denials.

In the unusual case in which the answer truly serves the functions of a responsive pleading, it is of great value in clarifying the issues and thus reducing the size of the record and the time consumed by the hearings. It is almost always possible, on the basis of the respondent's failure to deny or his admission of the allegations of the complaint concerning the jurisdiction of the Board, to arrange for a stipulation as to these facts. The failure to controvert other types of allegations may clear the way for additional stipulations. Unless a stipulation can be obtained, however, the Board does not avail itself of the provision in its rules of practice which states that the

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[50] In connection with amendments made at the hearing, it should be noted that continuances are granted only if the complaint is altered substantially thereby; if the effect of the amendment is merely to add another name to a list of persons allegedly the victims of discriminatory discharges, for example, the hearing is not halted. In some cases, the trial examiner does not grant a continuance, but refuses to permit proof to be adduced on the new issues until the parties have had a reasonable time to prepare to meet them.

At the close of the hearing, it is customary for the trial attorney to move to conform the pleadings to the proof. This motion is said to cover minor inaccuracies in the complaint, such as errors in dates, names, and places. The Board has been unwilling to utilize the motion for the purpose of amending the complaint to cover issues which have been litigated, but which were inadvertently omitted from the pleadings. See, e.g., *Matter of Titmus Optical Company*, 9 N.L.R.B. 1026 (1938) (Board authorized issuance of amended complaint. The parties subsequently stipulated that the amended charge and complaint be regarded as substituted for the original charge and complaint and that the record in the original hearing be considered as based on the amended pleadings); *Matter of Williams Coal Company*, 11 N.L.R.B. 579, 591 (1939) (Board ordered that the complaint be amended and gave the parties five days in which to answer the amended complaint and to request a hearing on the additional matters. No further hearing was sought). There would seem to be no reason, however, for the Board to restrict the motion to conform the pleadings to the proof to unsubstantial matters; the accepted court practice now permits for the inclusion in the pleadings of any issues which have been fully heard. See Federal Rules of Civil Procedure, Rule 15(b). "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

[51] See *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 873 (C. C. A. 2d, 1938), certiorari denied, 304 U.S. 576 (1938), where Judge Learned Hand made the following pithy remark: "The examiner did deny a bill of particulars, but that could not have seriously prejudiced the respondent. Such a bill is important only when a party must meet his adversary's case without opportunity to prepare; it is of slight value in a trial by hearings at intervals. The notion that its absence really handicapped the respondent in its cross-examination seems to us illusory."

[52] Much of the criticism of the quality of complaints could be promptly dissipated if the Litigation Division were to rescind its instructions to the field staff requiring the inclusion in every complaint of the catch-all allegation that the employer committed certain violations of the Act "by the above and other acts." *Supra*, note 49. This phrase is at best of questionable utility and, to the extent that it does enable the Board to direct its orders to matters not alleged in the complaint, it duplicates the function performed by the principle that litigated issues are regarded as raised by the pleadings. See *supra*, note 50.

[53] Sec. 10(b) of the Act. No time is stated in which answers are to be filed. The Board's rules, however, allow 10 days. Rules and Regulations, Art. II, Sec. 10. The answer is required to be in writing, verified by the respondent or a duly authorized agent, with 3 copies, with the regional director who issued the complaint. Id., sec. 11. The regional director may, and frequently does, extend the time to answer. Id., sec. 12. Amendments are permitted as a matter of right at any time before hearing. Id., sec. 13.

[54] Rules and Regulations, Art. II, Sec. 10.

failure to deny is to be regarded as an admission, but proceeds to adduce evidence on the particular issues.[55]

Parties to the proceedings.—Although section 10(b) of the Act requires that notice of hearing be given only to employer-respondents, the Board has provided in its regulations for the service of copies of the complaint on three other categories of persons interested in the outcome of the proceedings:[56] (1) the individuals or labor organizations filing the charge; (2) any bona fide labor organization which is a party to a contract with the employer, the validity of which is in question;[57] and (3) any labor organization which is alleged to be a company union.[58] The complainant and any union whose legitimacy is not attacked by the complaint automatically become parties under the Board's rules, but alleged company unions are required to petition to intervene in order to acquire party status.[59] Since the Board has determined, as a matter of sound policy, to permit labor organizations to defend themselves against an imputation of being employer-dominated, and they are thus almost invariably permitted to participate in the proceedings as interveners,[60] one may suggest that a step of administrative red tape may readily be eliminated by making such unions parties in the first instance. The filing and granting of motions to intervene is now a mere formality which could well be dispensed with.

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[55] Because of the language of sec. 10(c) of the Act, which authorizes the entry of a cease and desist order "if upon all the testimony taken, the Board shall be of the opinion" that unfair labor practices have been committed, the Board has taken the position that, as a matter of precaution, it should not base its findings of facts on anything other than evidence adduced at a hearing, or facts admitted by appropriate stipulations. The Board may possibly be overly cautious in this respect; it is perhaps unlikely that a reviewing court would permit a respondent, who is fully on notice of the Board's rules (which, as noted, accompany the service of each complaint), to object to a finding based on an allegation which he failed to deny in his answer.

[56] Rules and Regulations, Art. II, Sec. 5: Notice is not afforded to persons whose interest in the proceedings is too remote to support a petition for intervention. Thus, a nonunion employee would be affected by a Board order requiring his employer to bargain collectively with a union which he refuses to join, but he would not be permitted to intervene on that basis. Similarly, a person who is hired to replace strikers would be affected by an order of reinstatement, but since his presence in the proceedings would be of no utility, he is not given notice thereof.

[57] While the statute does not require the giving of notice to unions whose contracts are in issue, it was generally believed—a view shared by the Board—that the Supreme Court had held in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197 (1938), that these unions were entitled to be heard before the Board could make an order invalidating the contracts. The recent decision in *National Licorice Co.* v. *National Labor Relations Board*, 60 Sup. Ct. 569 (1940), makes it clead, however, that the Court does not interpret its earlier decision in this light; on the contrary, it is stated that, so long as the Board's order is not directed to the contracting labor organization or employees, they are not "indispensable parties" to the proceedings.

The Board has not altered its practice because of this recent elucidation of the *Consolidated Edison* case. Even before that decision, it had been the policy of the Board to apprise unions whose contracts were under attack of the commencement of proceedings, and to permit them to intervene. See Hearings, *supra*, note 10, at 558. In the proceedings which gave rise to the *Consolidated Edison* case, the Board, intending to serve the union whose contracts were in issue, erroneously served the wrong local of the union. See, also, *National Labor Relations Board* v. *Cowell Portland Cement Co.*, 108 F. (2d) 198 (C.C. 9th, 1939), where the complaint was erroneously served on the secretary of the State Federation of Labor.

[58] Notice is given to alleged company-dominated unions despite the holding in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938), that such unions are not entitled to be heard.

[59] Under sec. 10(b) of the Act, it is discretionary with the Board to permit persons to intervene in its proceedings. Intervention practice is governed by Rules and Regulations, Art. II, Sec. 19. Alleged company unions are limited in their participations to the issues in which they are interested, namely, the allegations of domination or interference with their formation or administration. The Board followed a liberal intervention policy prior to the adoption of the current party rules, and only in rare instances did it refuse to permit even an alleged company union to participate in the proceedings. See, e.g., *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938). But compare Matter of Star Publishing Co., 4 N.L.R.B. 498 (1937), aff'd 97 F. (2d) 465 (C.C.A. 9th, 1938) (intervention denied to persons replacing employees who had allegedly been the victims of discriminatory discharges).

[60] The only situation in which a company union is now denied the right to intervene is one in which it has been declared by the Board, in an earlier proceeding, to be a company union. See, e.g., *Matter of Metropolitan Engineering Co.*, 8 N.L.R.B. 670 (1938). But cf. *Matter of Pittsburgh Plate Glass Co.*, 15 N. L.R.B. No. 58 (1939).

There is considerable doubt as to the widsom of the Board's current practice of making the persons who filed the charges parties to the proceedings: That their interests should be represented is axiomatic, but it is not nearly so clear that they should be permitted to participate actively in the case, as least until the hearing has been terminated at which time they would continue to be allowed to file exceptions to the intermediate report (*infra*, pp. 23, *et seq.*). The Board is represented at each complaint hearing by an attorney whose duty it is to make "a complete and legally impregnable record that will pass the scrutiny of the court" although, the instructions continue:

> This does not mean that the Regional Attorney must conceive of himself as a prosecuting attorney, whose objective is to have the complaint sustained at any cost. Although it is not his duty to assist the respondent affirmatively in any way, he should be careful not to ignore any evidence which may come to his attention, even though such evidence may tend to prove that the complaint should be dismissed.[61]

The trial attorney is, nevertheless, essentially an advocate, entrusted with the task of establishing the truth of the charges contained in the complaint, so that there seems to be little occasion for the further appearance of the person or organization which originally filed the charges.[62] A very considerable amount of time is now consumed in some hearings by the reexamination and recross-examination of witnesses by counsel for these parties. In the hated atmosphere in which labor-relations cases are frequently tried, such largely repitious exercises may become extremely vexatious to respondents, exacerbating proceedings which are already none too amicable. Since neither statute nor Constitution compels a contrary course, the Board might advantageously cease its present practice of permitting complainants to participate at the trial stage.[63] As the Supreme Court has recently stated with some force, the cases before the Board are brought not to vindicate private rights, but to effectuate broad social policies whose enforcement incidently bestows benefits or confers protection upon individuals.[64] The Federal Trade Commission, in somewhat analogous circumstances, has steadfastly refused to permit intervention by those who wish to support the complaints issued by it, and has not regarded

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[61] Instructions to Staff Members, September 17, 1935, pp. 9–10.

[62] The trial attorney, if he performs his duties properly, should be fully cognizant of all the evidence available in support of the complaint as well as the theory of the "complainant" as to the manner in which the case should be developed. In the course of preparing for trial he is instructed "to cooperate throughout with the attorney or representatives of the party making the charge," a relationship which generally is continued during the hearing. The statute [sec. 10(b)] and the Board's rules (Rules and Regulations, Art. II, Sec. 25) permit any party to appear in person or by any representative he selects. Employers are almost uniformly represented by counsel; and labor organizations, while occasionally appearing through their officers or business agents, are retaining legal representatives with increasing frequency.

Under a recently promulgated rule (Rules and Regulations, Art. VII), no former employee of a regional office may engage in practice before the Board "in any capacity in connection with any case or proceeding which was pending in the Regional Office to which he was attached during his employment with the Board." Former members of the Washington staff are subject to the same disability in respect of cases pending before the Board or any of its regional offices at the time of their employment.

[63] But cf. the statement of Joseph A. Padway in Hearings, *supra*, note 10, at 1157–1158, 1160, to the effect that an unlimited right of intervention should be given to all interested labor organizations.

[64] See *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 60 Sup. Ct. 561 (1940); *National Licorice Co.* v. *National Labor Relations Board*, 60 Sup. Ct. (1940). Compare the First Annual Report, p. 23: "* * * the Board has interpreted the act as not conferring a private right of action upon the person or labor organization making the charge, but as placing upon the Board the responsibility for enforcing the public policy which the act embodies * * *."

as parties those who initiated its action by filing charges against the respondent. In order to reduce expenditure of time, to eliminate a frequent source of added friction, and to retain control over its own trial hearings, the Board should follow the lead of its older colleague, upon whose procedure its own is so closely patterned.[65]

Time and place of hearings.—Although section 10(b) of the Act requires only 5 days notice of hearing, and the Board's rules have increased the interval to 10 days, as a matter of practice more than half of the cases are marked by a lapse of at least 15 days between the service of the complaint and the commencement of the hearing.[66] This situation is largely a reflection of the Board's liberal policy in respect of the granting of adjournments, since only in rare instances is more than 10 days' notice given initially.

Hearings are normally held in the community in which the alleged unfair labor practices occurred in order not to discommode the witnesses or to increase the expenses of either the Board or the parties.[67] If there are no convenient facilities at hand, however, the hearing must necessarily be held elsewhere. Either the offices of the Board or other Government or public facilities are almost invariably utilized as the hearing rooms.

Trial examiners.—The Board's hearings, which are open to the public, are conducted by a trial examiner, who is designated by the Chief Trial Examiner, in the name of the Board, shortly prior to the hearing date, and whose identity is unknown either to the regional staff or the parties until the time of the hearing.[68] He is chosen from the Trial Examiners Division [69] which is a permanent unit of the Board.

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[65] Compare the practice of the Post Office Department in fraud order cases, the Federal Alcohol Administration in proceedings to suspend or revoke permits where the permittee has engaged in unfair trade practices, and the Federal Communications Commission in proceedings to revoke station licenses. None of these agencies permit the person who instigated official action by complaining of the activities which are in issue to appear in support of the Government's case.

[66] See Appendix A. No stastics are available as to the time which elapses between the authorization of complaints and the hearing. The designation of a hearing date is made by the Chief Trial Examiner upon receipt of a request from the Regional Director, and after the Litigation Division has indicated its approval of the manner in which the case has been prepared for trial. See *infra*, note 90. The date selected depends upon a variety of considerations including, among others, the number of cases already assigned for the day in question (because of the limited staff of trial examiners, it is rarely possible to start more than eight hearings on any given day); the availability of the trial examiner who, in view of the issues and circumstances involved in the case, is best fitted to preside; the possibility of avoiding a duplication of traveling expenses by holding the hearing at a time when another trial examiner, now engaged in conducting a case in an adjacent place, will be available.

[67] In order to meet the trial needs of the parties, the Board has, from time to time, exercised its authority under Rules and Regulations, Art. II, Sec. 36(c), to transfer proceedings from one region to another. See, e.g., *Matter of Wheeling Steel Corporation*, 8 N.L.R.B. 102 (1938).

[68] The Chief Trial Examiner does not select the person to preside until a few days before the hearing because it is not always possible for him to know which trial examiners will be available and, what is more important, whether the hearing is going to be adjourned. He makes a tentative formulation of his schedule, which he corrects as cases are closed upon settlement, or postponed. His assignments are based on a variety of considerations, of which the most important are the type of case to be heard, the place of hearing, and the work load of the members of his staff. Even after the trial examiner has been designated, his name is not publicized, because it frequently is necessary to substitute another examiner between the time of designation and the hearing. Reassignments are often required by adjournments, or by the resumption of other hearings in which indefinite continuances had been granted, and rather than explain the complicated internal circumstances which led to the substitution, the name of the trial examiner is not revealed in advance of the hearing.

[69] In the first few years of its existence, the Board or one of its members sometimes presided at hearings. This practice, as well as the utilization of the services of special trial examiners, is now extinct.

now consisting of 39 people, of whom all but three are lawyers.[70]

Virtually a complete separation between trial examiner and trial attorney is effected, both prior to and after the hearing, by the organization and internal procedure of the Board. The trial examiner's headquarters are in Washington, where he works when not traveling in circuit; ordinarily, therefore, he has no opportunity to talk with the field staff, nor is his identity known to them, until the day of the hearing. Since he takes no part in the investigation or preparation of a case for hearing, the extent of his knowledge of the issues involved is represented by the pleadings, which he is instructed to study before starting the hearing.

During the hearing, of course, distance is no longer a bar to conversation between the trial examiner and members of the regional staff. The arrival of a trial examiner at one of the outlying regions, where he may represent the sole personal contact the field staff has had with the Washington office for many months, almost inevitably results in "small talk." To a lesser degree, a trial examiner's presence is availed of by the personnel of the busier regional offices, to learn the current gossip. Trial examiners are told that they are not to engage in *ex parte* discussions of a case with trial attorneys, and that their social relationships are to be determined by their own judgment.

If the trial examiner is in doubt as to the manner in which to dispose of a question raised at a hearing, he is at liberty, and is urged, to confer with the Chief Trial Examiner by telephone, telegraph, or mail.[71] Since the trial examiner is able in this fashion to discuss the case with another examiner any doubtful questions of law or similar problems arising during the hearing, the need for possibly questionable conversations with the trial attorney or other regional officials is removed.

Conduct of the hearing.—In addition to the Board's rules of practice, which cover some aspects of hearing procedure, the trial examiners are provided with detailed instructions for their guidance in presiding over the proceedings. Pursuant to these directions, the trial examiner makes a brief opening statement apprising the parties of certain procedural matters which are not covered by the rules, as well as reminding them of some of the provisions of the rules.[72] Once the

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[70] Brief biographical sketches of most of the Board's trial examiners are set forth in 5 Lab. Rel. Rep. 5-7 (1939). Including the Chief and Assistant Chief of the Division, the average age of the trial examiners is approximately 43, the individual ages ranging from 32 to 71. They include former teachers, writers, economists, army officers, judges, an engineer and a consular official. Many were previously employed in other capacities by the Federal Government and some by States and municipalities. Most of them have not had previous experience with labor problems, although the Board prefers to hire persons who have had such training. The trial examiners with legal education all had at least 5 years' experience in the trial of cases in State or Federal courts or administrative agencies before coming to the Board.

All new trial examiners are given a special training course, lasting several months. They are then assigned to work with experienced trial examiners and finally designated to preside over relatively simple representation cases. The trial examiners, as is the case with the Board's Secretary, attorneys, and regional directors, may be selected "without regard for the provisions of the civil-service laws, but subject to the Classification Act of 1923." [Sec. 4 (a) of the Act.]

[71] This is one of the ways in which the Chief Trial Examiner is able to supervise the work of his staff. He and the Assistant Chief also attend hearings to observe the manner in which particular trial examiners are performing their duties, and hold weekly discussions with all examiners who are present in Washington. Weekly reports of activity are required from all trial examiners whether they are in Washington or in the field.

[72] The opening statement indicates that the official reporter's transcript is the only one which will be utilized by the Board; the manner in which corrections to the record may be made; the practice of not incorporating in the record argument with respect to motions or objections; the practice of allowing automatic exceptions to all adverse rulings; the necessity of filing 4 copies of all pleadings submitted during the hearing; and the right of the parties to have oral argument and file briefs at the close of the hearing.

hearing gets under way, the trial examiner is not a mere presiding officer; he not only has power to rule on motions, objections to evidence, and requests for subpenas,[73] but also is authorized and directed to take an active part in the development of the record.[74] The nature and extent of the actual participation of the several trial examiners has varied depending upon the thoroughness with which the issues have been developed by counsel and the difference in ability and attitude of the trial examiners.

The active participation of the trial examiners in the hearing, as well as their control over the activities of counsel, has occasioned many claims of error or bias in their conduct or rulings. It has been very rare, however, that either the Board or the courts have attributed any significance to such contentions. In the absence of a clear showing that a party has been prejudiced by the actions of the trial examiner, his questioning of witnesses or refusal to permit the party to introduce evidence or cross-examine witnesses on irrelevant or repetitious matters, has been held to be entirely within his discretion as a presiding officer.[75]

Examination of a number of records reveals, moreover, that in many instances the conflict between trial examiners and respondents' counsel has been occasioned by the persistence of counsel in refusing to abide by the examiner's rulings, or conduct which would put a

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[73] Rules and Regulations, Article II, Sec. 15, authorizes the trial examiner to rule on all motions made during the hearing and before the case has been transferred to the Board. He has specific authority to order amendments to the complaint (sec. 7) or the answer (sec. 13); to rule on motions to intervene (sec. 19); to permit the taking of depositions (sec. 20); to issue subpenas (sec. 21); to grant continuances (sec. 30); to exclude a person from the hearing for contemptuous conduct (sec. 31); and to administer oaths (Art. IV, sec. 2(c)).

Reference has already been made (supra, p. 36) to the availability of the Chief Trial Examiner for consultation on matters of this type. Attention should also be directed to the standing instructions to avoid the reservations of rulings, and to omit comments, by way of justification, on rulings when made. Where an attorney "may sincerely desire to predicate a future course of questioning upon the basis of reason for the trial examiner's ruling," however, the instructions require the trial examiner to divulge the reason underlying his ruling. If a motion for an adjournment exceeding 24 hours is made, the trial examiner is required to obtain his Chief's approval before granting it.

[74] Rules and Regulations, Article II, Section 24 states that the trial examiner's duty is "to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint." For this purpose, he is given power "to call, examine, and cross-examine witnesses and to introduce into the record documentary evidence."

The trial examiner's instructions advise him to "be ever alert to see to it that all relevant sources of material are fully explored. This does not mean that he should interrupt counsel in their presentation of evidence, but rather that he should not permit the record to be closed until he has fully satisfied himself that all relevant, competent, available evidence has been produced, either by the parties or, if necessary, by the trial examiner."

[75] In only two cases have Circuit Courts of Appeals found the conduct of the trial examiner to have been so prejudicial as to warrant the setting aside of the Board's order. *Montgomery Ward & Company, Inc.* v. *National Labor Relations Board*, 103 F. (2d) 147 (C. C. A. 8th, 1939); *Inland Steel Company* v. *National Labor Relations Board*, 109 F. (2d) 9 (C. C. A. 7th, 1940). One of these courts indicated in a later decision that such drastic action would not be taken unless there was a continued course of misconduct by the trial examiner; isolated instances of extensive questioning of witnesses by the trial examiner or of his limitation of the examination or cross-examination of the parties, do not necessarily result in unfairness. *Cupples Company Manufacturers* v. *National Labor Relations Board*, 106 F. (2d) 100 (C. C. A. 8th, 1939). See also *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 873 (C. C. A. 2d, 1938), cert. denied, 304 U.S. 590 (1938).

The Board itself, on occasion, has found it necessary to set aside a record and to order a new hearing where the trial examiner had made improper and prejudicial rulings. See, *e. g.*, *Matter of Bercut-Richards Packing Co.*, 13 N. L. R. B. No. 14 (1939) (trial examiner denied counsel the right to examine witnesses on new phases of testimony developed by the trial examiner in the course of his examination of witnesses).

severe strain upon the self-restraint of the most experienced presiding officer.[76]

"Bias" or "prejudice" on the part of adjudicative officers is basically a matter of personnel rather than of procedure. A sincere belief in the policies and principles set forth in an act whose application is entrusted to administrative officials cannot be called bias or prejudice, however distasteful such an attitude may be to parties or counsel who believe these policies and principles to be unwise or unfair.[77] On the other hand, if excessive zeal or other extraneous considerations on the part of a trial examiner or other adjudicator are such that they dictate decisions purporting to reflect honest judgments, the solution is not merely disqualification from a particular proceeding, but appropriate disciplinary action, perhaps even removal from office. In this respect the problem is in its essence the same in all adjudicatory agencies, including the courts themselves. It is primarily one of internal import, and its correction rests in the successful application by the agency of its machinery dealing with personnel problems.

The Board has been confronted with few specific charges of bias in particular cases. The problem of disqualification of trial examiners prior to hearing has arisen in only two cases. In one, the trial examiner assigned to a case advised the Chief Trial Examiner that prior to his employment by the Board, he had represented the complaining union and, under the circumstances, he thought it desirable that he be relieved of his duties. This request was granted. In the other case, the attorney for the respondent, prior to the announcement of the identity of the trial examiner to preside at the hearing, advised the Chief Trial Examiner by telephone that, if a particular member of the Examiners' Division was assigned, the respondent would file an affidavit of prejudice. The problem was academic because another trial examiner had already been selected. The Chief Trial Examiner has stated, however, that had he contemplated the assignment of the individual in question, he would have altered his plans rather than create a hostile atmosphere at the hearing.

In several cases, parties to the proceedings have, during or after the hearing, filed affidavits of prejudice directly with the Board or have incorporated claims of bias in their exceptions to the trial ex-

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[76] The Board has no power, under the statute, to punish for contempt, but it has provided in Rules and Regulations, Article II, Section 31, for the exclusion from the hearing of persons engaging in contemptuous conduct. This authority has been exercised in only two cases; in one, the contumacious attorney was excluded from further participation in the case and, in the other, he was asked to leave the hearing room for the balance of the day.

On two other occasions, the Board was sufficiently outraged by the conduct of attorneys, to institute proceedings to "disbar" them from further practice before the Board. Both proceedings were dismissed upon the receipt of appropriate apologies and explanations. Whether the Board's contemplated action in those instances was warranted, absent a provision in the regulations governing the enrollment and disbarment of attorneys, is open to some question. One may suggest, therefore, that the Board incorporate in its rules of practice, provision for the disbarment of attorneys for unprofessional conduct, if it intends to maintain disciplinary proceedings of this character.

[77] Compare L. L. Jaffe, *Invective and Investigation in Administrative Law* (1939) 52 Harv. L. Rev. 1201, 1218–9:

"It may well be that a sincere conviction as to public policy predisposes the mind when it might otherwise be in a position of doubt or balance on a conflict of fact or a choice of applicable principle. But to announce out of hand that such a state of mind constitutes a 'disqualification' is in part Quixotic and in part nonsequitur. A strong and sincere conviction as to certain laws may exist and undoubtedly often does exist in judges. During prohibition, for example, there must have been great numbers of judges who disapproved of the law just as many disapprove of the antitrust laws. Juries, notoriously, may believe that plaintiffs should recover from insured defendants regardless of negligence. If emotionally determined values constituted a disqualification, judges would be under constant attack and judicial-constitutional law nonexistent * * *. Pecuniary interest in the judge brings into any one litigation a purely capricious, fortuitous bias having no relation to the competing social values in the case before him. It does not follow that a hatred of monopoly is inappropriate in a Federal Trade Commission or of espionage and employer violence in a Labor Board Commissioner."

aminer's report. These claims, when made prior to the issuance of the intermediate report (*infra*, p. 21, *et seq.*), have been investigated, pursuant to instructions from the Board, by the Chief Trial Examiner. In no case has the Board removed the accused trial examiner during the hearing, but on two or three occasions it has concluded that, in view of the expressed attitude of the respondents, an intermediate report would be useless, and has transferred the case to itself upon conclusion of the hearing for proposed findings of the Board in lieu of an intermediate report. In two cases the Board has, as the result of claims of bias, set aside the records of the hearings and ordered a new hearing before another trial examiner.[78]

Subpenas.—The attendance and testimony of witnesses and the production of any evidence relating to any matter under investigation may be compelled by subpena.[79] In the event of contumacy or refusal to obey a subpena, the Board must apply to the appropriate District Court for an order requiring the contumacious person to appear before the Board and to produce evidence or testify; failure to obey the court mandate is, of course, punishable as a contempt.[80]

Since the Act specifically authorizes only members of the Board to issue subpenas, they are, as a matter of form, always signed by one of the Board members. In practice, however, the Board now considers and passes upon subpena questions only when, in the course of pre-complaint investigation, a regional office requests process to compel a recalcitrant employer to permit the field examiner to examine his records.[81] The Regional Directors and trial examiners, who are furnished with a supply of subpenas signed in blank, are authorized to issue subpenas needed in the trial of a case in accordance with specific instructions given by the Board.[82]

Applications for subpenas, which are made before hearing to the Regional Director and during the hearing to the trial examiner, are

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[78] *Matter of Express Publishing Company*, 8 N.L.R.B. 162 (1938); *Matter of Owens-Illinois Glass Co.*, 11 N.L.R.B. 38 (1939). But cf. *Matter of Union Die Casting Co., Ltd.*, 7 N.L.R.B. 846 (1938) (Board refused to disqualify trial examiner from hearing supplemental charges of unfair labor practices predicated upon a notice posted by the employer which, among other things, attacked the trial examiner's intermediate report as unfair and prejudiced). See, also, *supra*, note 75.

[79] Witnesses are entitled to the same fees and mileage that are paid witnesses in the Federal courts (sec. 11(4) of the Act). Under the Board's rules, the party summoning the witness is required to pay these fees. Rules and Regulations, Art. II, Sec. 22.

Provision is also made (Rules and Regulations, Art. II, Sec. 20) for the taking of depositions "in accordance with the procedural requirements for the taking of depositions provided by the law of the State in which the hearing is pending." Because hearings are held in close proximity to the respondent's place of business and the homes of the employees, it has rarely been necessary to utilize the deposition procedure. See, however, *Matter of Titmus Optical Company*, 9 N.L.R.B. 1026 (1938).

[80] Section 11(2) of the Act. The Board's rules provide (Rules and Regulations, Art. II, Sec. 31) that the refusal of a witness to answer a proper question shall be ground for the striking of all testimony previously given by such a witness on related matters. It is said that the trial examiners have had no occasion to exercise their authority in this respect although it has been necessary, from time to time, to seek court enforcement of Board subpenas.

Section 11(3) of the Act provides immunity, save for perjury, against prosecution of any witness who claims his privilege against self-incrimination and is instructed to testify nevertheless.

[81] *Supra*, note 20. The power of the Board to issue subpenas at this stage was recently sustained in a proceeding to enforce a subpena issued to obtain jurisdictional information prior to the institution of formal action by the Board. *National Labor Relations Board* v. *West Coast Macaroni Mfg. Co.*, decided January 12, 1940 (N.D. Calif.).

[82] The Regional Directors and trial examiners are required to keep a record of each subpena issued, stating the name of the person subpenaed, the hearing for which he is summoned, and whether the subpena was actually used.

The Board at first passed upon all applications for subpenas made by the parties. The trial attorney, however, was not required to resort to this cumbersome machinery, but was able to obtain any subpenas he needed from the Board or the Regional Director. The inconvenience occasioned to the parties was soon perceived by the Board and resulted, in January 1938, in the establishment of the subpena provisions which are now in force. Compare *Inland Steel Company* v. *National Labor Relations Board*, 109 F. (2d) 9, 18–20 (C.C.A. 7th, 1940).

required to be timely and to specify the name of the witness and the nature of the facts to be proved by him.[83] Requests were denied if they are made for dilatory purposes or to embarrass and harass Board members or employees, or prominent individuals and labor union officials not directly involved in the case. Similarly, if a subpena is desired to obtain evidence which is inadmissible because irrelevant, the application is denied. Subpenas will be refused if their purpose is a "fishing expedition" into the internal operations of labor unions or employers by compelling the production of books and records.

Most subpenas needed for the presentation of the Board's case are obtained by the trial attorney from the Regional Director prior to the hearing. The degree of supervision exercised over the attorneys varies from region to region, and it is not always required that the attorney justify, as other parties must, the issuance of a subpena at this stage. There is no reason why this requirement should be relaxed in favor of the Board's attorney. Indeed, the Regional Directors and Regional Attorneys should be meticulous to see that all subpenas issued are justified. It is impractical, of course, to require the trial attorneys to apply to the trial examiner for the issuance of all subpenas, because it would frequently be impossible to proceed with a hearing at the scheduled time unless the witnesses have previously been summoned; and, since the trial examiner does not generally arrive upon the scene until the day fixed for hearing, it is imperative that another Board official, available to the trial attorney, be invested with the power to issue subpenas. There is no reason, however, for the continuance of the practice, which still persists in some regions, of furnishing the trial attorneys with a supply of blank subpenas, so that they are not required to apply to the trial examiner even during the hearing.

Evidence.—Although section 10 (b) of the Act provides that the common-law rules of evidence "shall not be controlling" in unfair labor practice cases, the Board has pursued no major departures from established principles. The notion of relevancy, which is perhaps the most important rule of evidence, has been applied constantly in Board proceedings, and the rulings on this score have apparently not varied perceptibly from those which one might expect from an experienced judicial tribunal. There have been some departures from the technical exclusionary rules such as the hearsay and best evidence rules, but in the main, the traditional rules of evidence are the guiding authorities in the process of proof.

In following a policy of considering evidence, inadmissible under the traditional rules, which "in the daily life of employers and employees appears to have probative force."[84] the Board has departed

[83] Rules and Regulations, Art. II, Sec. 21. If a subpena *duces tecum* is desired, the documents must be specified "with such particularity as will enable them to be identified for purposes of production." The propriety of the Board's requirement that parties desiring subpenas furnish the reasons for their applications was upheld recently in *North Whittier Heights Citrus Ass'n* v. *National Labor Relations Board*, 109 F. (2d) 76 (C.C.A. 9th, 1940).

[84] Address of J. Warren Madden, Chairman of the Board, before the Legal Institute of the American Bar Association, November 13, 1939. In *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 873 (C. C. A. 2d, 1938), certiorari denied, 304 U.S. 590 (1938), Judge Learned Hand stated: "* * * mere rumor will [not] serve to 'support' a finding, but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which reasonable persons are accustomed to rely in serious affairs." See, also, Rutledge, J., in *International Association of Machinists, Tool and Die Makers* v. *National Labor Relations Board*, 110 F. (2d) 29, 35 (App. D.C., 1939): "But it is only convincing, not lawyers' evidence which is required * * * The evidence must be such as a reasonable mind would accept, though other like minds would not do so * * * We are required to sustain the Board's findings, if reasonable minds, unhampered by preconceptions derived from the technical law of evidence, would differ as to conclusions to be drawn from the evidence presented."

from the hearsay rule more frequently than from any of the others. Witnesses are permitted to give hearsay testimony if the evidence appears likely to open up a new line of inquiry previously undeveloped or if the parties are able, by virtue of their own knowledge, to explain or contradict the statement if it is inaccurate.

Record of the proceedings.[85]—Although efforts have been made to reduce the size of the records by stipulations, limitations upon cumulative evidence and repetitious cross-examination, and clarification of the issues through pre-trial conferences, they have not been noticeably successful except in respect of the question of jurisdiction.[86] Even though arguments on motions and objections are not included in the record,[87] and the oral argument before the Trial Examiner only rarely is transcribed,[88] the records continue to be large.[89] While this condition is caused in part by the frequent unwillingness of the Trial Examiners to prohibit parties from engaging in repetitious cross-examination or the introduction of cumulative evidence—a power which is inevitably exercised with the greatest of trepidation—and, in many instances, by respondents' counsel, the responsibility for confused and rambling records falls with equal force upon the Board's attorneys. The more careful preparation of the Board's case would

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[85] Section 10(c) of the Act provides that "the testimony taken * * * shall be reduced to writing and filed with the Board." See, also, Rules and Regulations, Art. II, Sec. 32. Copies of the record may be purchased from the official reporter. Errors in the record may be corrected by stipulation of the parties or, if they are unable to agree, by moving the trial examiner to make the proposed alterations.

[86] It is now possible, in most cases, to avoid litigation of the question of interstate commerce. Since it is accepted law that parties may not stipulate to the jurisdiction of a tribunal, however, special pains are taken to prepare a stipulation to facts which will support the Board's jurisdiction. Assistance in this respect is given to the trial attorney by the Division of Economic Research, which suggests for inclusion in the stipulation material concerning the respondent's industry and, in particular, the respondent's individual operations.

The Division may also assist in the trial of cases in which particularly difficult questions of jurisdiction or labor relations are in issue. Informational material relating to the employer's business is collated by the Division and, if the data are complicated, or if the inferences to be drawn therefrom are unclear, a member of the economic staff is called upon to testify as an expert, the framework for his examination being documentary evidence obtained from other agencies (such as registration statements filed with the Securities and Exchange Commission and circulating reports submitted to the Post Office Department), exhibits prepared by the division, or extracts from authoritative writings. See Third Annual Report (1939) 249. The Division not only advises the trial attorney in writing as to the nature and extent of the evidence which should be introduced on these technical questions, but also, in isolated instances, is represented at the hearing by one of its economists who assists the trial attorney in his examination and cross-examination of witnesses whose testimony is relevant to those issues.

[87] The preent practice of going off the record for the purpose of hearing argument on motions or objections has occasioned a measure of misunderstanding. Its purpose, of course, is to diminish the size of the record. Bult the failure to include argumentative material of this type has in some instances given rise to the impresson that the record was incomplete, and hence has increased doubts concerning the fairness of the hearing. See, e.g., *Montgomery Ward & Co., Inc.* v. *National Labor Relations Board*, 103 F. (2d) 147 (C.C.A. 8th, 1939); *Inland Steel Company* v. *National Labor Relations Board*, 109 F. (2d) 9 (C.C.A. 7th, 1940).

[88] Rules & Regs., Art. II, Sec. 29, leaves it in the discretion of the trial examiner to determine whether the oral argument should be included in the record.

[89] In his testimony before the Senate Committee on Education and Labor (*supra* note 10), the General Counsel of the Board stated (at 345–346): "As of December 31, 1938, the average page length of transcripts of hearings, excluding those of 5,000 or more pages, was 509 pages. Less than 5 percent of all cases exceed 5,000 pages. Under the reporter's contract for the fiscal year ending June 30, 1938, the reporter charged respondents 44 cents per page for regular copy and 55 cents for daily copy. The normal charge in court proceedings in the District of Columbia is 60 cents per page, 25 cents per page in the Southern District of New York, and 37½ to 50 cents in the New York Supreme Court.

"In cases against employers, the average length of our records, excluding the exceptional and especially long hearing, is 797 pages. To obtain a transcript, therefore, would cost the employer an average of $350.68 during 1938 and $390.50 under the present contract."

unquestionably result in the diminution of the size of records, as well as the improvement of their quality.[90]

Procedure at the close of the hearing.—Any party is entitled, as a matter of right, to argue orally or to file briefs before the trial examiner at the close of the hearing.[91] In most cases, the parties avail themselves of both privileges. The time consumed by oral argument varies from case to case; the average argument lasts only an hour or so, but there has been an instance where an attorney extended his summation over a 4-day period.

Both oral and written arguments have generally been helpful to the trial examiners. A well-organized brief is particularly useful in the preparation of an intermediate report, and frequently decreases the time needed by the trial examiner to complete the task. However, the Board's attorney is not permitted, except in rare instances, either to argue orally or to submit a brief to the trial examiner. The trial attorney's association with the case, at the present time, ends with the closing of the record; he is given no opportunity to present his view of the facts or law to the trial examiner, the Board, or any other person who assists the Board in disposing of the controversy. The fruits of the trial attorney's study of the matter, which is more extensive than that made by any other single member of the Board's staff, are thus unavailable at the post-hearing stages. This is inexcusably wasteful, when its preservation may so readily be assured.[92] Should the Board adopt the suggestion heretofore made that persons who file charges be denied the privilege of participating in the hearing, the desirability of permitting the trial attorney to file briefs would, of course, be even more apparent.

Trial examiner's intermediate report.—After the hearing is closed, the trial examiner is required to prepare an intermediate report containing findings of facts and recommendations as to the manner in

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[90] Constant efforts have been made to improve this phase of the trial attorney's work in order to assure that the records not only will contain sufficient evidence on all material issues, but also will be barren of testimony on irrelevant matters. See, for example, letters from the General Counsel to the Field Attorneys (M–491) April 25, 1938; (M–244) August 2, 1937; (M–161) April 29, 1937; (M–7) February 14, 1936. Trial attorneys are instructed to interview all witnesses who are to testify, and to prepare a trial brief which will serve as the basis for directing the progress of the hearing. Letter from Acting General Counsel to Regional Attorneys (M–564) June 28, 1938.

The failure of these casual attempts to improve the quality of records recently led the Board to adopt a system of extensive supervision of the work of trial attorneys. A thorough check is made by the Litigation Division upon the progress of the preparation of all cases for hearing. Suggestions are made by correspondence or telephone calls as to methods for improving the presentation of the case. Ideas as to the theory on which a case should be tried may be given, or the suggestions may relate to the manner in which certain allegations should be proved. Advice may also be given concerning the elimination of repetitious evidence or the removal from the complaint of portions of the case which are likely to fail of proof. While this supervisory process now consumes the time and energies of many members of the Litigation Division, it is anticipated that, as a result of the training the trial staff will receive, the need for the system, and the drain on the Litigation Division will become less, or even disappear, in the not distant future. In the interim, it is felt that the efforts of the Litigation Division will be more than justfied by the improvement in the quality of records and the more expeditious conclusion of hearings.

[91] Rules & Regs., art. II, sec. 29.

[92] The Board has stated, however, that it is scarcely feasible, under its present appropriation, to provide for the filings of briefs in all cases. The staff of trial attorneys is too limited to deprive the regional offices of their services during the time that would have to be devoted to the study of the record and the preparation of a brief.

which the case should be decided.[93] Copies of the report are served on all the parties, and the original is filed, together with the transcript of the record, with the Board. The skeleton of a trial examiner's report is the same as that of a final decision of the Board. It begins with a brief statement of the nature of the case, including a summary of the pleadings, and a chronology of the significant procedural steps. Any motions or objections on which rulings have been reserved are disposed of at the close of this introductory statement. The findings of fact, which constitute the bulk of the report, are then set forth, followed by the trial examiner's conclusions and recommendations of the appropriate order to be entered.

Although there can be little doubt that the reports have not met the requirements that would make them truly useful documents, it is only fair to observe, on behalf of the trial examiners, that the fault has not lain entirely at their doors. Until the office of the Chief Trial Examiner was created in November 1937, there was an almost complete lack of supervision of the examining staff, and it was the summer of 1938 before any real effort was made to improve the quality of intermediate reports. Even when the importance of preparing good reports became fully understood by the trial examiners, however, it was not a simple task for them to meet their obligations; only too frequently they have found it necessary to draft the major portion of their reports while presiding over other hearings in the field, a condition which has not been particularly conducive to painstaking efforts. Whatever its causes may have been, however, there can be no doubt concerning the condition: Intermediate reports in the main have not been of great value to either the parties or the Board

Intermediate reports have served to provide an excellent outline of the issues involved, but it has been the exception, rather than the rule, that they have fulfilled their major purposes. The functions of an intermediate report are to avoid the necessity of Board consideration by securing immediate voluntary compliance with its terms, to sharpen the issues to be argued before the Board in cases where the parties are not content with the trial examiner's appraisal of the controversy, and to provide the Board with the judgment of the person who conducted the hearing and observed the witnesses. The reports have not adequately performed these functions because of the following deficiencies: (1) The findings of fact have been mere statements of

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[93] Id., sec. 32. The Board has, on occasion, dispensed with intermediate reports and ordered cases transferred to it. Although it has been held that there is no necessity to provide a substitute for the intermediate report [*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938)], the practice now followed, in cases so transferred to the Board, is to issue the proposed findings and order of the Board, to which the parties may take exceptions. The process of preparation of the proposed findings is identical with that utilized in preparing final orders of the Board. See *infra*, p. 24 *et seq.*

The situations in which the Board has utilized ths procedure include the following: Where the importance of the case demanded special speed in its disposition; where the length of the record would necessitate the incapacitation of the trial examiner to perform his other duties for too long a period; where the trial examiner's draft intermediate report indicated such an inadequate comprehension of the issues that the preparation of a good report would require the reassignment of the matter; where the trial examiner has left the Board; where there has been a substitution of trial examiners during the hearing, leaving no one person upon whom the responsibility of preparing a report might properly be placed; where an affidavit of bias on the part of the trial examiner has been filed with the Board.

results and have generally been unaccompanied by a discussion of the evidence or the mental processes by which the trial examiner arrived at his judgments; (2) the reasoning which led to the trial examiner's conclusions has almost never been set forth; and (3) the recommendations of intermediate reports, while rarely disregarded in toto, have been partially rejected with such frequency that the parties have had little faith that the Board would adopt them.[94] These deficiencies should be supplied, if parties are to have more adequate notice of the issues and if the Board is to have the maximum benefit of the examiner's opinions.

In the summer of 1939, the Board, with an eye toward improving the quality of intermediate reports, instituted the practice of assigning a member of the Trial Examiners' Division to read all records and revise draft reports before issuance.[95] Formerly the only supervision was supplied by the Chief Trial Examiner and his assistant, but their review was devoted in large part to an examination of the form and style, rather than the scope and quality, of the reports. Under the new system, the intermediate reports have shown visible improvement, particularly with respect to their more complete treatment of the evidence in arriving at findings of facts. Attorneys in the Review Division have indicated that their analysis of the record and preparation of draft decisions have been expedited considerably when they have the benefit of one of the recent reports. There still is considerable room for betterment, however, in the portion of the reports which deals with the analysis of the issues in the case and the conclusions and recommendations.

Exceptions and oral argument.—After the case has been transferred to the Board by the filing of the intermediate report, the parties are given 20 days, a period which may be extended on petition, in which exceptions to the report may be filed.[96] The same time requirement is prescribed for the filing of briefs and requests to argue orally before the Board;[97] such reports have been made in the vast majority of cases, and, if timely, have uniformly been granted. The trial attorney

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[94] It is estimated that in about 70 percent of the cases, the recommendations of the trial examiner have been accepted in their entirety. Complete reversal has occurred in approximately 13 percent of the cases, and partial reversal in somewhat less than 17 percent. Even in the cases where the Board has arrived at the same results as those recommended by the intermediate reports, there have frequently been variations between the Board's approach to the issues and that utilized by the trial examiners.

[95] The attempt has also been made to keep the trial examiners in Washington for a period of approximately 3 weeks between trips to the field, in order to facilitate the preparation of their intermediate reports. But see *infra*, pp. 26–27.

[96] Rules and Regulations, Art. II, Sec. 33. The exceptions must be in writing and copies are to be served upon each of the other parties and the Regional Director, as well as with the Board. Exceptions may be taken to any portion of the intermediate report or to any other alleged error in the conduct of the hearing, whether or not objections were made at the time the alleged errors were committed. Rules and Regulations, Art. II, Sec. 28.

Requests for extension of time to file exceptions are considered in the first instance by the Secretary's office. For the most part, their disposal is a routine matter, additional time being given if a review attorney has not started his study of the record or, for some other reason, no delay is likely to be occasioned by the extension of time. Otherwise, sound reasons for the extension of time are required to be shown. In some cases, the granting of the request may result in the undue prolongation of the post-hearing process, a factor which may lead the Secretary to discuss with the review attorney, or even with the Board, the advisability of denying the extension.

[97] Rules and Regulations, Art. II, Sec. 35. Until recently, the Board's rules required persons desiring to file briefs to request that privilege in writing. At the present time, however, the right to file briefs is unqualified. Copies of the briefs must be served upon all the parties.

Sec. 10(c) of the Act provides that "in its discretion, the Board upon notice may * * * hear argument." Requests for oral argument are acted upon by the Secretary's office, the procedure being the same as that described *supra*, note 96.

is not permitted either to file exceptions or to argue, orally or by brief, before the Board, a practice which, if the Board's appropriations are sufficient, should be corrected, particularly if the complainants are not given the status of parties at the hearing.[98]

When the date for oral argument has been fixed,[99] notice thereof is sent to all the parties and, in cases involving the American Federation of Labor or the Congress of Industrial Organizations, to the Washington offices of these organizations.[100] Each participant is generally permitted 30 minutes of argument, although more time is allowed in important or difficult cases. Argument is always heard by a quorum of the Board, and usually all three members are present.

The scope of the presentation, while limited by the record made before the trial examiner, is not restricted to the exceptions filed by the parties. Not only does the Board consider the portions of the record to which specific exceptions have not been taken but it also makes a complete review of the case where no exceptions have been filed by any of the parties. The failure to file exceptions is said to operate merely "as a submission of the case to the Board on the record," [101] except in cases where the trial examiner has recommended the dismissal of the complaint, in which event the absence of exceptions results in the closing of the case without further consideration by the Board.[102]

The Board's policy of examining every aspect of a case in which limited exceptions have been taken would seem to involve an unnecessary expenditure of staff time and energy.[103] In at least one situation, however, the Board could, consistently with its announced policy, refuse to be behind the trial examiner's findings. Where an intermediate report makes affirmative findings and recommendations with respect to certain allegedly discriminatory discharges, to which findings exceptions are filed, but recommends dismissal of the allegations with respect to other discharges, to which no exceptions are taken, there would seem to be no occasion for the Board to review the unchallenged dismissals along with the affirmative findings of discriminatory discharges. As pointed out above, the Board would not consider the case if no affirmative recommendations whatsoever were made, and con-

[98] As indicated *supra*, p. 21, the inability of the trial attorney to participate in the post-hearing process may have the effect of depriving the Board of the opinions and argument of the member of its staff who has lived with the case longer than any other person. The suggestion that the Board permit its trial attorneys to file exception to an intermediate report when they are in disagreement with its findings and recommendations has been objected to on the ground that the regional offices will be subjected to pressure by the complaining parties to file exceptions even when regional officials do not believe that such procedure is warranted, and that, rather than create ill will in the field, the staff will yield to such requests. It would seem, however, that it should not be too difficult to follow a determined policy in this respect, since the dissatisfied complainants always have the privilege of utilizing the exception procedure, and may be so advised in response to their exhortations that the trial attorney file exceptions.

[99] See *infra*, p. 25.

[100] These national labor organizations have sometimes been permitted to argue or submit briefs as amici curiae. The same privilege has, on occasion, been granted to other persons who have been able to demonstrate some interest in the proceedings.

[101] Rules and Regulations, Art. II, Sec. 33.

[102] Id., sec. 35. A case is also considered closed if the employer has complied with the intermediate report and no exceptions have been filed. Whether there has been compliance is a fact which is ascertained by the regional office acting under instructions from the Secretary.

[103] Conservation of the time and energies of the Board members is imperative, as may be seen from the fact that, in addition to the two full days which it must devote each week to oral arguments, a considerable, if underterminate, amount of the Board's time is consumed by sundry administrative and internal matters. The disposition of requests for authorization to proceed to hearing in unfair labor practice and representation matters, the approval of settlement agreements, the solution of personnel problems, are typical components of the miscellany with which the Board is constantly confronted.

sistency with this practice would require a similar refusal of review in the circumstances described.

The Review Division and the process of decision.—When an intermediate report is filed with the Board, the Case is assigned by the Associate General Counsel at the head of the Review Division to one of the approximately ninety attorneys on his staff. The function of the review attorney is to make a complete study of the record with the view, first, of acquainting the members of the Board with the details of the case and providing them with any information they may desire in arriving at a decision, and, second, of drafting the Board's final decision and order.

The review attorney's analysis of the case includes examinations of the pleadings, the trial examiner's intermediate report, the transcript of the record, and the parties' exceptions and briefs. Detailed notes are taken on the record, and are ultimately integrated so as to bring together all the evidence on any given issue. The review attorney frequently engages in legal research, or seeks the advice of the Division of Economic Research on technical questions of labor relations.[104] He may also confer with his supervisor during this stage of his work, but, as a rule, he does not discuss the case with the supervisor until his study of the record is completed.[105]

The discussion with the supervisor, in preparation for the presentation of the case to the Board, involves an exhaustive report of the results of the review attorney's work. The aim of this conference is to reduce the review attorney's conception of the case to a cohesive and intelligible story by eliminating all cumulative and irrevelant material. The supervisor has usually read the pleadings, intermediate report, and briefs prior to discussing the case; if he is skeptical about the review attorney's impression of particular matters, he checks the record to satisfy his doubts. When the supervisor and the review attorney have agreed upon the description and analysis of the case which they believe will fairly and fully reflect its various aspects, a conference with the Board members is arranged.

In order to synchronize the oral argument with the review attorney's conference with the Board, the time for the argument is not set until the review attorney has indicated to his supervisor the approximate time in which his study of the record will be completed. This may vary from a few days to several months depending upon the complexity of the issues involved, but on the average does not exceed a month.

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[104] The review attorneys are under strict instructions not to discuss cases they are studying with either the trial attorney or the trial examiner. While the isolation of the review attorney from the advocate is understandable, the reasons for forbidding discussion with the trial examiner are not so clear. Surely, if the review attorney desired some information concerning the demeanor of witnesses to which the trial examiner did not allude in his intermediate report, he should be able to obtain that intelligence for transmittal to the Board. Where conflicts in testimony are commonplace, the Board should not be deprived of the observations of the agent who served in its stead as presiding officer at the hearing. Even with improved intermediate reports, there would seem to be some room for discussion between the trial examiner and the review attorney. The focal point of the Board's consideration of a case is the intermediate report, and any failure of the written document to depict fully the trial examiner's understanding of the issues should not be regarded as an unfortunate incident of the examining process. If the Board were to dispense with an intermediate report, and issue proposed findings, there would be no question as to the propriety of discussion between the trial examiner and the review attorney. To forbid these conversations where a report has issued, on the theory that the fortuitous intervention of the report has altered the trial examiner's viewpoint from that of an impartial adjudicator to that of an advocate, is an extremely questionable prohibition.

[105] Each supervisor is in charge of from 7 to 9 review attorneys. They are, for the most part, former review attorneys who have merited the promotion by virtue of their continued excellent work.

Shortly prior to the oral argument, the review attorney prepares a four- or five-page memorandum containing a summary statement of the case, an outline of the evidence, and a brief discussion of the major issues raised by the exceptions. This memorandum serves to familiarize the Board sufficiently with the controversy to enable it to profit from the oral argument.[106]

As soon as possible after oral argument is heard, the review attorney makes his full report to the Board. The conference is attended by the supervisor and sometimes by the Associate General Counsel. The nature and length of the report depend upon the complexity of the case, the quality of the oral argument previously heard by the Board, and the existence of any conflict between the members of the Board concerning the decision to be rendered. The question of jurisdiction, for example, is rarely discussed, being very infrequently in issue; the Board properly assumes that if the regional director, the secretary, the trial attorney, the parties, the trial examiner, the review attorney, and the supervisor all agree that interstate commerce is involved, there is no occasion for it to inquire into that question with particularity. Where there is a close question, on the other hand, the review attorney gives a full description of all the evidence on both sides, and indicates the significant portions of the record when the Board feels that the actual reading of the testimony would facilitate its consideration of the issue.[107]

As a rule, after the review attorney has finished his report and the Board members have discussed among themselves and with him and his supervisor the manner in which to dispose of the various issues, the Board makes its decision and instructs the review attorney to prepare a draft decision accordingly.[108] If particularly difficult questions are involved, and further study seems desirable before they are resolved, the Board may request the review attorney and his supervisor to renew their analysis of the case and to report back at some later time. Or they may decide to examine the controversial portions of the record themselves prior to arriving at a decision. In any event, once a decision is reached, the review attorney begins to prepare a draft of the Board's findings and order.

When the review attorney completes his draft of the final decision, which, as has previously been observed, contains findings of facts, conclusions, and an order, with an analysis of the evidence supporting the findings and an argumentative opinion justifying the conclusions,

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[106] The review attorney and his supervisor attend the argument, but do not participate in it. Notes are taken on the significant portions of the argument, particular attention being paid to admissions and statements apparently in conflict with the record.

[107] The Board members almost never read an entire record and it is wholly out of the question that they should do so with any frequency. In the month of October 1939, for example, the Board decided 72 cases, in which the records totaled over 58,000 pages. As of January 1, 1940, there were awaiting decision some 256 complaint cases and 50 representation cases, totaling 600,000 pages.

[108] The Board rarely confers with any members of its staff, other than the Review Division, in arriving at its decisions. Conference with trial examiners are extremely infrequent, and only on a few occasions has the chief economist's advice been sought directly by the Board. From time to time, the Board has sought the advice of the General Counsel or the Secretary on matters of basic policy, but this too has been rare.

The informal files are not available either to the Board or the Review Division although, prior to 1939, the contrary was true. Correspondence requesting expedition in the disposal of a case, or relating to its procedural aspects, is handled by the Secretary's office and is never referred to the Board or the review attorney unless it appears to warrant particular attention. Letters dealing with the merits of cases are merely acknowledged but are not shown to any person who participates in the preparation of decisions. The members of the Board studiously decline to discuss any matter *sub judice* with persons outside the agency, and review attorneys are instructed to follow the same policy.

he submits it to his supervisor for revision and approval. Copies of the revised draft are then distributed to the members of the Board and the Associate General Counsel for their criticisms and suggestions. A careful study is made by them of both the form and substance of the draft decision; further conferences among the Board members and the review attorney or his superiors are frequently necessary before the decision is reduced to its final form. Eventually it is adopted by the Board members as their own, is signed by them, and is served on the parties.

Suggested revision of the post-hearing procedure.[109]—Whether or not the Board may be justly criticized for failure to speed the disposition of cases, it seems unlikely that any appreciable expedition of the decision process may be anticipated under the present system. While various members of the Board's staff are in somewhat marked disagreement as to the time that must be consumed at the various stages of the post-hearing process, an estimate indicates that the average case, under a normal work load, would not be decided until perhaps five months after the close of the hearing. The time would be consumed (it may be estimated) in the following manner:

	Days
From close of hearing to intermediate report	60
From intermediate report to oral argument	30
From oral argument to decision	60
Total	150

An analysis of these statistics reveals where the difficulties lie and suggests certain changes which should not only diminish the major delays, but also should provide for a much more satisfactory post-hearing procedure.

The preparation of an intermediate report now requires a considerable amount of time not only because it is a difficult task, but also because the conditions under which it is written are not ideally suited for speed. A first draft of an intermediate report could be completed, in the average case, within 3 weeks after the close of the hearing and, since the revision by the reviewing examiner generally lasts no more than a week, the finished production could be available after the lapse of only a month. Unfortunately, however, the trial examiner does not always have an uninterrupted period of 3 weeks which he can devote to the preparation of his report; a considerable portion of his analysis of the record and drafting of his report must still be done in the field during the "free" time he can find while presiding over other hearings.[110] Even when the draft is completed, moreover, a reviewing

[109] Before proceeding to the details of the suggested changes in the post-hearing process, it should be indicated that the procedure just outlined has been departed from by the most recently appointed member of the Board. He does not normally attend the conference at which the review attorney reports. It is his practice to consider the case as fully as possible prior to the oral argument. He depends upon the trial examiner's report, and the memorandum of the reviewing examiner commenting thereon, for an understanding of the controversy, and examines the parties' exceptions and briefs in order to ascertain the vital issues requiring resolution. If, on the basis of these documents, he is unable to arrive at a decision, he reads the evidence in the record on the disputed issues. He may, in the course of his study of the case, call upon the review attorney or the trial examiner for assistance, but, for the most part, relies upon his own impressions of the issues. He participates in the revision of the draft decision, however, in the same manner as do the other members of the Board.

[110] The trial examiners, it is said, do not always regard the prospect of evening work while in the field as an unwelcome chore. When their duties bring them to a small community, for example, the absence of any other forms of diversion in which the trial examiner feels he may properly engage, may leave the preparation of an intermediate report the sole manner in which he may occupy his spare time.

examiner is not always available; reports must sometimes wait a week or two before they are assigned for review.[111] Then, after the expenditure of all this time and effort, the further progress of the case is marked by this anomaly: Two men with considerable experience in presiding over unfair labor practice cases have read the record in order to prepare an intermediate report which is of limited utility to the parties and is substantially disregarded by the Board members, who rely largely upon an independent review made by a third person, whose work is closely supervised by still a fourth.

A minor alteration of present methods and a slight reallocation of staff might, it is suggested, go far toward improving the situation.

(1) In the first place, it is desirable that the trial examiner be enabled to concentrate upon the preparation of his reports when the hearings have ben concluded. To accomplish this, it would ordinarily be necessary to recall him to his headquarters after each case heard, although if the hearing were not too extended, it might still be appropriate to assign a trial examiner to preside over another short unfair labor practice case or, preferably, over a representation case where he is under no duty to submit an intermediate report.[112] This would enable the Board to utilize the trial examiner's services during the period in which the transcript of the record of the first hearing was being prepared. Such a program might entail the employment of additional trial examiners, and somewhat increase the cost of Board operations, by adding to traveling and other expenses.[113]

(2) As to issues of fact, particularly where dependent for their resolution upon the demeanor of witnesses, the trial examiner who heard the witnesses is better equipped than any other member of the Board's staff to recommend the conclusions to be drawn from the record. At the same time, the work of trial examiners is such that they have little time for study of the Board's decisions and other expressions of policy, or of judicial opinions which relate to labor relations cases. Since these are often of critical significance in formulating the ultimate conclusions to be drawn from the primary facts as found, the trial examiner would be aided in preparing an intermediate report if there were available to him a law assistant comparable with the law clerks who now serve most federal and many state judges. A small staff of law assistants could be established by transfers from the present Review Division of the General Counsel's office. Individual members of the group need not be permanently attached to a single examiner, but could be available for assignment, as are reviewing examiners at the present time, as cases gave rise to need for their services. Working jointly with, but (for the time being) under the direction of the trial examiner, the law assistant would (like a judge's law clerk) check his chief's conclusions against the record; would prepare

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[111] The use of some of the trial examiners to review the reports of others has the effect of diminishing the number of trial examiners available to preside at hearings. As a result, a backlog was created in the Trial Examiners' Division during the latter part of 1939, and hearings could not as a rule be scheduled until a month to 6 weeks after request. While this condition has been largely eliminated during the first 2 months of 1940, a result attributable almost entirely to the unusually small number of hearings held, it is not at all unlikely that upon the resumption of a normal work load, a backlog will once again be created.

[112] See *infra*, p. 35.

[113] See, in this connection, *infra*, p. 35, where it is suggested that trail examiners be relieved from their present duties in most representation proceedings. But compare *supra*, note 110.

memoranda bearing upon the problems of law and policy involved in the case—drawing, if necessary, upon the members of the legal and economic staffs for assistance; and would furnish to the trial examiner such editorial assistance as he might desire in the preparation of his intermediate report.

(3) The recently instituted system of review employed by the Trial Examiners' Division has already gone far toward producing a perfected type of intermediate report. It should not be abandoned. But the process of review in the Trial Examiners' Division should not be a complicated one, and the number of persons engaged in review work need not be more than two or three. The Chief Examiner's aides should not feel it necessary to read the record—for that will already have been studied by the trial examiner and restudied by his law assistant—nor should they find it incumbent upon them to repeat the researches of the law assistant (who, of course, may have been aided by the legal and economic staffs). The function of the Division's review should be merely to detect ambiguities of statement in the proposed report, thus eliminating needless exceptions to it, and secondly to forestall any egregious blunders or oversights which appear on the face of the document.

Intermediate reports prepared in the manner suggested above should be of untold benefit to the parties, who would be able to direct their efforts before the Board to the argument of the really critical issues in the case. The report, being more carefully prepared, might be regarded both by the Board and the parties as a more authoritative statement of the case to be accepted unless successfully attacked by exceptions; hence, a further consequence might well be to increase the instances in which the parties accept and observe the intermediate reports, so that further appellate proceedings would be unnecessary.[114]

Furthermore, the improvement of intermediate reports might reduce the delay which now occurs after the intermediate report has been published. The elements of that delay and the possibilities of diminution are the following:

(1) Until recently the average interval between issuance of the trial examiner's report and the hearing of oral argument on exceptions has been about 45 days.[115] This delay could be greatly reduced if the Board could rely upon the trial examiner's report (which, if prepared in the manner suggested above, would be reliable for this purpose) for a statement of the case except insofar as attacked by specific exceptions. Memoranda prepared either by the law assistants in the Trial

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[114] That the suggestion is not fanciful is indicated somewhat by the encouraging results obtained by the system of reviewing examiners. Up to August 1, 1939, when that system was installed, 928 intermediate reports were issued and compliance was had in only 45. Up to January 1, 1940, 63 reports had been issued under the new system; compliance had already been noted in 6, and it appeared likely that at least 5 more cases would be closed in this manner.

The experience of the Federal Communications Commission, which was faced with a similar problem, is worthy of note. Under its old examining system, where the presiding officer prepared a report without consulting with any other members of the Commission's staff, exceptions were taken in the vast preponderance of cases because the parties were uncertain as to the probable attitude of the Commission toward the case. Since the adoption of the system of proposed decisions—similar to proposed findings of the Board where no intermediate report is prepared (*supra*, note 93)—there has been a remarkable decrease both in the number of cases in which exceptions have been filed, and the number of exemptions taken.

[115] This lapse of time has been occasioned by the inability of the Review Division to commence its study of the record promptly which, because of the Board's practice of synchronizing the review attorney's report with the hearing of oral argument, necessitated the postponement of oral argument. See *supra*, p. 25.

Examiners' Division, or by the Board's own aides, could set forth such additional information from the record as the Board would need to appreciate the issues raised by the parties' exceptions and briefs. It should then be entirely feasible to schedule oral argument within 10 days or 2 weeks after the filing of exceptions, a period which should suffice for the preparation of argument in opposition to exceptions filed by other parties.[116]

(2) The major causes of delay after oral argument has been had are these: (*a*) the review attorneys are unable to utilize the trial examiner's report to any appreciable extent in drafting the decision, thereby increasing the time that they must spend in completing their task: (*b*) the supervisors frequently are unable to consider the draft decision immediately because they are occupied with matters presented by the six or eight other review attorneys for whose work they are responsible: (*c*) the Board members, who have never seen the decision before, and whose last association with the case may have been as much as 3 months before, must study it carefully, a task which may last from 2 days to a week or more.[117]

These troubles, it will be perceived, have a single origin, the inadequacy of the trial examiner's report. Given an intermediate report improved not merely in form but also as a considered and informed statement of the case, these time-consuming steps might be substantially shortened. It might even be possible, since the report is a part of the record, for the Board in many cases to adopt as its own the trial examiner's findings and conclusions, subject, of course, to such alterations as might appear to be necessary in the light of the parties' arguments to the Board.

By centering attention upon improvement of intermediate reports, a considerable saving of time and personnel might be effected. In the first place, consideration of a case would no longer necessitate a detailed analysis of the entire record. The primary function of the review attorney heretofore has been to perform just this task. But with the perfected intermediate reports which it may be expected would issue from the Trial Examiners' Division under the improved system of preparation, gaps would no longer appear in the statement of the cases, so that review of the record might be limited to those issues which had been raised by the parties' exceptions.

The study of these issues would not require the Board's continued utilization of a large staff of review attorneys, repeating in a somewhat isolated manner labors which might more profitably have been done by others. Instead, assisted by a much smaller corps of law clerks working with them as do the law clerks of judges,[118] the Board members

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[116] Whether or not the Board's method of considering cases is altered or expedited by improvement in intermediate reports, it is anticipated that, when the Review Division eliminates the backlog of cases with which it is now struggling, it will be possible to assign a review attorney (if the present reviewing system is preserved) to a case soon after the intermediate report is issued and thus to designate the matter for oral argument within a short period after exceptions are filed. See Report of Legal Survey Committee to General Counsel (Z–669), November 7, 1939, p. 12. Considerable progress has already been made in this direction. As of March 1, 1940, there were not more than 15 cases, in which intermediate reports had been issued, that were awaiting assignment to review attorneys.

[117] So that there may be a coordinating review of all decisions of the Board, the Associate General Counsel's approval is required before the issuance of any decision; this requirement may also occasionally delay the determination of a case.

[118] That is by subordinates under their own immediate supervision, directed to make such supplementary analyses, prepare such memorandums of law, and draft such opinions, or portions of opinions or orders, as might be necessary in the performance of the members' adjudicatory duties.

could familiarize themselves with the problems of a case through consideration of the intermediate report, the exceptions and briefs of the parties, and the portions of the record upon which the parties relied.[119]

Reopening of records.—The Board's regulations provide for the reopening of a record by the Chief Trial Examiner, at any time prior to the service of the intermediate report, or by the Board, at any time prior to the filing of a transcript of the record in a Circuit Court of Appeals.[120] Reopening may be ordered, upon reasonable notice, either *sua sponte* by the Chief Trial Examiner or the Board, or upon application made by one of the parties.[121] The usual grounds for such action are the correction of a procedural error made by the trial examiner, the discovery of evidence not available at the time of the hearing, and the introduction of additional issues into the case as the result of new unfair labor practices.[122]

Rehearings.—While the rules of practice contain no provisions governing the rehearing of cases, petitions for rehearing have been made from time to time and have uniformly been considered by the Board.[123] The matter is studied by the same review attorney who assisted in the preparation of the decision; he then reports to the Board, which acts upon the request. Petitions which seek the reopening of the record in order to introduce new evidence are denied unless there is a clear showing that the evidence was unavailable at the time of hearing. Since the petitioning parties have rarely been able to support this burden, rehearings have been granted most frequently in situations where the Board has been uncertain of its position on the aspects of the case referred to in the petition and has desired to hear further argument on those points.

II. Representation proceedings

Introduction.—The functions of the Board in respect of proceedings leading to the certification of the exclusive bargaining representative of the employees in an appropriate bargaining unit, are wholly unlike those which it performs in connection with unfair labor practice cases. In any representation matter not complicated by the presence of allegations of unfair labor practices, it is the task of the Board to resolve two issues: (1) What is the appropriate bargaining unit—i. e., the grouping of employees which will insure them "the full benefit

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[119] When necessary, moreover, assistance could profitably be drawn from the ranks of those who, having aided the trial examiners in the preparation of the intermediate reports, are already familiar with the cases and would not require further study to familiarize themselves with the record.

[120] Rules and Regulations, Art. II, Secs. 30, 37, 38. Applications made to the Board are customarily studied and reported by the same review attorney who is responsible for analyzing the original record in the case.

The Board's authority to reopen a record prior to the filing of a transcript in the Circuit Court is derived from section 10(d) of the Act. *In re National Labor Relations Board*, 304 U.S. 486 (1938). Compare *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364 (1939).

[121] It is anticipated that, as a result of the recently developed system of supervision of intermediate reports, the Chief Trial Examiner may find occasion to reopen hearings on his own motion (a power which he has hitherto had no occasion to exercise) because of errors at the trial hearing.

[122] See, e.g., *Matter of Pearlstone Company*, 16 N.L.R.B. No. 66 (1939) (record reopened to permit taking of evidence on new unfair practices); *Matter of Clark Shoe Company*, 17 N.L.R.B. No. 108 (1939) (record reopened to resolve an ambiguity in the record of the original hearing).

[123] Up to October 22, 1939, a total of 208 motions for rehearing had been made in the 1,950 cases decided by the Board up to that date. 24 petitions were granted, 153 were denied, and the balance were still pending. In 22 of the 24 cases in which rehearing was granted, the Board has modified its original decision.

of their right to self-organization and to collective bargaining"? [124] (2) Have the majority of the employees in that unit designated a representative for collective bargaining purposes? [125]

The statute gives only a skeleton guide to the procedure to be followed in performing these functions. Section 9(c) authorizes the Board, whenever a question of representation arises, to "investigate such controversy" prior to certification. "In any such investigation, the Board shall provide for an appropriate hearing upon due notice * * * and may take a secret ballot of employees or utilize any other suitable method to ascertain such representatives." While the Board has thus been at liberty to adopt any of a number of procedures, it has chosen to cast representation proceedings in substantially the same mould as unfair labor practice cases. Hence, except for some variations which will be indicated, the procedure previously outlined is equally applicable to representation matters.

Petitions.—Representation proceedings are instituted by the filing of a petition "by an employee or any person or labor organization acting on behalf of employees, or by an employer." [126] The petition, which must be verified and filed in quadruplicate with the Regional Director for the region where the proposed bargaining unit exists, must, in accordance with the Board's prescribed form, set forth information supporting the jurisdiction of the Board and the existence of a question as to representation.[127] In the case of an employer petition, in order to be certain that the proceedings are not brought for purposes inconsistent with the policies of the Act, the petitioner is required to state, in addition, that there are two or more labor organizations which have asserted conflicting claims that each represents a majority of the employees in an alleged bargaining unit.[128]

Preliminary inquiries and informal disposition of petitions.—After a petition is received by a regional office it is assigned for investigation to a field examiner, who proceeds in much the same manner as he does in unfair labor practice cases. The investigations are more stereo-

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[124] Section 9 (b) of the Act. An excellent discussion of the Board decisions dealing and was adopted as a basic principle by the Board's processor under the N. L. R. B. See *Matter of Houde Engineering Co.*, 1 N. L. R. B. (old) 35 (1934).

[125] Majority rule is also provided for in the Railway Labor Act [45 U.S.C. § 152 (1935)] and was adopted as a basic principle by the Board's predecessor under the N. L. R. B. See *Matter of Houde Engineering Co.*, 1 N. L. R. B. (old) 35 (1934).

[126] Rules and Regulations, Art. III, Sec. 1. While the Board probably has authority under the act to institute representation proceedings on its own motion [see Rules and Regulations, Art. III, Sec. 10(*b*)], it has pursued a strict policy of not acting unless a dispute has been called to its attention by an interested party. This policy has been fortified by the recent amendment to the Board's rules which permits an employer to file a petition; if neither employee nor employer desires to institute a proceeding, intervention by the Board in the situation is likely to be unnecessary.

[127] Rules and Regulations, Art. III, Sec. 12. Printed copies of the form are supplied on request at any of the regional offices.

The rules of practice also provide [sec. 10(a)] for the filing of petitions directly with the Board if necessary "in order to effectuate the purposes of the act." Only 23 petitions have been so filed since the creation of the Board. Compare *supra*, note 5.

[128] The Board formerly had refused to entertain employee petitions because it was of the opinion that, under ordinary circumstances, an employer has no legitimate interest in the question of his employees' representatives, at least until he has been approached for collective bargaining purposes. Until that time has arrived, to permit the employer to compel an election might well result in the stifling of incipient labor organizations which have not yet succeeded in obtaining the membership of the necessary majority of employees. See Hearings, *supra* note 10, at 540–543.

As a consequence of the arguments advanced before the Senate Committee on Education and Labor in 1939, the Board amended its rules to permit employers to file petitions where they can show that they are suffering from interunion strife. In the 7 months ending February 1, 1950, during which the amendment was in effect, only 52 employer petitions were filed. Of these, 16 were withdrawn or dismissed, 5 disposed of by consent elections, 1 by recognition of a union, and the balance were still pending.

typed in representation matters, however, since the main questions, other than the Board's jurisdiction, are the number of employees who wish a certification of representatives, the identity of the labor organizations involved, and the nature of the contentions concerning the appropriate bargaining unit.

If the investigation reveals that the petitioner does not represent a sufficient number of employees to indicate that it has a reasonable interest in the institution of a representation proceeding (that is, it is extremely unlikely that the petitioner could obtain the votes of a majority of the employees), or that the bargaining unit claimed by the petitioner would not conceivably be regarded by the Board as an appropriate unit, the field examiner requests the withdrawal of the petition; refusal to withdraw, under these circumstances, is generally followed by the dismissal of the petition.[129] It is frequently possible to arrange a settlement of the controversy, or, to be more accurate, to avoid the necessity for formal proceedings, by the employment of the conference method. Adjustments take the form of outright recognition of the petitioning union by the employer, or the determination of the question of representation either by checking the union members' cards against the employer's pay roll or by holding a consent election. A consent election, which is conducted in the same manner as elections ordered by the Board,[130] may be arranged where there is no controversy as to the appropriate unit and the sole question is whether the petitioner represents a majority of the employees in that unit.[131]

It has been possible for the Board to dispose of 76 percent of all petitions either by their withdrawal of dismissal, or by the arrangement of a settlement.[132]

Orders of investigation and hearing.—If, as a result of the field examiner's inquiry, it appears that a question as to representation exists, but an informal adjustment of the case cannot be arranged, the statute requires that a hearing be held.[133] Authorization for a hearing must be obtained from the Board; the same internal procedure is followed as in complaint cases, except that it culminates in a Board order of investigation and hearing, rather than in an authorization to the Regional Director to make such an order. This nominal difference in practice results from interpreting the Act as denying the Board the authority to delegate its power to institute representation proceedings.

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[129] Unlike the situation in complaint cases, the Regional Directors have no authority either to approve the withdrawal of or to dismiss a petition; a Board order must be obtained for that purpose. Since it is said that the Board (through its Secretary) has never refused to approve a withdrawal and only rarely has failed to dismiss on the Regional Director's request, it would seem that a considerable amount of labor of a perfunctory character could readily be eliminated through the installation of the same procedure that is not utilized in complaint cases. The refusal of the Regional Director to order a hearing would be subject to Board review in the same fashion as is his failure to issue a complaint. *Supra* p. 6.

The objection to this proposal is based upon an interpretation of the Act which holds that no delegation of Board authority in respect of representation matters may be made. This argument is discussed *infra*, p. 23.

[130] See *infra*, p. 36.

[131] The Board has adopted the policy of not certifying the representative of the employees as indicated by the results of a consent election because it has felt that, under sec. 9(c) of the Act, it was a condition precedent to the making of a certification that a formal hearing be held.

[132] Of the 6,184 petitions disposed of by the Board up to June 30, 1939, 1,285 were withdrawn, 571 dismissed, and 2,819 settled at this stage of the proceedings. Many other petitions were similarly removed from the docket after a hearing had been ordered, but prior to the entry of a Board decision.

[133] Settlements can rarely be obtained where there are conflicting claims by two or more unions since there generally will be an issue as to the appropriate bargaining unit under such conditions.

While the soundness of this construction is immaterial so long as the Board insists upon requiring the Regional Directors to inaugurate formal proceedings only after receiving approval from Washington, it is an important question if the criticisms of the present system, and the suggestion of decentralization are meritorious.[134]

The interpretation of the statute which occasions the distinction in the handling of the two types of cases is based upon the difference in the language found in sections 9 (c) and 10 (b). The former states that "the Board may investigate * * *" representation controversies, the latter that "the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue * * * a complaint," in unfair labor practice matters. If the difference in language can be said to denote an intention on the part of Congress that the Board itself order the investigation of representation cases, it would seem even clearer that it requires the actual investigation by the Board rather than by any delegates. Since the latter proposition could not seriously be maintained, the first one would appear to be equally untenable. Moreover, even if the Board is convinced by this literal interpretation of the statute, it should be noted that it has not adhered to it in practice; the vast majority of orders of investigation and hearing are never considered by the Board, but are issued by the Secretary in the Board's name. In any event, since it is unlikely that anyone could raise the objection that the delegation was improper, it would seem that the practicalities of the problem should be given precedence to a tenuous legalistic argument.

Consolidations.—It has not been at all unusual for the Board to receive charges against a person whose employees have petitioned for certification. The charge may be made by the same union which filed the petition, in which event it customarily alleges that the employer is dominating a company union, or else that he has refused to bargain with the complaining union. Or a charge of employer domination of the union which is seeking certification may be made by another labor organization. This device has been sometimes used for "strike" purposes, because, since it is universally known that the Board will not proceed with the determination of the question of representation so long as any unfair labor practices are extant, an incipient union may delay the holding of an election for a period of sufficient length to enable it to acquire additional strength in the plant.

When confronted with the two matters involving the same employer, it has been the Board's practice to consolidate them in a single hearing in order to save the time and expense that would be entailed by having two separate hearings.[135] These consolidations have frequently proved to be a source of great embarrassment to the Board. It has been faced with extremely perplexing problems which it should never have been required to resolve because, during the period that the un-

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[134] *Supra*, pp. 9–10. While requests for orders of investigation and hearing are handled much more rapidly by the Secretary's office than are requests for authorization of complaints, the need for speed is considerably more pronounced in representation proceedings and the expenditure of any time without adequate justification is to be deplored.

[135] Consolidation is not formally ordered, of course, until the charges have been investigated and a complaint authorized. In many situations, the charges have been disposed of promptly, as a result of the investigation, by withdrawal or dismissal. Occasionally, even where the charges are apparently meritorious, the labor organization filing the charges has been willing to proceed with an election, an offer which the Board has accepted upon receipt of the union's assurance that it would not seek to invalidate the election on the basis of the unfair labor practices of which it had complained.

fair labor practice issues were sub judice, changes in the industrial situation have either rendered obsolete portions of the record relating to the representation matter or have occasioned the disappearance of any question as to representation. Not only may the evidence relating to the issue of appropriate unit have become antiquated, but also the weakening or disintegration of the petitioning union may render moot the representation controversy.

Aware of the seriousness of the problem, the Board has recently come to grips with it. The Board was unwilling to forego its policy of refusing to consider representation petitions until the air has been cleared of any charges of unfair labor practices, but it has determined that, in lieu of consolidating the two matters, the representation case should be disposed of temporarily by the simple expedient or requesting withdrawal of or dismissing the petition without prejudice. After the complaint case has been disposed of, the persons filing the petition will then be permitted, if they still desire so to do, to institute a new representation proceeding. The benefits to be derived from this practice are manifest: In the first place, it should be possible to expedite the disposal of the charges of unfair labor practices by the exclusion from the case of the issues relating to the representation question. As a consequence of this acceleration of the administrative process, there are likely to be fewer situations in which the representation case has become moot because of changed conditions. In any event, the Board should not be confronted with those matters in which a new petition is not filed because of an unfavorable decision in the complaint case or because of a change in the industrial situation. Furthermore, it should be much simpler to arrange a settlement of the representation case after the unfair labor practices have been cleared away or have been demonstrated to be nonexistent. And, where the practice in issue is an alleged refusal to bargain, the portions of the record relating to the question of appropriate unit, to the extent that they have not become obsolete, should be available and should permit for a rapid termination of the representation case.

Consolidations are desirable, however, in at least one situation, and here the Board's recently adopted practice contemplates no change in its former procedure. Where two or more petitions have been filed by alleged representatives of employees in a given plant, and there are conflicting contentions concerning the appropriate unit, it is well to join all the cases so that the evidence which is equally pertinent to all the petitions may be amassed in one rather than two or three proceedings.

Parties to the proceedings.—After the Board has ordered an investigation and hearing, the Regional Director serves a notice of hearing upon the petitioners, the employer [136] and any other known persons or labor organizations purporting to act as representatives of any

[136] In legal contemplation the employer is not an appropriate party in representation proceedings. The Board's certification of employees' representative does not affect the quality of the employer's duty to bargain; and it might be said, as the National Mediation Board has said to railroad employers in comparable circumstances, that he can have no interest in determining employee representation until he is actually approach by an alleged representative of his employees for collective bargaining purposes. The Board has, however, always permitted an employer to participate fully in its representation hearings. The consequent prolongation of the proceedings is probably more than compensated by the elimination of any contention that question affecting the employer are determined in his absence.

employees affected by the investigation.[137] All persons served with notice of hearing become parties to the proceedings under the Board's rules.[138] Although the field examiner's investigation generally reveal all the labor organizations which are likely to be interested in the outcome of the hearing,[139] motions to intervene are sometimes made by unions which have organized some persons having a common employer with the petitioners. If there is no conflict between the units desired by the petitioner and the union seeking to intervene, and the latter is unable to show substantial membership among the employees of the unit which the petitioner claims to represent, the trial examiner denies intervention. If a different unit, in conflict with that claimed by the petitioner, is sought by the proposed intervener, however, the motion is generally granted.[140] A typical situation is one in which the petitioner desires a craft unit and the intervener, which has little or no membership among employees in the craft, but has organized other employees, is contending for a plant unit.

Trial examiners and trial attorneys.—The major distinction between hearings in representation and complaint cases is that the trial attorney in the former is not an advocate but is present to develop a full record on which the Board may make its decisions.[141] The parties are expected to produce the significant facts and, only when they fail in this respect, does the trial attorney pick up the burden. The similarity in the functions of the trial attorney and the trial examiner suggests the possibility of eliminating one of the Board's representatives from the average representation proceedings. This notion is fortified by the unimportance of the trial examiner in the post-hearing procedure; he does not submit an intermediate report, but merely transmits the record to the Board.[142] Only rarely do difficulties develop

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[137] The notice merely sets forth the time and place of hearing, but it is accompanied by a copy of the petition, the contents of which suffice to apprise the parties of the issues involved. No responsive pleadings are provided for, although statements in the form of answers are sometimes filed, since the notice of hearing does not purport to assert as true any of the facts contained in the petition, but merely provides for a hearing at which the accuracy of such facts may be ascertained.

[138] Rules and Regulations, Article II, Sec. 3. While the Board's certification of employee representatives is not *res judicata* in a subsequent complaint case, it has been held that persons who participated in the representation proceeding may not introduce in the complaint case evidence which was available to them at the time of the earlier proceeding. *Matter of Pittsburgh Plate Glass Co.*, 15 N. L. R. B. No. 58 (1939).

[139] The field examiner, in order to reduce to a minimum the possibility of error in this respect, always inquires of the local offices of the American Federation of Labor and Congress of Industrial Organizations as to their knowledge concerning the existence of any labor organizations in the plant in question.

[140] There is unquestionably at the present time a tendency of unions to intervene in proceedings in which they have no real interest, for the sole purpose of harassing rival labor organizations by seeking continuances and encumbering the record with frivolous motions and objections, as well as by obstructive examination and cross-examination of witnesses. This situation, while a source of much embarrassment, is one which it is probably beyond the power of the Board to relieve. Since the very purpose of the hearings is to ascertain the extent of the interest of the competing unions, it would be difficult to bar one or more of the competitors from participating. The solution to this, like many others of the Board's problems, lies in the rapproachement of the new discordant American labor movements.

[141] The trial attorney, it is true, is responsible for the introduction of evidence supporting the Board's jurisdiction, but this issue is generally disposed of by stipulation of the relevant facts.

[142] The Board has frequently varied its practice with respect to the participation of trial examiners in the post-hearing process. Originally the trial examiners prepared lengthy informal reports, similar to their reports in unfair labor practice cases, which were sent to the Board members but not served on the parties. When the Trial Examiners' Division learned that no attention was being paid to these reports, they changed their practice and prepared only brief summaries of the case for the use of the chief trial examiner. During 1939, one of the Board members decided to utilize these reports and, as a result, the trial examiners returned to the more elaborate form. At the present time, because the need for expeditious handling of these cases requires the immediate transfer of the record to the Review Division, the trial examiner can do no more than prepare a one-page statement of the nature of the case and his conclusions.

in the hearings themselves, though the issues ultimately to be determined by the Board may involve delicate judgments. To preside at the hearings at which the facts are explored does not, however require extended experience as a trial examiner. Especially since the Board is not, as it were, an active participant in this type of proceeding, there is no reason why the presiding officer should not be the member of its regional staff of attorneys who is already familiar with the case.[143] The adoption of this proposal would free the Trial Examiners' Division from much of their present responsibility with respect to representation proceedings, and thus enable them to devote all their energies to unfair-labor practice cases.

Orders of election.—In order to expedite the decision of representation disputes, the Board has made no provision for intermediate reports but disposes of the case in the first instance itself.[144] The process of decision is the same as that used in complaint cases, the Review Division acting as the Board's assistant in analyzing the record and preparing the final decision.[145] The Board's order which now issues in the average case about 4 months after the filing of petition and less than 1 month after hearing, either dismisses the proceedings or directs that an election be held, designating the unions whose names are to appear on the ballot, the employees eligible to vote, and the date as of which eligibility is to be calculated. In the past, the Board would frequently certify a representative at this stage, but during recent months it has abandoned this practice entirely except where the record indicates no disagreement among the parties on this question.[146] In short, the sole issue which bulks large in most of the cases is the unit appropriate for bargaining purposes.

Objections to elections.—Elections are conducted under the supervision of the regional director or some other responsible staff member. All expenses of the election, including the notices and the ballots, are borne by the Board. After the secret ballot has been taken, the supervisor prepares an election report containing a tally of the ballots, his rulings on challenged ballots, and his recommendations.[147] The report is served on all the interested parties, who are given 5 days in which to file objections. The objections are ruled on by the super-

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[143] Where the case appears to present particular difficulties—as, for example, where a heated controversy between the American Federation of Labor and Congress of Industrial Organizations is expected—the Regional Director could request the services of a trial examiner in order to keep the peace.

[144] The need for intermediate reports, to the extent that they provide a method for obtaining the judgment of the trial examiner on issues of fact dependent for their resolution upon the demeanor of witnesses, is rarely present in a representation proceeding. The evidentiary material relates to economic facts such as the nature of the employer's business, the duties of certain employees, and the history of collective bargaining in the plant. Issues of credibility are rarely present.

[145] Since the trial examiner does not participate in the decision process, there is no purpose in providing for oral argument or the filing of briefs before him. Leave to file briefs or to argue orally before the Board has been granted in a number of cases, however, upon petition made within 5 days after the close of the hearing. Rules and Regulations, Art III, Sec. 8.

[146] The desire to certify on the record, and thus to avoid the time and expense of an election, resulted in the complication of hearings with considerable evidence on the question of how many employees were in fact members of the petitioning union. The validity of signatures on membership cards, the circumstances under which particular employees were induced to join the union, and other similar issues, entirely collateral to the main problems, were hotly litigated. This practice had the effect not only of prolonging hearings, but also, it is said, of exposing to discriminatory discharge some of the employees whose union membership was revealed. Aware of the abuses occasioned by its certification on records, the Board has altered its policy in this respect with the result that more consent elections have been possible and that the records in the cases where hearings have still been necessary have shown a remarkable diminution in size.

[147] Rules and Regulations, Art. III, Sec. 9.

visor in a report which is transmitted to the Board and served on the parties. For the most part, the objections which have been taken have been readily disposed of, and, if one of the unions on the ballot has received a majority of the votes cast, Board certification follows. In about 10 cases, however, serious questions with respect to the conduct of the election have been raised by the objections, and, in those situations, the Board has ordered that a hearing on the objections be conducted before a trial examiner. As a result of these hearings, the Board, whose consideration of the case followed the usual pattern in representation proceedings, ordered the holding of new elections in a few instances. While the objection procedure entails some small delay in completing the proceedings, its retention is no doubt desirable in order to dispose of all doubts concerning the fairness of the elections conducted at the Board's direction. In any event, there is no substantial postponement of certification following the counting of the ballots.

Appendix A

UNFAIR LABOR PRACTICE CASES—AVERAGE TIME ELAPSED IN EACH STAGE

	1935–36	1936–37	1937–38	1938–39
Average number of days from—				
Charge to complaint	38	73	94	33
Complaint to hearing	18	14	16	15
Number days of hearing	6	8	7	7
Hearing to intermediate report	30	58	63	50
Intermediate report to exceptions	14	16	16	30
Exceptions to oral argument	25	30	80	20
Oral argument to decision	60	130	113	55
Total	191	329	389	210

Note: The median is used to denote the average.

16. (Source: James MacGregor Burns, in *The Journal of Politics*, Vol. 3, No. 4 [November 1941])

A NEW HOUSE FOR THE LABOR BOARD

(By James MacGregor Burns, Williams College)

The administrators of the National Labor Relations Act had hardly set up their central and regional offices when they found themselves the center of a storm of criticism. The decisions of Board members and staff, their policies and regulations, their interpretation of the Wagner Act, and their social philosophies continued for several years to receive a denunciation probably more severe and more incessant than that of any other New Deal agency. The reason is not hard to find. The Labor Board has affected intimately in thousands of plants the relations between employers and their workers, and in many cases disrupted the traditional pattern of these relations to the employers' immediate disadvantage. More important, the Labor Board has shouldered the task of settling disputes between powerful labor organizations and in doing so has drawn fire from the very group it was designed to serve.

The culmination of this criticism came in the spring of 1939 with the establishment by the House of Representatives of a special committee to investigate the National Labor Relations Board.[1] The Committee was given broad powers to study all aspects of the Board's work in open hearings. Representative Howard W. Smith of Virginia, the sponsor of the resolution calling for the investigation, was appointed chairman. A Democrat, he had voted against the Wagner Act in 1935 and had repeatedly attacked the Board since that time. The rest of the committee consisted of two Republicans, critics of the Board, and two Democrats who had voted for the Labor Act and had subsequently defended the Board.

To those who hoped that the investigation would either confirm or repudiate the attacks on the Labor Board, the results were disappointing. So voluminous and complex had been the work of the Board, and with such far-reaching effects, that the committee could hardly scratch the surface of its activities. Instances of poor judgment, overzealousness, incompetence, and bias on the part of certain Board employees were revealed. But there was evidence that such activities had met with the Board's disapproval and in some cases with disciplinary action. When compared to the enormous amount of work accomplished by the Board in five years under difficult circumstances, the cases of incompetence and wrong-doing were so scattered and in-

[1] 76th Congress, 1st Sess., H.R. 258.

significant that they gave little help to those seeking an honest evaluation of the Board's work.

This is not to say, however, that the investigation was entirely barren of helpful material. Its sessions were hardly under way when the committee discovered a serious controversy within the Board over administrative policy. This disclosure was taken up widely in the press. As the sessions continued, additional evidence of administrative confusion was uncovered. Controversies between Board members and underlying administrative confusion seemed to appear and reappear in various forms in both Washington and the regional offices. The record was as replete with indications of administrative weaknesses as it was empty of examples of dishonesty or illegality on the part of key officials. The issue seemed to take the shape of competent administration rather than one of misinterpretation of the Act or "radicalism" on the part of the Board.

The situation appeared to call for a reorientation of the investigators' plans in order to focus attention on the real problem of management. Unfortunately, so eager was the majority of the committee to unearth evidence damaging to the integrity of the Board and indicating the need for a change in personnel and in the Act itself that the initimidations of mal-administration were not tracked down.[2] Rather the committee continued its fishing expedition into random aspects of the Board's work with the hope that something might turn up.

This analysis is an attempt to carry out the implications of the indications of administrative weaknesses unearthed by the Smith Committee. It is not, however, restricted to the committee record. On the contrary, this analysis and its recommendations are based also on opinions of the Labor Board and of other government officials, and on recent contributions to the theory and practice of public administration.

I

The most obvious administrative weakness in the Labor Board has been one that exists in many government agencies—incompatibility between the lawyers and the administrators. The former usually insist on adherence to traditional legal methods and the words of the law. The latter are more likely to seek rapid disposal of cases even if they must cut corners to do so. What the lawyers consider necessary deliberations often becomes red tape to the administrators. The latter feel that a good deal of the legal process amounts to duplication, delay and confusion. Fearing the brusque, rough-and-ready methods often used by the administrators, the lawyers point out that in the long run careful safeguarding of private rights will create the only framework within which administration can be effective.

At the Board a large proportion of the policy-makers have been men versed primarily in the techniques and philosophy of law. Officials who

[2] Chairman Smith appointed as chief counsel Mr. Edmund M. Toland, who made no effort to conceal his animus for the Board. When Toland's method of procedure was under attack shortly after the investigation got under way, Smith declared, "We are of course trying to develop all the facts in this case. We employed counsel for the purpose of presenting those facts from his standpoint."—*Verbatim Record* of the House Committee Investigating the National Labor Relations Board, Volume I, p. 259. (Page numbers refer to preliminary record published by the Bureau of National Affairs, Washington, D.C.)

might be termed as primarily "administrators" have in general held subordinate posts allowing them little control of major administrative policy. The three men who have had most to do with the establishment of procedures and subsequent supervision of administration—Lloyd Garrison, chairman of the old Labor Board set up before the enactment of the Wagner Act, J. Warren Madden, chairman of the present Board from 1935 to 1940, and Nathan Witt, Secretary of the Board from 1937 to 1940—had had little other than legal and academic training before coming to the Board.

The appointment of Dr. William M. Leiserson to the Labor Board in the spring of 1939 was apparently intended to alleviate this situation. Leiserson, a non-lawyer, had been chairman of the National Mediation Board. His previous experience, except for his academic positions, had been chiefly administrative.[3] It was only to be expected that his views would come in conflict with those of other officials. This conflict was fully revealed before the Smith committee. Again and again Leiserson was shown as running counter to traditional procedure at the Board in his attempts to speed up disposition of cases. At one point he testified:[4]

> Now, I have to confess that they know a good deal more about law and what the law requires than I do. I know what I think is practical and best in handling these labor questions.

In his prepared report to the committee, Leiserson asserted:[5]

> If there are faults in the work of the staff, I think that for the most part they are due to deficiencies in administrative organization and supervision, lack of training, and lack of experienced direction of the staff by capable and experienced men who are both good administrators and have expert understanding of the problems of labor relations.

Concerning his disputes with other officials at the Board he said:[6]

> Now, from a legal point of view I may be all wrong; certainly the legal department thought I was all wrong, and they know their business, I think. But from an administrative point of view I though I was right. . . .

Of another dispute with the Board Leiserson remarked, "Again it gets back to the deeper problem" of the differing ways of lawyers and administrators.[7]

Leiserson centered his fire on Nathan Witt, the Secretary of the Board, who was the chief administrative official. Contrary to general impression, Leiserson's criticism was not that Witt was incompetent legally, but that he "lacked understanding of the problems of administration that are required in managing a large organization such as the Board has."[8] It seemed to him that duties of an administrative character should not be handled by a lawyer unfamiliar with the techniques of management.

In his testimony Leiserson failed to indicate specifically where the Secretary had shown administrative incompetence (except for his citation of Witt's handling of a difficult situation in the Los Angeles regional office). According to J. Warren Madden, chairman of the Board, Leiserson never complied with Madden's request for specific examples

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[3] *Proceedings*, Vol. 1, p. 2.
[4] *Ibid.*, Vol. 1, p. 15a.
[5] *Ibid.*, Vol. 1, p. 7a.
[6] *Ibid.*, Vol. 1, p. 10a.
[7] *Ibid.*, Vol. 1, p. 19b.
[8] *Ibid.*, Vol. 1, p. 46b. For other examples, *cf.* Vol. 1, pp. 8a and 13a.

of incompetence.[9] Consequently, the proceedings of the Smith committee offer little additional indication of just where the administrative weaknesses might be found in the Secretary's office or in the Board as a whole, although examples of the results of existing weaknesses are numerous.[10]

Fortunately, material on this very question is available. Shortly after coming to the Board, Leiserson induced his colleagues to have a management survey made of the Secretary's office.[11] A 13,000-word report, embodying conclusions and major recommendations, was submitted in the fall of 1939. According to Leiserson the Board adopted some of the recommendations, "but there again we began to disagree," and major changes were postponed.[12] This report, which was drawn up by four of the Board's most experienced regional directors, offers valuable evidence concerning the basic administrative difficulties.

Essentially the report confirmed Leiserson's criticisms of the organization of the Secretary's office. Where Leiserson had been general and somewhat vague, however, the report was specific; and where Leiserson was tart and precipitate, the report was even-tempered. It offered nine "findings and conclusions:" [13]

1. The administrative division is insufficiently organized.
2. By reason of lack of organization the administrative process has suffered in effectiveness.
3. Too many functions are centralized in the Secretary's office and there is too little delegation of responsibility.
4. As a result of over-centralization, the Secretary's office is overburdened with work.
5. There is too little coördination between various Washington divisions.
6. There is too much isolation and too little coördination between Washington and Regional offices.
7. A definite personnel policy is lacking.
8. The Board is participating in too many administrative details.
9. These findings constitute some of the major causes of the delays which have provoked criticism.

The drafters of the report backed up their findings with impressive material. The mere listing of the activities of the Secretary's office occupied five legal pages. Preparation of the Board's agenda, attendance at Board meetings, administration of the Washington office, contact with Congressional committees, submission of the budget, supervision of regional offices, direction of personnel—these were only a few of the functions of the Secretary and his office. The direct implication of the report was that the office of the Secretary had persistently assumed innumerable responsibilities far out of proportion to its original status. Whether or not this original status had been analogous to that of a clerk of a court, certainly there had been no organizational planning to accommodate the responsibilities that were later thrust upon it. Without criticising the legal competence of the Secretary, the report indicated that the flood of work following the Supreme Court decision upholding the Wagner Act in 1937 had forced the Board to dump an assortment of functions into the nearest receptacle, which

[9] *Ibid.*, Vol. 2, p. 76c.
[10] *Ibid.*, Vol. 1, pp. 11c, 12a, 243c, 42b.
[11] *Ibid.*, Vol. 1, p. 17a.
[12] *Ibid.*, Vol. 1, p. 17a.
[13] *Report of Four Regional Directors*, p. 32. Only typewritten copies of this report are available.

happened to be the Secretary's office. In the absence of a planned system of administration, a topsy-turvy structure had grown up.

As for the lack of coördination between Washington and regional offices, the report again offered abundant proof. In the absence of such coördination the Board had relied on several special examiners, who moved from office to office checking up on regional activities and who were known by regional officials as the "goon squad." The Smith committee proceedings as well as this report testify to the unsatisfactory nature of this method of coördination.[15] The report also asserted that "regional directors are handling many complex situations without knowledge of how similar situations are handled in other regions." [16] When individual regional offices departed from Board policy and from policy in other regions, the report added, antagonisms were created on the part of union officials, employers, and lawyers.

The report was even more pointed on the subject of coördination between divisions of the Washington office. The administrative situation at times apparently approached a condition of chaos. To quote the regional directors: [17]

> . . . we learned that occasions have arisen when knowledge of action taken, indispensable to the operations of another division, did not reach the proper division head by reason of the lack of coördination. The information had to be obtained from a Regional office, although the action had originated in Washington. Similarly, some departments appear to be handicapped in their efforts to get prompt approval of their work before it is released; such approval frequently entails waiting until the proposal can be put on the agenda of the full Board, even though it is of no unusual importance. . . .
>
> Although the legal division reports directly to the full Board, the routing through the Secretary's office for Board approval on proposed settlements which already have the approval of the litigation division results in frequent extended delays that can sometimes be determined only by rescuing the documents from the Secretary's Office and taking a board meeting by storm. . . .

II

The regional directors concluded their report with four recommendations. Since the directors were men of competence who had felt the impact of the administrative situation in Washington for several years, these recommendations carry unusual weight:

> 1. That the administrative division be re-organized and the present duties of the Secretary's office be distributed as follows:
>
> (a) That a Regional Office division be established, as a separate and distinct unit, responsible directly to the Board for the coördination of the field offices, handling of authorization case development and direction of policy. The creation of this division contemplates sufficient personnel to conduct its work in Washington and a sufficient number of field coördinators to cover Regional offices in the manner hereinbefore described.
>
> (b) that a personnel officer be selected and appointed and a definite personnel policy be formulated and adopted and made known to all Board employees. The duties of such officer should extend to the rendition of service for all departments of the Board.
>
> (c) that the remaining duties of the Secretary's office be organized for more definite delegation of responsibility.
>
> 2. That the operation of the respective Washington divisions be better coördinated.

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[15] *Smith Committee Proceedings*, Vol. 1, pp. 12a, 347–349. *Regional Directors' Report*, pp. 9–16.

[16] *Regional Directors' Report*, p. 9.

[17] *Ibid.*, pp. 25–26.

(a) that a permanent administrative committee consisting of the division heads be set up to analyze; and decide such administrative problems as the Board may delegate to it and to act as a clearing house on inter-departmental matters.

(b) the time saved as a result of recommendation No. 1 should be used by the Secretary's office for the administration of Washington office and the coördination of the various Washington divisions.

3. That the Board delegate more of its administrative responsibilities so that more time can be devoted to its judicial and policy-making functions.

4. Finally, in the interest of averting the effects of inadequate organization and the resulting criticism we cannot urge too strongly a prompt consideration of the problem outlined above and prompt adoption of corrective measures either along the lines recommended herein or along other constructive lines.

Contrary to general impression, this report was not pigeon-holed. Shortly after its submission, the Board met one of the recommendations by appointing a director of personnel to relieve the Secretary's office of that work. The proposal to establish a "regional office division" provoked a good deal of discussion, and a new office somewhat similar to the one suggested was set up. Instead of being under a director immediately responsible to the Board, however, the new "regional office division" was still part of the Secretary's office and was headed by a member of the Board's legal staff.

Following the appointment of Harry A. Millis as chairman of the Board early in 1940, other changes were made. The "regional office division" was taken out of the Secretary's office and considerably strengthened. The director of the division now reports and is immediately responsible to the Board itself. He not only directs the work of the twenty-two regional offices, but also supervises the issuance of complaints and authorization of proceedings in representation cases. According to the Board, these changes "will make the secretary's function primarily that of an office manager." [18] Evidently, then, the regional directors' recommendations have borne fruit. It is not so certain that these recommendations meet the basic difficulties so ably analyzed in the committee report.

It is unfortunate that the regional directors did not have the benefit of the testimony before the Smith committee. Had they written their report six months later, they might have proposed in the way of change what so much of their report silently suggests. For the administrative weaknesses revealed by the Smith committee and in the regional directors' report point to the necessity not of a more decentralized administrative set-up, but for a strong administrator with the power and staff sufficient to carry out his duties. The failure of the directors to make this recommendation may be ascribed to the fact that the Smith committee had not yet dramatized the administrative weaknesses within the Board.

We can see now that it was not by accident that so much responsibility devolved on the Secretary. The piling up of functions in his office was in direct response to a basic administrative demand—the need for centralized administration. The Secretary's office grew powerful because it lay in a strategic position to handle the major and minor details that had no other place to lodge in a poorly organized administrative structure, and because the officials there did not shirk added duties. In an agency composed of divisions engaged in such diverse functions as economic research, publicity, "housekeeping," clerical, and legal, to

[18] NLRB Press Release No. R–4073, Feb. 5, 1941.

name a few, it was inevitable that all marginal functions would gradually find their way to an office where they could be supervised and coördinated by one official. The fact that all these functions were not managed properly is due to the lack of organization and to the absence of trained administrators in an office primarily administrative.

A clue to this condition may be found in the conclusion of the regional directors that "the Board is participating in too many administrative details." This finding was substantiated before the Smith committee. In episodes involving administrative activities of the Board, the question that keeps recurring in the minds of those who study the proceedings of the Smith committee is not whether particular acts of the Board were proper, but why the Board troubled itself with these administrative matters in the first place. Obviously, calm consideration of the crucial judicial and sub-legislative problems facing the Board can hardly flourish in an atmosphere of concern over petty, if troublesome, administrative matters.

One need not go far to find the reason for Board intervention in administrative matters. Although the heads of the various divisions of the Board have worked in informal collaboration with the Secretary's office, they report to and are responsible to the Board itself. In the absence of a central administrative office with supervision over these divisions, there has been no sifting machinery to separate questions of major policy from minor administrative matters; consequently, all such matters have gone to the Board itself.

This state of affairs is merely one aspect of a condition that has already been discussed—the hold of "legalism" on the administrative work of the Board. Supervision of administration by legal standards remains the basic administrative weakness in the Board. Obviously it is impossible to take a group of men and glibly divide them into "lawyers" and "administrators." Some officials are both good administrators and good lawyers, and other officials are neither. And there may be some argument for a policy of balancing administrators with lawyers in top executive positions. But if the administrative maxim that lawyers are good servants but bad masters has any meaning, surely an administrative agency which has been set up and managed almost exclusively by lawyers is in a dangerous position. Yet this has been the situation in the Labor Board.

The inevitable result of this situation has been a curious "legalism" surrounding the most elementary activities. Administrative dispatch is lacking. In its place is a disposition to balance one action against another in the best traditions of jurisprudence. Direct and effective action is lost in the shuffle of many minds in conflict. The regional directors mention the existence in the Board of "an unwritten rule that every matter on which there can be two differing judgments must be taken to the full Board for decision. . . ." [19] Faulty and inadequate delegation of authority, inadequate inter-office communication, uncertainty as to the lines of responsibility, duplication of effort—these and other evils cropped up in luxuriant fashion.

It is this situation that breeds delay, described by Leiserson as "the greatest weakness in the work of the Board." [20] It is this situation that leads the regional directors to say that "insofar as the admin-

[19] *Report of the Regional Directors*, p. 27.
[20] Smith Committee *Proceeds*, Vol. 1, p. 6c. *Cf.* Vol. 1, p. 39b.

istrative methods aggravate the unavoidable delays of the whole cumbersome administrative and court processes, to that exent do we fail to meet our obligations." [21] It is this situation that brings on the "sluggishness of the administrative process," described by the Attorney General's Committee Monograph on the NLRB as "the major procedural problem with which the Board has been compelled to cope.[22]

Here we have a striking unanimity of opinion in the diagnosis of experts both within and outside of the Board. Their concern over delay is central. Delay defeats the idea of justice and the objectives of the Act. In the months [23] that lapse between the filing of a charge and a decision by the Board, interim developments may render the final decision a farce. The union may die from financial want; or a new managmenet-labor policy may make idle a decision based on the original premises. In this sense, efficiency and dispatch, rather than leading to arbitrary methods, may actually be a guarantee of ultimate justice. It may offer the best means of achieving precisely what elaborate legal procedures originally were established to achieve—effectuation of the provisions of a new statute without violating private rights.

This aspect of the administrative process calls for a nice balance, both in personnel and in procedure, between the managerial techniques of the "efficiency expert" and the procedural techniques of the lawyers. It calls for administrators—whether lawyers or not—who sense the urgency of most management-labor crises and the need for speedy action. It calls for a framework of administration within which legal procedures safeguard private rights without weakening the ultimate impact of adjudication.

But the reforms advocated by the directors attack the symptoms rather than the causes of this basic weakness. Alarmed by the centralization of functions in one office, they propose a redistribution of functions. The difficulty, however, lies not in the centralization of functions in one official. If such centralization were undesirable, we should concentrate our attention on the President and on the heads of great departments. Rather the condition undermining effective administration is the haphazard disposition of great responsibility in an office which is not commensurate with that responsibility in terms of official status or actual capacity, and which at the same time is not organized to delegate that responsibility properly. This has been precisely the situation in the Secretary's office.

Viewed in this light, the administrative condition at the Board must be met with thorough reorganization rather than by minor changes or stopgaps. Most of the recommendations of the regional directors must be placed in the latter category.[24] Their proposal to set up a Regional office division, independent of the Secretary's office, creates merely another unit reporting separately to the Board and producing still more chaos in its loose organizational structure. In an effort to coordi-

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[21] *Report of the Regional Directors*, p. 2.

[22] Attorney General's Committee on Administrative Procedure, Pt. 5, *National Labor Relations Board*, p. 1.

[23] The average time consumed between the close of the trial examiner's hearing and a Board decision alone has been estimated at five months.—*Monograph No. 5* of the Attorney General's Committee p. 26. Many weeks of course elapse before the trial examiner hears the case.

[24] Although they do recognize that "it is essential that administrative details be routed to the Board by way of a centralized channel."—*Regional Directors' Report*, p. 3.

nate the divisions in Washington, the report urges that a "permanent administrative committee consisting of the division heads be set up." Thus, along with the existing Board, another committee would supervise administration. Is this the way to relieve the present lack of coordination?

Fortunately, there is a method of reorganization that goes to the heart of the problem. If the Board lacks coordination and proper delegation in its administrative structure, as the evidence suggests, then it would seem desirable to appoint one person as the chief administrative officer. And if the Board suffers from too much legal-mindedness, as the evidence also suggests, then it would seem wise to choose a man primarily versed in the techniques of management. Under such a reorganization, the Administrator would take over the responsibilities that came to be lodged in the Secretary's office. Most of the Board's divisions would come under his immediate supervision. The newly created regional office division would be responsible to him, as would the director of personnel. Only under such conditions could he introduce efficiency and dispatch in an agency where these essentials have been lacking.

One is faced with two basic alternatives in granting power to the new Administrator. On the one hand, he could be the chief administrator in the narrow sense of the term, supervising housekeeping functions such as budgeting, personnel, clerical work, and supplies, as well as routine details of law enforcement. On the other hand, he could be the head administrator in the sense of a chief executive. He would be responsible to a cabinet officer or to the President himself. His administrative powers would not only be very broad, but he would manage all cases brought to the Board up to the point of their presentation before the three members of the Board, and presumably the presentation of cases before the Board would be undertaken by a division under his aegis as well. In other words, he would possess the functions exercised by the Attorney-General of the United States in law-enforcement under many other federal statutes. The Administrator would supervise the initiation of action, the investigation of complaints, the holding of preliminary hearings, the preparation of formal records, the administration of regional offices, and the coordination of the Washington divisions, as well as housekeeping functions. The Board would continue to exercise its judicial functions, and through the Secretary would supervise the making of decisions in the lower stages on the part of trial examiners and review attorneys.

On the basis of evidence afforded by the Smith committee and the regional directors' report, the latter seems to be the wise course. If, as Leiserson says, "ninety-four per cent of the work of the Board is administrative,"[25] then the need of a strong administrator as the Board's Chief Executive is apparent. Responsibility would flow from a central office. Power could be delegated safely. Division heads could take administrative problems to the Administrator for quick decisions, obviating the drawnout deliberations which inevitably occur when a board of three or more members must decide administrative questions. It is worth noting, moreover, that such a reorganization adheres to the traditional legal system which envisages a prosecutor taking his cases before a court which has had no contact with the prosecution of

[25] *Report of the Regional Directors*, p. 27.

the case. Yet at the same time the enactment of these changes would retain all the advantages of our modern administrative agencies.

The reorganization of the Labor Board on such lines would have another important advantage. The regional directors point out that the present organization of the Board results in a "condition whereby the Board, through necessity as well as through choice, is compelled to spread its time too thinly over a multitude of duties and details, many of them not requiring the judgment and special talents of the Board members whose primary responsibility must be on cases." [26] The report quotes approvingly a portion of Landis' statement that: [27]

> A further factor that makes against administrative adjudication having those qualities that it should appropriately have is that the members of an administrative agency rarely have the time and opportunity for thoroughly scrutinizing a record and coming to their own conclusions as to what it establishes. Their other functions may be so time-consuming that the actual process of adjudication is delegated, subject to only slight supervision. . . . Delegation of opinion-writing has the danger of forcing a cavalier treatment of a record in order to support a conclusion reached only upon a superficial examination of that record.

The Smith committee discovered that the Board's concern with administrative problems forced it to rely heavily in its adjudicative work on review attorneys.[28] Transferring the administrative work to an Administrator would enable the Board to supervise more carefully its decisionmaking.

Adoption of this proposal would have a third major advantage. Reorganization along such lines would still the popular outcry that the Board combines the functions of judge and jury in one agency, and that these functions are so intertwined that the adjudicators are influenced consciously and unconsciously by those prosecuting the cases. It is entirely possible that the danger of this in quasi-judicial agencies is more apparent than real. The Smith committee failed to unearth more than a few minor violations of the "separation requirement" at the Labor Board.[29] Nevertheless, the appearance of judicial neutrality is almost as important as its actuality. As long as the devision of functions at the Board remains obscure, the enemies of the Board as well as the critics of the administrative process will have the materials to give color to their claims. Although under the reorganization proposed here the two functions would remain in the same agency, the separation of functions would be more clearcut. Shorn of its administrative functions, the Board would have no influence over the initiation and conduct of cases.[30]

Once the initial separation of powers is accomplished there will remain border-line functions requiring special consideration. The suggestion has already been made that since the trial examiners and review attorneys (who review the findings of the trial examiners) are charged with responsibilities of a judicial character, they should be responsible to the Board and not to the Administrator. The Legal division and economic staff also raise special questions. The Board may need separate economic information from its economists, and help from the

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[26] *Report of the Regional Directors*, p. 27.

[27] James M. Landis, *The Administrative Process* (New Haven, 1938), p. 105.

[28] *Intermediate Report of the Special Committee Investigating the National Labor Relations Board*, 76th Congress, 3rd Session, pp. 46–51.

[29] Smith Committee *Proceedings*, Vol. 2, pp. 14b, 81b, 59c, 51a.

[30] It seems likely that the violations of the 'separation requirement" that did occur were caused primarily by the lack of administrative order within the Board rather than by irresponsibility or deliberate intent on the part of Board officials.

Legal Division when its decisions are taken to the courts. Special protection might be established, or semi-independence from the Administrator, without impairing the advantages of reorganization. Since this is but the outline of a plan, and not a blueprint, the precise machinery to attain such an end need not be considered here.

III

No proposal to revise the administration of the Wagner Act would be complete or valid unless it took account of another function of the Labor Board. The Board, like many other government agencies, must interpret the general statute enacted by Congress and clothe the bare framework with "sub-legislation" or "policy-making" so specific and flexible that it effectuates the Congressional intent in the face of varying conditions throughout the country. This function, like the judicial and administrative duties, is at present exercised by the three members of the Labor Board.

The policy-making function is a critical one. The Wagner Act safeguards labor's right to organize and bargain collectively. It enunciates unfair labor practices. But what is collective bargaining? May an employer petition for an election? What is a company union? What comprises the proper bargaining unit? Under what circumstances should back pay be awarded? These and a thousand other questions must be answered by a specific set of rules. And it is these rules, not the solemn expression of labor's right to bargain collectively, that touch the daily lives of workers and employers alike.

Under the proposed reorganization, should this function be delegated to the Board or to the Administrator? Unlike the problems raised in the previous sections, the answer to this question cannot be resolved in purely administrative or managerial terms. Rather it involves constitutional issues and goes to the heart of current controversies over the proper way to preserve and implement our democratic institutions. Specifically, it raises the issue of whether Congress or the President should control policy-making in independent agencies.

Under the revisions suggested here, the Labor Board as an adjudicative agency would continue to be completely independent of the Executive. Consequently, placing the policy-making function in the Board would shield this function from the President. The members of the Board would have long, staggered terms of office, with the result that interpretation of the Wagner Act and Board policy-making in general would remain impervious to anything but long-term fluctuations in public opinion and political alignments. Similarly, since the Administrator would be the creature of the current Administration, should policy-making be lodged in him it would be more flexible and more immediately responsible to public opinion.

Opposition to the second alternative—vesting policy-making in the *Administrator*—is based on the thesis that determination of policy is lodged in Congress, not in the Executive, and that the exercise of policy-making by independent agencies is a function delegated to those agencies by Congress. Blachly and Oatman state: [31]

[31] Frederick F. Blachly and Miriam E. Oatman, *Federal Regulatory Action and Control* (Washington, 1940), p. 170. This is a recent analysis of the conflicting theories on control of policy-making, and is a revised version of the Brookings Institution's earlier report to the Senate on executive agencies (see Senate Report 1275, 75th Cong., 1st Session, pp. 792–803.)

. . . the President is not and cannot be, under our Constitution, the general policy-determining agency of the federal government. . . . It is Congress that should organize the regulatory bodies, distribute functions among their various organs, and hold them responsible . . . the fact that Congress chooses to place [this work] in the hands of a special regulatory agency does not alter the fact that the duties of such an agency are principally legislative.

This thesis does not state that members of the independent agencies should have tenure of such length as to correspond to Congressional terms. Rather it is felt that members of a Board with independent tenure are best capable of following the mandates of Congress in the formation of policy.

Fundamentally, this view does not rest on a constitutional basis, however, but on a clear-cut attitude toward the mechanics of a political system dealing with great social problems. Those who wish to shield the policy-making activity from the President do so out of a deep fear of "partisan action." In the independent agency they see an instrument for ensuring sustained and undeviating regulation of certain phases of the economic order. In the freedom of the directors of such agencies from the Executive they see the means of insulating these agencies from sharp fluctuations in public sentiment. According to Blachly and Oatman: [32]

Administration of this kind should be wholly non-partisan and free from the domination of the party in power. Any attempt to make it reflect policy, other than the policy laid down by the statute, is in essence an attempt to establish partisan or individual control of the economic realm involved.

The implications of this viewpoint have special significance in a day when democracy is imperiled because of its own impotence or vacillation in times of crisis. The Chief Executive today finds himself vested with heavy responsibilities, but lacking in the power to meet many of those responsibilities. According to the President's Committee on Administrative Management: [33]

But though the commissions enjoy power without responsibility they also leave the President with responsibility without power. Placed by the Constitution at the head of a unified and centralized Executive Branch, and charged with the duties to see that the laws are faithfully executed, he must detour around powerful administrative agencies which are in no way subject to his authority and which are, therefore, both actual and potential obstruction to his effective over-all management of national administration. The commissions produce confusion, conflict and incoherence in the formulation and the execution of the President's policies. . . . The people look to him for leadership. And yet we whittle away the control essential to that leadership by parceling out to a dozen or more irresponsible agents important powers of policy and administration.

The danger is not only that independent agencies may fail to act in accordance with national policy, but that they may operate against that policy. Under the present system of staggered terms resulting in independence from the Executive, a new administration elected to face a national or international crisis may find itself attempting to enact programs with government instrumentalities in the hands of opponents of the Administration. The *Humphrey case* afforded us a taste of this situation in 1933. It was only a taste because of the relative unimportance of independent agencies at that time. The problem has assumed far greater proportions with the growth of such agencies under the New Deal. In the coming years we may expect the areas of

[32] *Ibid.*, p. 171.

[33] President's Committee on Administrative Management, *Report with Special Studies* (1937), pp. 39–41. The President's Committee takes an opposite view from the Brookings Institution's analysis on this question.

state intervention to expand until they touch and overlap, and the more they do so the greater will be the need for cohesion and coördination in the administrative structure.[34]

So much for the question of Executive *versus* Congressional control. The real issue, however, may not be between Executive and Congressional control, but between Executive and no control at all. In the first place, if Congress is to supervise independent agencies, it must have some means of gaining the information necessary to such supervision. Aside from the annual reports of the agencies, which present merely the viewpoint of the administrators, the Congress has only its inquisitorial powers to enable it to obtain the information on the basis of which it must evaluate the policies of the agency.

The investigation of the Labor Board by the Smith committee illustrates the lengths to which Congress must go in order to evaluate policy-making and administrative actions in independent agencies. Here was an agency which a majority in the House of Representatives believed was not carrying out the intent of Congress. A committee of five members was appointed, and $100,000 initially appropriated. The committee held hearings for many days, heard scores of witnesses whose testimony filled hundreds of pages. The committee's report was just what everyone expected—the three members who had previously criticized the Board reported adversely, and the two pro-Board members of the committee reported in favor of the Board. As a means of dramatizing the attack on the Board and the nature of its work, the investigation was a success; but as a means of transmitting information to Congress for the sake of better control, it was a failure.

The majority report criticized the Board for sending "goon squads" to regional offices to check up on the work there after it had been performed. But is there any real difference between that method of control and the Congressional policy of checking up on the work of independent agencies *after* it had been performed? Such a technique prohibits sustained control; committees composed of legislators unfamiliar with the agency's work attempt to establish control after the fact. In contrast to this, the policy-making in an agency under Executive control is subject to direct, every-day supervision by an official responsible to a cabinet officer or to the President himself. The policy-making is linked closely to the contemporary national program. In view of the ineffectiveness of Congressional committees as instruments of supervision, the issue again becomes one of control by the Executive or no control at all.

Even were it possible for Congress to obtain a proper evaluation of administration and policy-making, there would remain another obstacle to effective remedial action on its part. To assume that statutory changes in an Act of Congress would establish greater identity of purpose between Congress and an independent agency would be to under-estimate the importance of personnel. One would be naive to think that administrators popularly identified with one program or political creed could execute with equal vigor an opposite program. They would be more likely to sabotage the enactment of that program. Yet the tenure of Board members would not rest with Congress, both

[34] Leonard D. White notes that "An increasing emphasis upon a 'planned' economic system would tend to undermine the separate position of the independent commissions since there cannot be many such plans. . . ." *Introduction to the Study of Public Administration* (rev. ed., New York, 1939), p. 123.

because of the system of staggered terms and because the President shares the appointing power with Congress. A board member's tenure might last long after Congress enacted changes in the Act. It would seem far more desirable to make the policy-forming officials responsible to the Executive. This would ensure coördination and coherence of policy and establish clearly defined responsibility where such is now lacking.

Does such a program involve a raid on the traditional powers of Congress? Quite the contrary. Vesting in Congress control over the myriad activities of dozens of independent agencies vitiates the authority that properly belongs in the legislative branch of a democracy. It is easy for Congress to deal intelligently with a broad, integrated program enunciated by an Executive who himself must face the people. The legislator can bring into play all their powers of publicity and focus the spotlight of national attention on a series of integrated measures that have a coherent plan back of them. It is not so easy to deal intelligently with a number of diverse or partly integrated programs put forth by scattered agencies. The job becomes even more difficult when issues such as labor relations do not confine themselves to one agency like the Labor Board but crop up here and there, today in the War Department, tomorrow in the Tennessee Valley Authority, next week in the Maritime Commission or the National Youth Administration. Slicing up the lines of responsibility is not the way to increase legislative authority. The only effective method is to make the activities of the agencies a part of the program of the Executive, who in turn can face Congress and the people with a coherent and consistent set of policies.

This is an argument for Executive control of policymaking which concerns the status and future of Congress itself. The attempts of Congress to exercise detailed supervision over a multitudinous group of agencies may imperil its ability to enunciate major policies and supervise general programs. A great failing of parliamentary government is its tendency to stifle itself in a mass of detail. Continued immersion of the legislature in the technical aspects of policy-making diminishes public interest in its activities. The common man comes to expect the important national decisions to be made outside the legislative process. Laski says: [35]

> Parliamentary government, to retain its hold, must give the promise of great results. If it fails to do so, the electorate will look elsewhere for them. Nothing is more dangerous in a democratic state than a condition in which the people is persuaded that the fundamental instruments of its government are not equal to the task imposed upon them. A habit of lethargy is thereby induced which easily persuades a people to lend a ready ear to the siren voices of dictatorship.

In view of these considerations, it would seem desirable under the reorganization proposed here to vest the policy-making power in the Administrator. This would bring the policies of the independent agencies in line with the program of the Executive. It would relieve Congress of the responsibility—which it now assumes half-heartedly and ineffectively—of supervising the decisions of independent agencies ranging all the way from minor procedural and administrative rules to policies of great import to the public. It would prove that Congress was ready to renew its concern with great national issues and restore

[35] Harold J. Laski, *Parliamentary Government in England*, p. 22.

the people's faith in its ability to rise to the magnitude of the problems facing it. There is nothing revolutionary in such reorganization. Already in the administration of the Fair Labor Standards Act we have an example of a single administrator making policy after receiving recommendations from industry committees. Bureau heads in the Department of Agriculture, as in other departments, have exercised policy-making functions for many years without injury to the original regulatory statute.

By now it will be evident to students of government that the reorganization proposed here follows in general the philosophy of the President's Committee on Administrative Management. No attempt has been made, however, to fit the proposed organization of the Board into a rigid theory of administration. On the contrary, a study of the internal organization of the Board indicates that the recommendations of the President's Committee represent the best mechanism for improving the administrative situation at the Board. No attempt was made to follow a detailed outline; the study of independent commissions accompanying the Committee's report itself emphasizes that the plan should be regarded as "a general rather than a specific proposal." [26] It is true also that the proposed reorganization is similar to one of the recommendations of the report of the Smith committee majority, which is suspected of having been opposed to the Wagner Act as well as the Labor Board. The proposals put forward here, however, are based on entirely different premises from those on the basis of which the Smith committee majority was operating.

These proposals will disappoint those seeking changes in the Wagner Act or wholesale dismissals of officials at the Board. No convincing evidence has been brought forward showing that such drastic measures are necessary. The legal competence of many officials of the Board must not be lost to it. The situation merely calls for structural changes in order to place that competence where it would most aid the effective administration of the Wagner Act. Moreover, if the Board were merely a temporary creation, even these proposals might be unnecessary. But the Board is administering a right of labor which ultimately may rival our traditional constitutional liberties as a basic American right. It would be short-sighted not to make now the organizational changes which in the long run would best safeguard that right and enable it to achieve its fullest meaning.

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[26] President's Committee on Administrative Management, *Report with Special Studies*, p. 229 (Robert E. Cushman, author).

17. (Source: Harry Shulman, in *The George Washington Law Review*, Vol. 10, No. 1 [November 1941])

REFORMING PROCEDURE OF THE N.L.R.B.[1]

My subject implies a dichotomy which constitutes one of the law's perpetual paradoxes, seemingly impossible of resolution, the differentiation between procedure and substance. By all experience divorcement of the two seems impossible. Procedure must be a function of the substance sought to be achieved; it is the instrument fashioned to attain previously determined goals. Yet substance is the function of the procedures which produce it; policy can be made, changed, perverted by procedure. This seeming paradox is not peculiar to administrative law and, perhaps, not even peculiar to law alone. And it does not leave us helpless. It merely requires us, when considering procedural reform—specifically in administration—to bear clearly in mind three obvious ideas—axioms so commonplace that, unless specifically adverted to, they are likely to be ignored to the detriment of our thinking.

The first of these three ideas, if you will forgive me for belaboring the obvious, is that no procedure can insure "right" or "fair" or "wise" decisions; it cannot insure honest judgment, loyalty to prescribed goal or faithful execution of statutory duty. These objectives necessarily depend on the qualities of the human beings who are the administrators. If they are fired "with a zeal to pervert" they can do it despite meticulous compliance with the finest procedures; and, *per contra*, if they are superior and gifted men, they may achieve fair results despite poor procedure. All that procedure can do for the result, all that we can expect it to do, is to assure full opportunity for fair and wise consideration, to make unfairness more difficult than fairness, and not to mislead an honest, ordinary administrator into uninformed judgment.

Second, procedure must be fashioned for, and its appropriateness judged by, the particular policy which it is designed to enforce. The goal of procedure is not fairness alone. Its goal is the efficient enforcement, as fairly as possible, of a prescribed policy. A fully fair procedure which impedes efficient enforcement is no better, and indeed, may sometimes be worse, than one which produces the desired results even though it may otherwise be deemed unfair. This may be but another way of saying that the fairness of a procedure is not absolute, but relative—relative, that is, to the circumstances in which it is to be employed. And it means that the procedure must be fashioned only wtih firm belief in, and loyalty to, the task entrusted to

[1]Address delivered at The George Washington University Law School Symposium on Labor Relations, March 27, 1941.

the agency which is to be guided by the procedure. Hostile critics of the procedure who are also hostile to the substantive policy for which the procedure is instrumental must be doubly careful to assure that the former criticism is not merely the product of the latter hostility. They must necessarily be ready to be suspect in their criticism and to demonstrate that their proposals are calculated to promote fairness in efficient enforcement rather than to impede enforcement.

The essentially instrumental character of procedure implies also that its architects must be persons who are fully acquainted with the problems, the needs, the idiosyncracies of the agency which it is to serve. A house designed by an architect in Mars would hardly serve a family on earth. This means that ordinarily the persons most qualified to fashion procedure are those who are to live by it; specifically it means that the agency entrusted with the task of executing a statutory policy is ordinarily the most qualified to fashion suitable procedures for its enforcement. Yet continuous outside criticism also is necessary and desirable, certainly when it is informed and even when it is not so well informed—because, in any event, (a) it will tend to prod the agency into self-examination, and conquest of inertia and habit and (b) even an uninformed and seemingly silly suggestion may nevertheless prove to be the spark which will ignite experience and wisdom to produce desirable change.

Finally, the instrumental quality of procedure implies that its first and most important requisite is to promote its appointed task. The same procedure may, perchance, adequately serve more than one agency. But always, the first question is what procedure will best serve the particular agency. Uniformity in administrative procedure may be a good, although its advantages, and the difficulties of variety can be easily exaggerated. But uniformity is a good only if the uniform procedure adequately serves each agency that employs it. And so the crucial question continues to be—how well does the procedure serve the particular agency?

The third axiom is that an agency's procedure must necessarily depend on its resources. An agency cannot establish field offices, for example, or hold hearings in the field unless it has the required financial means. It cannot acquire all the desired skills and information unless it is permitted to employ the needed staff. It will be tempted to cut corners if its appropriations so limit it that it must cut corners or fall hopelessly short of accomplishing its task. Abundance of funds may, indeed, encourage waste or overelaboration in procedures; but excessive penury in appropriation surely impedes adoption of the optimum procedure.

Now the N.L.R.A. proclaimed a basic yet revolutionary policy for the governance of labor relations. The first choice of procedure had to be made by Congress. It might have proclaimed its policy and made violation a crime, leaving enforcement to the ordinary machinery of the criminal law. But for reasons deeply rooted in experience Congress chose the method of administrative enforcement. And because the policy as a statutory command was revolutionary, because it required a complete change in century-old habits, the Congress prescribed a relatively mild and largely educative machinery for enforcement. When an employer is charged with an unfair labor practice the Board is empowered to investigate; and if, after formal trial, the employer is

found guilty of the charge, the Board is empowered to order him to stop violating the Act. Only the provision for back pay orders can operate as risk of detriment for a first violation. Where those orders are not involved, as they are not in many cases, an employer has a privilege of at least one violation—something like the dog's privilege of one bite. And probably that is a wise way in which to introduce a radical change and provide the education requisite for its accomplishment.

For similar reasons and because of the suspicions and legal doubts which hung over it, the Board also adopted a cautious procedure when its turn to choose came. Before a complaint could be issued on a charge of an unfair labor practice, the Board required a careful informal investigation to ascertain whether there was reasonable likelihood that the charge was sustainable. The power to issue complaints was expressly withheld from Regional Directors. They could recommend; but they could issue a complaint only upon specific authorization from the Board through its Secretary. In this way the Board sought to avoid issuance of unwarranted complaints and to control the careful and consistent development of its policy and power.

The hearing procedure and the process of decision were equally surrounded with safeguards. Hearings were full, detailed and long. Evidence was taken almost exclusively by oral testimony—direct examination, cross, redirect, recross, until counsel had nothing more to ask. After the hearing, oral argument and briefs could be submitted to the trial examiner. He would then make an intermediate report to which exceptions could be filed as a basis for further argument and briefs to the Board itself. In the meantime a review attorney would make an independent study of the entire record; he would be checked by his supervisor and both would be checked by the chief of the Review Section. Then the Board, having heard argument and had briefs, would confer with these three, reach a decision and direct an opinion to be drafted. Whereupon the review attorney would draft an opinion, which would be checked by his supervisor, rechecked by the chief and submitted to the Board members—who would finally issue it as the Board opinion after procuring such revisions or amendments as they might have directed. The process was slow and cumbersome and doubtless accounted for much of the long delays in Board decisions. And perhaps the broth suffered from too many cooks. Perhaps one review merely nullified another. But there is no doubt of the intention of the procedure. The Board wanted to be sure that each of its decisions was "right" and that together they comprised a uniform and consistent policy. By the system of check and double check it sought to achieve this "rightness," uniformity and consistency.

Yet, in all this the Board wasn't really inventive. On the contrary it played safe and borrowed known and established procedures.

I speak of this in the past tense because the Board is now engaged in revision and has already announced some changes. And I do not wish to question the propriety of the procedure in the years in which it was employed. The Board's first years were peculiarly difficult, as we well know. A procedure which may seem inappropriate now may have been requisite then. The question now relates to procedure under present circumstances—when the constitutionality of the Act is well established, when the impact of judicial review on Board action is more pre-

dictable and when 15 or more volumes of Board opinions, in addition to the many court opinions, chart the policy of the Act's enforcement and provide guiding precedent for most cases. For present circumstances the disadvantages of the old procedure are fairly apparent:

First, and most important, given the Board's actual resources, the old procedure is too elaborate and too time-consuming. It did not enable the Board to keep abreast of its docket or to decide cases expeditiously. I suppose that in much of the Board's work, expedition is as desirable as in the administration of unemployment insurance or work accident compensation. And it is probably just as important in those cases that the decisions be "right," consistent or uniform. Yet the emphasis on expedition in those cases was lacking in the Board procedure and was subordinated to an emphasis on review and recheck. The trial examiner's report was not a final judgment subject only to appeal but was rather a document in the record something like the testimony of a witness. The review attorney made a thorough and independent study of the case. Though provision was made for exceptions to the report, the exceptions operated in effect as a notice of appeal and review extended to the entire case regardless of the exceptions. The attorney for the Board who tried the case and who was presumably intimately familiar with all its details and the trial examiner who presided over the hearings and wrote the intermediate report were eliminated from all proceedings subsequent to the report and new men began to study the case ab initio. A completely new and independent opinion was prepared for the Board even when the trial examiner's report was confirmed and when no new principles were to be established.

Second, while the procedure was designed to assure fairness and accuracy, it did not fully inspire confidence in its operation. It made possible the disingenuous, if not the honest, charge that decisions were made by anonymous youngsters in the back rooms. Lawyers could complain that, in their arguments to the Board, they were required to address themselves to the trail examiner's report when their important obstacle was the analysis of the review attorney which they were not permitted to know. They could say, with plausible demonstration, that the Examiner's report merely entrapped them into venting their powers on general argument of the whole case rather than directing themselves to the specific and determinative issues which the review attorney and his supervisors would pose. The charges could be denied of course and laid to bad faith; but they could not in that way be stilled or their effects avoided.

The reforms so far announced by the Board are two-fold:

First, the Board is establishing a new relationship with its regional officers. A new section has been set up, under a former regional director, to head the Board's administrative relationships with its field staff. The Board's Secretary who previously performed this function has been relieved of it. The step is not merely a reorganization and an effort to relieve the field staff of the feeling that they have been "isolated and more or less neglected." It is, rather, the result of a realization of the extreme importance of the field staff and is an effort to improve administration at its major activity. As Chairman Millis wrote in his announcement of the change:

> The Board feels strongly that the regional offices are of major importance in its operations. There the cases are investigated and the great majority dis-

posed of. There the cases not settled locally are prepared for further necessary procedures. The whole future of a case depends upon the most careful investigation at the start. Moreover, it can be truthfully said that attitudes of labor, employers and public toward the Board and the Act depend quite as much upon the work and demeanor of the regional staffs as upon all other things taken together, including Board decisions.

The details of this effort have not yet been promulgated, but are due soon.

Similarly, a unit has been set up in the General Counsel's office to coordinate and assist the legal work in the field.

The second announced reform is in the post-hearing procedure. There the trail examiner's report is to become the focal point. The review attorney is no longer to start from scratch and make a new and independent study of the whole case. He is now to start with the trial examiner's report and is to study the entire record, exceptions and briefs for the purpose of discovering "whether the trial examiner's report represents a fair and accurate reflection of the facts as revealed by the record and a correct statement of applicable principles of law." Then, instead of appearing before the Board to make an oral presentation and subject himself to oral examination, the review attorney is to prepare a memorandum setting forth his findings. The instructions are that:

. . . Where the intermediate report appears accurate and its application of legal principles appears to be correct, the review attorney's memorandum shall so state. He shall also point out those instances in which, despite his individual agreement with the trial examiner's findings or legal conclusions, reasonable doubts might be raised as to their accuracy or soundness, summarizing the evidence or considerations in point. Wherever the review attorney shall indicate the portions of the intermediate report which he believes are inaccurate or incorrect, either in fact or in law, he shall likewise summarize the evidence or considerations in point. In the event of material disagreement between the review attorney and the supervisor, the memorandum shall specifically indicate such points of disagreement together with reasons therefore based on the record.

Then:

The memorandum so prepared shall go to each Board member, who shall also have available for consideration therewith the entire record, including exhibits, the trial examiner's intermediate report, the exceptions thereto and briefs thereon, in making an independent decision.

Then, when the Board has decided the case, the review attorney is not in each instance to draft a wholly new opinion as in the past but is to prepare:

. . . a draft decision incorporating the intermediate report with such changes, additions, and modification as may be necessary, unless the Board directs otherwise.

These changes were apparently decided upon independently of the recommendations of the Attorney General's Committee on Administrative Procedure, but they are in line with those recommendations and seek to remove the two types of disadvantages of the old procedure which I outlined.

The Attorney General's Committee made several recommendations for the Labor Board specifically. It suggested that more care be taken to make the issued complaints as specific as possible in order to deter motions for bills of particulars and for amendment of the complaint and charges of surprise. It suggested that evidence be not adduced

at the hearings on uncontested issues. It felt that the Board's practice of adducing evidence on each issue of fact not covered by a stipulation, whether or not the issue was denied by the respondent, was wasteful and not required by the Act. And it recommended that effort be made to utilize the trial attorney's ready knowledge of the case in the post-hearing process, that is, that he be permitted to file exceptions to the trial examiner's report and argue orally and/or by brief before the Board in support of his position.

The other recommendations applicable to the Labord Board are addressed to all the agencies, but as applied to the Labor Board they seem to me peculiarly appropriate. I can see why some agencies may view the recommendations with misgivings; but for the Labor Board, the suggestions seem to me to be well designed to promote efficient enforcement and to provide a procedure which is not only fair in fact but fair also in appearance, so as to make for acceptance rather than suspicion.

The Committee recommends, first, that more power be decentralized and delegated to Regional Offices—subject to supervision from Washington. The decision to issue a complaint may probably now be safely entrusted to the field staff. The power of the Board is well established and there is no longer the need for careful selection of trial cases in order to test the Board's authority in the courts. Control of the work of the regional directors in this respect may probably be adequately retained by the requirement of periodic reports, further sample reviews and inspection, and the requirement that on difficult, novel or important matters the regional offices consult headquarters before action. In this way duplication of effort would be avoided and the time between the completion of investigation and issuance of complaint would be shortened.

The Committee also recommends further encouragement of settlement and other informal disposal of cases. The Labor Board's record in this respect is enviable. Only some 8% of its unfair practice cases result in formal proceedings and even less in formal disposition. Yet perhaps improvement may be possible even here. To be sure, settlement should not compromise enforcement so as to make violation painless or attractive. But voluntarism and speedy termination rather than prolongation of controversy are also good. Between the extremes of this seeming paradox there is much room for satisfactory adjustment. And immediate satisfactory adjustment is more to be desired than ultimate, unsatisfactory, literal "rightness."

The Committee then makes a series of recommendations with respect to the process of formal proceedings. It suggests first that the trial examiners be supplanted by hearing commissions, whose sole function it will be to hear and decide cases subject to review by the Board, who will be appointed for a period of seven years and will be paid $7,500 per year without diminution during that period. It recommends that effort be made to shorten the records and the hearings by pre-hearing conferences, stipulations, admissions and other devices. For example, though this is not stated in the report, in the Board's earlier cases, its jurisdiction was a matter of great importance. The relation of the respondent's business to interstate commerce was explored at length at the hearing and elaborated in the opinion. This matter now requires less time; but it is still a matter of proof and finding in

each case. It seems to me that some economy may still be possible here. The cases in which the Board has been held to have exceeded its jurisdiction because of the nature of the respondent's business are practically nil. May it not therefore be appropriate now to put on the respondent the burden of challenging jurisdiction and to adduce evidence on the issue of commerce only if the respondent has introduced evidence tending to show lack of jurisdiction? Or would it not be sufficient to let the investigator who prepared the case merely submit a statement of the facts on this point and leave it to the respondent to introduce disproving testimony if he will? If Mr. Capizzi refuses to stipulate that the Ford Motor Company's business is in or affects interstate commerce, is it really necessary to provide elaborate, oral testimony on the issue? And perhaps there are other matters with reference to which the process of proof may be readily expedited.

The Board further recommends that the hearing Commissioner's report be the final decision in the case unless exceptions are taken to it or unless the Board of its own motion decides to review it. The suggestion is that the Board's attorney as well as the respondent be permitted to file exceptions. And the Board is given authority, although it is not required, to confine its review to those issues to which exception has been taken. The Board can then adopt the Commissioner's decision as its own or reverse or modify it in such way as it desires. This suggestion would curtail, if not eliminate, the Review Division as it has developed. The Board might, of course, employ assistants to aid either individual members or the Board as a whole in analyzing the cases or writing the opinions. But there would be no occasion for the complete and independent consideration by the Review Division between the decision of the Hearing Commissioner and the submission to the Board.

Objection to the Commissioner system proposed by the Committee may well be anticipated. It will be said that the Board should have full control over the appointment or removal of the Commissioners; that the Board should have power to remove a Commissioner who becomes disloyal to its policies; that the assurance of tenure to the Commissioners may deprive the Board of ability to enforce the statute uniformly in accordance with its interpretation.

The objections are not to be lightly regarded. The responsibility for enforcement of the Act lies with the Board. So long as it is responsible for the result, it should not be deprived of power to produce it. The possibility that a Commissioner will become obstreperous is not wholly imaginary, though it may be exaggerated. But, in my opinion, the objections, seriously considered, are not sufficient to outweigh the merits of the plan.

Under the Committee's plan, the Board will still have some control over the appointment of Commissioners. No appointment can be made except from the Board's nominees. No appointment can be forced on the Board. Provisional appointment may be made for one year to enable the Board to observe the appointee at work and determine whether it desires him for a full term. If the Board will have made a mistake or if a Commissioner will have gone through a mental metamorphosis, the Board is not powerless to deal with him. It can, of course, subject his decisions to special scrutiny and reverse him. If his refusal to follow Board policy is persistent, it may well constitute

"malfeasance in office," a cause for removal. If reversal of his decisions is too frequent and due to his deficiency, it may constitute neglect or inefficiency in the performance of his duty, again grounds for removal. But if removal is not practical, administrative ingenuity is not thereby exhausted. It might be possible to lighten the Commissioner's assignments, to assign him only to cases in which his perversity would not be given scope or to assign him for sittings with another Commissioner. Parenthetically, in view of the saving anticipated from this procedure, it may be possible and desirable in a number of cases to assign a panel of two Commissioners for the hearing. If a residuum of risk still remains it is more than compensated by the advantages of making of the Trial Examiner's position a real office which can attract able men, of the gains in efficiency resulting from the treatment of his determination as a real decision commanding the respect which his office deserves, and of the increased public confidence which his stature and the proposed procedure will inspire.

Other suggestions may be made which were beyond the scope of the Committee's reference. For example, it may be desirable to empower the Board to proceed against alleged violators in the District Courts as an alternative to the administrative proceeding. The Securities and Exchange Commission has found this power very useful and has proceeded in the courts for injunctions in many cases.[2] By making initial resort to the courts optional with the Board, there will be no sacrifice of administrative policy or of the advantages of unified enforcement of the statute by the Board. Only the Board will have power to choose the court rather than the administrative route; and its choice will be made on the basis of its judgment of the desirable. There may be many cases in which resort to the court may be advantageous. To the extent that the remedy is made available and is used by the Board, the administrative burden will be lightened and Board members may find time occasionally themselves to sit on the trial of cases.

It may also be time to require obedience for the Board's order rather than, as is now the case, only for the judgment of the court approving the Board's order. The present procedure may well have been appropriate in order to educate employers in the new policy. But it is rather anomalous to continue the assumption that every Board order is presumably wrong and that its violation involves no penalty until and unless it is first approved by a court. In the judicial hierarchy the assumption is that the judgment of a trial court is presumably correct; it commands obedience and is not automatically stayed by an appeal. As with the court, so with the Board, provision may be made for a stay by the Board or by the reviewing court pending judicial review. But unless stayed, the order should be operative and command obedience on pain of penalty for violation. This is not, of course, a suggestion that violation of the Act itself be made subject to penalties, as, for example, in the case of the Railway Labor Act. It is merely a proposal that the Board's determinations, after formal trial, should command the respect of the parties as well as of the reviewing court.

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[2] See Sen. Doc. No. 10, 77th Cong., 1st Sess., ATTORNEY GENERAL'S COMMITTEE MONOGRAPH ON SECURITIES & EXCHANGE COMMISSION (1941) 6, 8.

18. (Source: Julius Cohen and Lillian Cohen, in *Industrial and Labor Relations Review*, Vol. 1, No. 4, July 1948. Copyright © 1948 by Cornell University. All rights reserved.)

THE NATIONAL LABOR RELATIONS BOARD IN RETROSPECT

Common to many of the current commentaries on the Taft-Hartley Law [1] is the assumption that it represents the *first* successful milestone in management's battle to wrest control of the National Labor Relations Board from labor. The Board under the Wagner Act—so the view goes—was prolabor; its role was to build up labor's strength by encouraging collective bargaining, consolidating labor's forces, and curbing the excesses of management's power; and it was not until the passage of the Taft-Hartley Act that the pendlum began to swing the other way. The chairman of the new Labor Board, Paul M. Herzog, summed it up by observing in a recent speech, that, since the Taft-Hartley Law "the spotlight was *now* on the *employers* of the nation as it has been on union labor in the last decade." [2]

It is understandable why it is that the well-publicized, dramatic event is the one selected to mark the point of transition and change. To be sure, it is the noonday whistle and not the passing hours, minutes, and seconds which usually heralds the change from morning to noon. But much of reality is thereby obscured. And much of reality is obscured if the Taft-Harley Act is viewed as the turning point. It hides from view the not-too-perceptible, but enormously significant, policy changes which were brought about by shifts in the *interpretation* of the Wagner Act. For long before the enactment of the Taft-Hartley Law, the Board, under the Wagner Act, had been substantially "softened up" and unmistakably pulled to the "right." It was like an orderly "retreat"—in fact, so orderly as to escape all but very limited attention. Its details, however, are worth noting for at least two reasons: (1) they furnish a rough gauge for measuring the relative strength of those forces which caused the Board to backtrack and modify its interpretations of the Wagner Act (it must be remembered that during this period the language of the Act remained unchanged); and (2) they raise the basic question whether a government agency can ever escape being the prisoner of whatever forces happen to have won the commanding position in the field.

The "retreat" may be viewed as only *one* of the phases of the bitter struggle over the passage of the Wagner Act in 1935. This struggle did not subside when the Board finally won legislative approval;

[1] Public Law 101, 80th Cong., 1st sess. (June 23, 1947).
[2] Address before the Institute on Labor Law, University of Minnesota, December 6, 1947, NLRB (A–26), Dec. 6, 1947.

it just took on different form. For immediately after the creation of the Board the same pressures that were vainly exerted to prevent the Board from being conceived persisted to make sure that even if the Board were born, it would be only a "still-life" birth. These pressure took such forms as the report of the National Lawyer's Committee of the American Liberty League "adjudging" the NLRA unconstitutional, the whipping up of adverse public opinion through a hostile press, the widespread ignoring of the act by many employers, and the tieing up of the Board by a mass of injunction suits during the first year of its existence.[3] Foiled on the judicial front by the decisions of the Supreme Court in 1937 upholding the constitutionality of the Wagner Act,[4] the opposition's drive centered again in the legislative arena in the form of a series of extended investigations and proposed crippling amendments. These assaults reached their peaks in 1939 and 1940,[5] subsided during the war period, and have been revised again since 1945 without letup. Although they greatly hampered the efficiency of the Board, the legislative line—up until the Taft-Hartley Act—held firm. While trying to "crack" the judicial and legislative lines, however, the opponents of the Board apparently seized upon a strategy that paid off in greater dividends. It was as if they had put to good use one of the old saws of the business world: "If you can't eliminate your competitor, then try to get control of him." In the language of crude power politics, one obvious method was to endeavor to capture the Board's three seats and fill them with members endowed with the "proper" viewpoint.

Almost from the beginning dissatisfaction was voiced against the early members of the Board. Charges of "prolabor bias" were rife; even the AFL joined in the attack, accusing the Board of showing favoritism to the then newly formed CIO. The first casualty in the battle over Board personnel was member Donald Wakefield Smith. Some indication of the high esteem in which his successor, William Leiserson, was held by business groups is evidenced by a statement in one of the leading publications of the business world—issued at the time when the attack on the second prospective casualty, Chairman J. Warren Madden, was under way: "If he [Madden] is replaced by a man of Leiserson's stripe, the Board will have a 'safe' majority."[6] The successive replacements on the Board brought additional approbation. Upon the appointment of Harry A. Millis as Chairman Madden's successor, it was reported by the same organ that "subtly, perhaps, but surely, the Board may be counted upon to change its line" [7] and that "from now on business can expect to find the Board's agents more tolerant to its problems and points of view." [8] When Gerard Reilly succeeded Edwin S. Smith, this change was "interpreted as White House endorsement of more moderate policies . . . [and] closes [a] chapter

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[3] For the story of this period, see Silverberg, *The Wagner Act After Ten Years* (1945), pp. 63–71.

[4] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S. Ct. 615 (1937); NLRB v. Fruehauf Trailer Co., 301 U.S. 49, 57 S. Ct. 642 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937).

[5] See, for example, Hearings on S. 1000, S. 1392, S. 1550, S. 1580, S. 2123, 76th Cong., 1st–3rd sess., Senate Committee on Education and Labor; Hearings on proposed amendments to the N.L.R.A., 76th Cong., 1st–3rd sess., House of Representatives Committee on Labor; Hearings before the Special Committee to Investigate the N.L.R.B. pursuant to H. Res. 258 (Smith Committee), 76th Cong., 2nd–3rd sess., House of Representatives.

[6] *Business Week*, July 13, 1940, p. 24.

[7] *Ibid.*, Nov. 23, 1940, pp. 55–56.

[8] *Ibid.*, April 5, 1941, p. 53.

in government labor policy which business found painful and costly." [9] John M. Houston, who replaced Leiserson, was regarded as "no zealot like Madden and Smith." [10] Paul Herzog, named to succeed Millis, was heralded as bringing "stabilizing influence to NLRB," and as being "no zealot who will try to use NLRB as [a] lever with which to effect social changes." [11] And the last appointee, John J. Reynolds, who replaced Reilly, was, with comember Houston, regarded in another respected business journal as one of the two "members with business background [who] for the first time are in majority on NLRB." [12] If the reactions of these business organs are proper criteria, it took the appointment of but a few new members to give the Board a more chastened view of the Wagner Act.

Undoubtedly, some of the shifts in the direction of the Board's opinions during this period may be ascribed to the more conservative viewpoints which the newer members brought to the Board. Other shifts may well have been occasioned by the proddings of the Supreme Court in reviewing Board actions. But whatever the causative factors, it is clear that there *was* a decided shift to the "right."

It is the purpose of this study at this juncture to sketch and record this shift in at least eight major areas of activity: in the Board's determination of (1) whether bargaining should be on a craft or industrial basis; (2) whether multiple plants of a single employer constitute a single or multiple bargaining unit; (3) what employees are eligible to vote in an election for an exclusive bargaining agent; (4) the extent of the employer's right to influence union activity by speech or other methods of persuasion; (5) the union activity which absolves an employer of a charge of unfair labor practice; (6) what constitutes bargaining in good faith; (7) who may petition for an election to determine the bargaining representatives; and (8) the length of time a union's certification may remain unchallenged.

The points of "departure" and "arrival"—with perhaps a few major intermediate stopovers—should suffice to demonstrate the *direction* of the Board's voyage in these areas.

CRAFT VERSUS INDUSTRIAL UNITS

In an early major decision involving a plant whose employees had a long history of bargaining on an industrial basis, a small craft group sought the Board's permission to "splinter off" and bargain separately with the employer. The Board decided that: "To permit such small groups to break up an appropriate unit . . . would make stability and responsibility in collective bargaining impossible." [13] Seven years later, however, the tide was beginning to turn. It was urged that craft units should be permitted to bargain separately if they did not have an opportunity prior to the commencement of the collective bargaining history to bargain on a craft basis. Although a majority of the Board denied that this was a proper ground for severing a craft from an industrial bargaining unit, one member, in a strong dissent, was at this time prepared to permit such craft separation.[14] Three months later,

[9] *Ibid.*, Sept. 27, 1941, p. 67.
[10] *Ibid.*, March 13, 1943, p. 38.
[11] *Ibid.*, June 16, 1945, p. 94.
[12] *Newsweek*, Aug. 30, 1946, p. 32.
[13] American Can Co., 13 N.L.R.B. 1252, 1256 (1939).
[14] Philip Morris & Co., Ltd., Inc., 70 N.L.R.B. 274 (1946).

the minority view became the holding of the Board; [15] and since then many craft unions have been successful in obtaining severance from industrial units, even after there had been a substantial history of bargaining by workers on an industrial basis.[16] It is needless to point out the effect of such a development upon labor's strength, for by splitting labor into separate bargaining units, there was greater opportunity to discourage labor solidarity, to diffuse labor's strength, and thus weaken its bargaining potential.

SINGLE VERSUS MULTIPLE PLANT UNITS

The diffusion of labor's strength was given additional encouragement in the Board's changed attitude toward the problem of whether to include the multiple plants of one employer as a single bargaining unit. Recognizing the need for a united front in collective bargaining, the early Board favored the multiple-plant unit, even in the face of the articulate desire of a majority in any single plant for separate representation.[17] Later, however, the Board in a similar situation refused to regard an employer's separate bargaining with one of the plants in the multiple unit an unfair labor practice.[18] The opinion of the dissenting member sharpens the directional lines of the decision: "It weakens the bargaining power of employees in dealing with unified management, multiplies the problems of management in dealing with employees, and aggravates existing division in the ranks of organized labor." [19]

In this connection it is also interesting to note the shift in the Board's attitude toward collective employer units. In an early key case involving a determination of the bargaining representatives of the Pacific Coast longshoremen,[20] the Board held that the purposes of the act could best be effectuated by the designation of *all* the Pacific Coast ports as a single unit, because of "the failure of longshoremen to achieve any satisfactory collective bargaining agreements when the bargaining was on a local scale . . . contrasted with the highly successful collective bargaining achievements when the longshoremen bargained as a coast unit." [21] Three years later,[22] however, the Board, in a proceeding to determine anew the longshoremen's bargaining representatives, ordered *separate* elections in three *separate* Pacific Coast ports—thus making possible a splintering rather than a unification of bargaining strength.

WHAT EMPLOYEES MAY VOTE

Another significant shift by the Board was evidenced in its treatment of the problem of determining what employees were eligible to vote in an election for an exclusive bargaining agent. It was brought into focus during a controversy between an employer and his employees over wages. Neither group could agree; so the employees decided to strike, and the employer hired new men. The Board, in deter-

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[15] International Minerals & Chemical Corp., 71 N.L.R.B. 878 (1947).
[16] For example, see Food Machinery Corp., 72 N.L.R.B. 483 (1947); American Fork & Hoe Co., 72 N.L.R.B. 1025 (1947).
[17] Pittsburgh Plate Glass Co., 15 N.L.R.B. 515 (1939).
[18] Libbey-Owen-Ford Glass Co., 31 N.L.R.B. 243 (1941).
[19] *Ibid.*, 255.
[20] Shipowners' Association of the Pacific Coast, 7 N.L.R.B. 1002 (1938).
[21] *Ibid.*, 1022.
[22] Shipowners' Association of the Pacific Coast, 32 N.L.R.B. 668 (1941).

mining the exclusive bargaining agent for the employees, ruled in an early decision that only those employees on the payroll prior to the strike were entitled to vote.[23] Three years after the decision, however, a majority of the Board reversed its stance and permitted both the strikers *and* the workers who replaced them to vote in an election for the exclusive bargaining agent. It was the Board's view that "were the so-called 'strike-breakers' made ineligible to vote, it would mean that the scales would be turned against the employer." [24] (It was the view of the earlier Board, however, that such a decision would have permitted the casting of more votes than there were jobs, and tended to encourage the hiring of temporary employees to influence the selection of the regular workers' representatives. Moreover, if the strikers returned to their regular posts, they would have found themselves represented by a bargaining agent who was not sympathetic to their interests.)

INFLUENCING UNION ACTIVITY

One of the most crucial of the Board's functions had been the mapping of the area of permissible employer activities, i.e., of determining just how far an employer may go in his relations with his employees without interfering with the "employees' freedom of self-organization." The Board was faced with the problem in an early case involving the determination whether an action by a foreman in promoting a labor organization constituted "interference" by the employer when the latter disavowed responsibility for the foreman's activities. The Board decided that such action constituted employer interference, stating, "Foremen are company representatives, . . . in fact, their acts may well have a greater effect on employees than posted generalities by high executives." [25] Its view was that "the effect on employees of coercive acts of foremen is telling, *whether or not the acts have specific sanction from above.*" [26] Contrast, however, the later position of the Board: "While we normally hold an employer responsible for conduct of supervisory employees of the character involved herein, we think that the . . . employees did not regard the activities of the supervisors, taken in their setting, as a reflection of the wishes of management, and that the respondents did not interfere with, restrain, or coerce their employees in their choice of representatives." [27] By placing upon the employees the burden of showing that the supervisor's actions were in reality those of the employer's, despite the latter's disavowal, the way was left open—in view of the difficulties of proof—for the employer to accomplish indirectly what he was prohibited from doing directly.

What the employer was able to do *directly* involved a determination by the Board of the extent of the employer's freedom to influence union activity by speech or other methods of persuasion. In two early cases the Board held the following to constitute coercion, and hence not protected as "free speech": (1) a statement by an employer prior to an election that we would not agree to a closed shop even though the employees select the union as their bargaining agent,[28] and (2) a state-

[23] A. Sartorius & Co., 10 N.L.R.B. 493 (1938).
[24] Rudolph Wurlitzer Co., 32 N.L.R.B. 163, 168 (1941). See also Columbia Pictures Corp., 64 N.L.R.B. 490 (1945).
[25] Inland Steel Co., 9 N.L.R.B. 783, 812 (1938).
[26] *Ibid.*, Emphasis supplied.
[27] Jos. E. Seagram & Sons, Inc., 32 N.L.R.B. 1056, 1071 (1941).
[28] Comas Manufacturing Co., 59 N.L.R.B. 208, 209 (1944).

ment that benefits accorded employees might be withheld by the advent of a union.[29] By contrast, later the Board held the following to be *within* the area of the employer's "freedom": (1) an employers statement (prior to collective bargaining negotiations) that he would refuse to grant closed shop or check-off clauses;[30] (2) the distribution of antiunion letters and documents to employees;[31] (3) the distribution of an antiunion pamphlet, even though there was earlier evidence of employer's acts of interference;[32] (4) a letter attached to employees' time cards declaring that the employer would never make membership in the union a condition of employment, even though the day after the distribution of the letter, which also was the day of an election for a bargaining agent, the employer announced a wage increase;[33] and (5) a speech evidencing hostility to the union delivered approximately ten days after the discharge of union members.[34]

ABSOLVING THE EMPLOYER

Although it had been the original policy of the Board not to take cognizance of the pressures which may have compelled an employer to commit an unfair labor practice,[35] the Board in later years relaxed its rule by absolving the employer if the unfair labor practice was "technical." This relaxation afforded the employer greater protection in those instances when he was caught, viselike, in a struggle between two competing unions. Thus, where one union, through the exertion of economic pressure, forced an employer to discharge and refuse to employ members of a rival union, the later Board held that, although the employer "technically violated the Act" (because the discharge and refusal to employ were based on membership in a rival union), the employer, nevertheless, "did not voluntarily commit the unfair labor practices. . . . The coercion upon respondents . . . is a factor which the Board may properly consider."[36]

THE REQUIREMENT OF BARGAINING IN GOOD FAITH

It had been the view of the early Board that the Wagner Act imposed "an unconditional duty upon an *employer* to bargain collectively" in good faith, and even misconduct on the part of striking employees would not have absolved the employer from noncompliance.[37] In the Board's more recent decisions, however, *unions* themselves were required to bargain with the employer in good faith before a charge of an unfair labor practice could be leveled against the employer.[38] This, in effect, constituted a move to achieve greater "equalization" in the administration of the National Labor Relations Act by a method short of Congressional action.

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[29] Ridge Tool Co., 58 N.L.R.B. 1095, 1097 (1944).
[30] M. T. Stevens & Sons Co., 68 N.L.R.B. 229 (1946).
[31] Arkansas-Missouri Power Corp., 68 N.L.R.B. 805 (1946).
[32] Bausch & Lomb Optical Co., 72 N.L.R.B. 132 (1947).
[33] La Salle Steel Co., 72 N.L.R.B. 411 (1947).
[34] Fisher Governor Co., 71 N.L.R.B. 1291 (1946).
[35] Star Publishing Co., 4 N.L.R.B. 498 (1937).
[36] New York & Porto Rico Steamship Co., 34 N.L.R.B. 1028, 1045 (1941).
[37] Kuehne Manufacturing Co., 7 N.L.R.B. 304, 321 (1938).
[38] Times Publishing Co., 72 N.L.R.B. 676 (1947).

PETITIONS FOR CERTIFICATION OF REPRESENTATIVES

Another step in this direction was made when the Board, by administrative regulation, modified its original practice of allowing only employees to file petitions for investigation of representatives, and permitted employers to file such petitions if it appeared to the Board "that two or more labor organizations have presented to the employer conflicting claims that each represents a majority of the employees. . . ."[39]

DURATION OF CERTIFICATION

In the interest of "stabilizing" labor relations, the Board, in a recent series of holdings, has evidenced increased reluctance to hold frequent elections for bargaining representatives, once a union has been certified. Although in the earlier Board decisions a one-year contract had normally been held to be a bar to an election,[40] more recently the time has been extended to two [41] and even three years, "if in accord with the custom of the industry." [42]

More evidence of the "retreat" by the Wagner Act Board is available, but its presentation, at this point, would be no more than a heaping of the obvious. Suffice it merely to add the significant remark of Chairman Herzog in his testimony before the Senate Committee considering the Taft-Hartley Bill: the "evolution" of the Board's decisions, said Mr. Herzog, in revealing the trend during his tenure, "has been in *one* [i.e., in management's] direction." [43]

RETREAT FROM WAGNER ACT

Almost a half-century ago Brooks Adams postulated that "the law is the envelope with which any society surrounds itself for its own protection. The rules of the law are established by the self-interest of the dominant class. . . ." [44] Despite its obvious exaggeration, the core of truth which still remains helps in part to explain not only the purpose behind the original Wagner Act, but the direction in which the Board has been "pulled" in administering its provisions.

The testimony of the representative of a large tobacco company at the time of the hearings on the Wagner Act reveals with startling clarity what undoubtedly was uppermost in the minds of a substantial segment of the industrial and business population at the time this legislation was being considered. After citing figures showing the inequitable distribution of income in the country, it was stated:

With this situation it became obvious to the management of our company that no mass production could long be carried on unless there was increased purchasing power by the great masses of people. To us this meant there must be increase in wages and shortening of hours. This became the very fixed conviction of our management. The more difficult question was as to how this should be accomplished, and we arrived

[39] CFR (Supp. 1943) 203.3.
[40] Kahn & Feldman Inc., 30 N.L.R.B. 294 (1941).
[41] Uxbridge Worsted Co., Inc., 60 N.L.R.B. 1395 (1945); Reed Roller Bit Co., 72 N.L.R.B. 927 (1947).
[42] United States Finishing Co., 63 N.L.R.B. 575 (1945).
[43] Hearings before Committee on Labor and Public Welfare, U.S. Senate, 80th Cong., 1st sess., part 4, 1855. Emphasis supplied.
[44] Brooks Adams, "Nature of Law," in Bigelow, *Centralization and the Law* (1906), p. 45.

at the conclusion that collective bargaining by employer and employee . . . was the only means by which, under our system, any adjustment in the inequitable distribution of income could be accomplished. We realized the difficulty of this method, but we felt that if this method did not accomplish the desired end, then the present capitalistic system would collapse. . . . There is a further and more selfish reason as to why we took the step which we did in cooperating with the organization of our plants. We felt that if the present economic system was to continue, it was inevitable that in the future there should be the organization of labor, and that real collective bargaining would eventually be made effective. . . .[45]

This same thesis was voiced by two government spokesmen who had leading roles in the administration of the pre-Wagner Act Labor Board. To one, the Wagner Act was a means of keeping the profit system intact by effectuating a wider distribution of income, since "profit rests on large scale production which cannot live upon the small market of the new wealthy, but must be absorbed in the vast and general markets of the masses." [46] The other spokesman was for the Act "first as a safety measure because . . . [he regarded] organized labor in this country as our chief bulwark against communism and other revolutionary movements." [47]

But the currents which were swirling beneath the considerations of the Wagner Bill were not in one direction. The voluminous hearings on the bill reveal that management itself was divided, a powerful dissenting segment insisting relentlessly that our economy could be saved only by private initiative, and that government intervention would lead only to disaster. There was, in general, an agreement on basic ends; there was disagreement only as to the means for accomplishing these ends. The early Board seemed thus to be created in the image of the then dominant representatives of business and industry, who saw in the Act a prop to a system threatened with collapse. To them, the existence of the Board was no more an intrusion upon "free enterprise" than was the Interstate Commerce Commission upon the well-being of the railroads. Although after sixty years of struggle it is now safe to say that railroad management is, by and large, quite content with the beneficial workings of the Interstate Commerce Commission, an important (and now dominant) segment of business and industry has never become resigned to the need for the NLRB. Indeed, from the view of the defenders of the Act, the "retreat" of the Board under the Wagner Act may be considered as a series of concessions to forestall *drastic* amendatory or repeal legislation threatened by the die-hards. From the vantage point of the attackers it was, in view of their inabil-

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[45] Testimony of H. M. Robertson, General Counsel, Brown & Williamson Tobacco Corp., in Hearings before Committee on Education and Labor, U.S. Senate, 74th Cong., 1st sess., part 2, 218.

[46] Testimony of Francis Biddle in Hearings before Committee on Education and Labor, U.S. Senate, 74th Cong., 1st sess., part 1, 77.

[47] Testimony of Lloyd K. Garrison in Hearings before Committee on Education and Labor, U.S. Senate, 74th Cong., 1st sess., part 2, 125.

ity to obtain complete victory, an acceptable "next best." As the depression waned, as business was gaining momentum in the preparation for war, the resistance and power of these opposition groups increased; and so concessions to them in the form of a more chastened application of the Wagner Act were made. Flushed by a wave of unprecedented prosperity as a result of the aftermath of the war, and convinced of the buoyancy of the economic structure, it is not surprising that they would reject small concessions, and strike out for larger game.

JULIUS COHEN AND LILLIAN COHEN.*

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19. (Source: Joel Seidman, chs. 4, 10, and 14 of *American Labor from Defense to Reconversion,* Chicago, The University of Chicago Press [1953])

Chapter 4

GOVERNMENT LABOR POLICY IN THE DEFENSE CRISIS

Before the United States found itself in a defense crisis, two agencies of the federal government, other than those operating in the highly specialized railroad field, were intimately concerned with industrial relations. To the National Labor Relations Board fell the tasks of determining bargaining representatives and investigating and preventing unfair labor practices by employers. The Conciliation Service aided the parties to work out peaceful settlements of their collective bargaining problems, and thereby avoid or settle strikes. Except to perform these limited functions, the government remained largely aloof from the field of industrial relations, although the President or his close advisers were inevitably drawn into major disputes, and the courts, of course, had to decide cases involving federal law. This government policy, satisfactory during normal times, proved inadequate during the defense crisis, when uninterrupted production of military equipment was essential. The wave of strikes that occurred in the early months of 1941 convinced the President that a more highly specialized agency was needed to cope with defense strikes, and on March 19, 1941, he created the National Defense Mediation Board.

The Defense Mediation Board began its life under circumstances somewhat less than promising. The President, who chose to establish the board by executive order rather than by congressional action, could not confer upon it greater authority than he himself possessed; since the country was not then at war, he had only the limited peacetime powers of the presidency at his disposal, though during an emergency public opinion rallies to the support of the President and the courts tend to take a liberal view of his powers under the Constitution. The Defense Mediation Board, entering into the area of mediation, was forced to repeat to some extent the work of the Conciliation Service, though the greater prestige of the board members as Presidential appointees and in their own right may have helped them obtain settlements that evaded the Conciliation Service or the Labor Division of the Office of Production Management. Under the terms of the executive order, the board could take jurisdiction only on certification from the Secretary of Labor that there was a dispute threatening defense production which the Conciliation Service could not adjust. Thus the board was handicapped from the start by cumbersome machinery and overlapping jurisdiction with other federal agencies.

In spite of these handicaps, the general reaction to the formation of the board was favorable. The general public, alarmed at the growing volume of defense strikes, relaxed in the comforting belief that something was being done. Even more important was the reaction in Congress, where pressure had been rising for some type of legislation controlling strikes. Roosevelt's appointment of the board satisfied these pressures and staved off legislation while Congress gave the board an opportunity to show what it could do.

The board met first under the chairmanship of President Clarence A. Dykstra of the University of Wisconsin, who was succeeded after several months by William H. Davis. The board proved fairly successful in most of its early efforts; many of the cases certified to it were settled within several days, and even the stubborn Allis-Chalmers dispute was settled quickly. Members of the board, emphasizing collective bargaining rather than judicial determination of the issues, sought first to have the disputants work out their own problems and resorted to findings and recommendations only after mediation had failed and the parties had refused voluntary arbitration. In only a small percentage of cases were formal recommendations necessary.

The tripartite organization of the board, and of each panel that it appointed to handle particular disputes, involved both advantages and disadvantages. One of the advantages was the greater sense of participation in governmental labor efforts that both management and labor enjoyed, a feeling that perhaps heightened their sense of responsibility. Another advantage was that, with experienced employer and labor representatives on each panel, there was less chance of unworkable solutions to problems being attempted than might otherwise have been the case. Moreover, each disputing party had confidence that on his panel there was at least one member who understood his problems and shared his point of view. Conversely, where one of the parties to a dispute proved unreasonable, it often proved effective to have him spoken to privately by a panel member whom he respected and who represented his type of interest. There were disadvantages, too, in that some of the board members, appointed to represent partisan interests, behaved in too partisan a fashion; and since board members were busy men who served on a part-time basis, their attendance was irregular and continuity of policy suffered. Nevertheless, for its purpose the type of board that was appointed probably served better than the alternative type of organization, a board all of whose members were appointed to represent the public interest. It should be noted, however, that the tripartite form of organization gave both labor and management veto power at any time, since a resignation by either party would render the board ineffective.

Another difficulty was the ambiguity in the board's function. The general experience of the government was that, because of the different relationship to the parties as well as the different skills and qualifications called for, it was usually unwise to have the same persons attempt both mediation and the judicial or quasi-judicial determination of issues. The board was given such authority; for in the event that mediation failed, it was authorized to conduct hearings, make findings of fact, and make public its recommendations for settlement. Though the recommendations were not officially stated to be binding on the parties to the dispute, in view of the national crisis

there was bound to be widespread public pressure in support of the board's proposals, and perhaps government enforcement action as well. Realization of this, the board recognized in the report of its work, aided its mediation efforts, for

> the power to recommend was one of the circumstances conditioning the mediation process. The parties understood that failure to agree involved a gamble as to what the Board would recommend. The parties understood also that public opinion and even governmental force might compel acceptance of the recommendation. This meant, at least, that the parties would be impressed with the futility and wastefulness of assuming intransigent positions. It could be said to increase the likelihood of a serious examination of all possibilities.[1]

In the two cases in which management refused the board's recommendations, the government seized the plants. What was called a mediation board, then, was one that came fairly close in its operations to compulsory arbitration as a last resort, despite the opposition both of management and of labor, and likewise of the administration, to that form of settlement of labor disputes.

Still another problem was whether the board should have a set of principles to guide it in the determination of cases. The War Labor Board in World War I had had such a set of principles, though certain ones, such as a "living wage" were subject to conflicting interpretations. While there was some sentiment for establishing such a declaration of policy, those who favored merely the settlement of each case "on its own merits" had their way. This was bound to prove in large measure a self-defeating effort, since inevitably earlier decisions influenced later ones involving similar issues, whether or not the earlier ones were officially termed precedents. The policy adopted by the board had its advantages, since it permitted flexibility in the handling of cases as unexpected developments or changes in the relative bargaining strength of the parties made desirable.

In the large number of wage disputes that were referred to the board, the absence of a set of principles forced the panels to improvise, which meant either that decisions followed relative bargaining strengths or that panel members fell back upon their own beliefs as to desirable industrial practice, until guideposts were provided by decisions in other cases. Sometimes panels were influenced by the prevailing rate of wages in the industry and in the area, sometimes by the question of the company's ability to pay, sometimes by the rising cost of living, sometimes by the need to attract workers to essential war industry. In most wage cases mediation proved successful, since matters of principle were seldom involved, and rising profit levels and growing shortages of skilled labor suggested quick settlements at higher wage levels. In the other cases, on one or another of the grounds suggested above, the board encouraged a slow but steady rise in wages. Collective bargaining agreements negotiated without the board's assistance showed the same tendency during the lifetime of the board, as business enterprises yielded to pressures arising from a combination of high profits, rising living costs, and expanding employment. Many of these companies, in the final bargaining, were prepared to trade a higher wage rate for the union's willingness to

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[1] *Report on the Work of the National Defense Mediation Board, March 19, 1941—January 12, 1942* (U.S. Department of Labor, Bureau of Labor Statistics, Bulletin No. 714 [Washington, D.C., 1942]), p. 21.

forego a more advanced form of union security. The National Defense Mediation Board had an easier task with regard to wage disputes than that which later confronted the War Labor Board, for during the defense period the goal was to avoid interruption of production on whatever terms the parties would agree to; the War Labor Board, by way of contrast, had to insure continued production and at the same time enforce the government's anti-inflation policy.

Both the AF of L and the CIO were satisfied with the work the Defense Mediation Board accomplished in the early months of its existence. The AF of L, which had fewer cases cited to the board, noted that "the major activity of the Board is the promotion of collective bargaining," and praised this "democratic machinery for settling industrial disputes in a voluntary way." [2] Secretary-Treasurer George Meany of the Federation wrote that:

> Since the National Defense Mediation Board was established, there have been more sweeping changes in wages and conditions with less time lost through industrial disputes than ever before in our nation's history. . . .
>
> The work of the National Defense Mediation Board is a healthy and encouraging demonstration of the value of democratic cooperation among labor, management and government in the interests of the national welfare.[3]

In his report to the November, 1941, convention of the CIO, Philip Murray conceded that the board had "thus far supported the principles of collective bargaining" and observed that the results it had achieved had been

> a substantial factor in heading of reactionary proposals for repressive labor legislation, By and large, the activities of the Board has been to the good and it has resulted in material and substantial gains for workers in terms of wage increases and other improvements in working conditions. . . . The National Defense Mediation Board . . . is one of the few emergency defense agencies that has worked successfully. This is largely due to the fact that labor has been given and has exercised an equal voice in the formulation of policy.[4]

During its existence of slightly less than ten months, the board had 114 cases, involving 1,190,000 workers, certified to it by the Secretary of Labor; several of these were later divided by the board, to give it a total of 118 cases on its docket. In three-fourths of these cases wage demands were in issue, and in half of them union security was involved. The board was able to settle 96 of its 118 cases, running into serious trouble only four times. In these four cases, twice because of unions and twice because of management, the board had to seek action by the President.

In its wage cases the board emphasized the mediation process, seeking to have the parties reach an agreement. In this effort it was usually successful, and in only about twenty wage cases was it necessary for the board to make recommendations. Since its rather loose methods of procedure, primarily adapted to mediation, often failed to provide all the facts needed for arbitration, the board appointed special investigators where further information was necessary for the formulation of recommendations. In a few cases the board's recommendation was limited to the procedure for determining rates—

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[2] *Report of the Proceedings of the Sixty-first Annual Convention of the American Federation of Labor,* 1941, p. 206.

[3] George Meany, "Four Months of Defense Mediation," *American Federationist,* August, 1941, pp. 10, 11.

[4] *Daily Proceedings of the Fourth Constitutional Convention of the Congress of Industrial Organizations,* 1941, p. 120.

as arbitration or a study by industrial engineers. Often the board's recommendations fixed disputed rates in accordance with the logic of the existing scale.

Where the board had to determine the wage scale itself it was usually guided, as in the Marlin Rockwell Corporation case, by the prevailing rates in the industry and in the area. In the North American Aviation case, however, where company rates were in line with those of other West Coast airplane plants, the board took the unusual step of recommending that wages in the industry be raised to the level of highly paid industries such as automobiles and steel, to enable the newly developing and vital airplane manufacturing industry to attract and keep the best workers in the area. Occasionally, as in the General Motors case, the board noted that the employer was able to pay the recommended increase. In the important case involving trucking operations in twelve midwestern states the board held that an employer, regardless of its profit or loss position, must pay a reasonable level of wages, considering those paid by representative truckers and by comparable industries; where the wage demanded was more than a reasonable minimum, however, profit and loss might be taken into account.[5]

One of the board's most complicated wage problems, one that caused a long and bitter controversy, arose in the bituminous coal industry. On April 1, 1941, some four hundred thousand bituminous miners stopped work in an effort to get a wage increase and to eliminate the 40-cent daily wage differential between northern and southern miners. It took a month's strike, intervention by the President, a recommendation by the board, and the threat of another strike to enforce the board's recommendation before the southern operators agreed both to pay the one dollar daily wage increase negotiated for the northern miners and to eliminate the differential. The agreement, which established the highest rates ever paid by the bituminous industry and which for the first time gave coal miners vacation with pay, was called by the United Mine Workers the greatest victory in their history.

Wage controversies were simple, however, compared to those involving union security. Disputes over this issue proved the most difficult presented to the Defense Mediation Board, partly because they could not easily be compromised, partly because a matter of "principle" was involved, partly because the parties were seeking to bolster their positions for future conflicts. Unions were aware that the right to strike would be curtailed during the emergency, and without such freedom to win wage and other improvements by economic action they feared the loss of much of their recently acquired membership. During World War I the unions had agreed not to seek extension of the union shop, and in return employers gave up discrimination against union members. No comparable bargain was possible in 1941, since antiunion discrimination was already illegal; recognition of a majority bargaining agency was required by law, but any provision for union security beyond this depended on the desires and bargaining power of the parties.

The issue of union security was raised first in the Snoqualmie Falls case, one of the earliest cases certified to the Defense Mediation Board. This stubborn lumber-camp case, in which the AF of L struck for

[5] *Report on the Work of the National Defense Mediation Board, March 19, 1941—January 12, 1942*, pp. 29, 32–33.

months to get a union shop from the powerful Weyerhaeuser Timber Co., which was equally resolved to maintain an open shop, showed the determination of both management and labor on this issue and the bitterness that their conflict would arouse. In this case the board urged and finally persuaded the parties to accept a membership maintenance clause, which was later to become the War Labor Board's standard compromise proposal between the open and the union shop. Membership maintenance proved on the whole an acceptable compromise, since no one was forced to join the union against his will, and yet the union was safeguarded against a shrinkage of membership and relieved of the necessity of reselling itself to its membership every month. Membership maintenance had been used successfully in several industries, including the paper and pulp industry of the Pacific Northwest, before the Defense Mediation Board, searching for a form of union security that would prove reasonably acceptable to both parties, introduced the provision to a wider audience.

Despite the success of the membership maintenance proposal in the Snoqualmie Falls case, the Defense Mediation Board recommended the clause in relatively few cases. Only in seven cases, out of some fifty-six in which union security was an issue, did the board propose membership maintenance, and in four cases it explicitly refused to recommend it. In each of three cases, North American Aviation, Western Cartridge, and Federal Shipbuilding, in which the board recommended membership maintenance despite the employer's opposition to it, there were unusual circumstances that gave the union a special need for a union security clause. In the North American Aviation case, the union had been weakened by the use of troops and by a quarrel between the local and national leadership; Western Cartridge had shown itself, even during board proceedings, strongly opposed to unionization; and in Federal Shipbuilding the union was limiting its appeal, while many new workers were being employed, by accepting a shipbuilding stabilization pact.

Though the board never recommended a union shop, in one very unusual case involving the Shipbuilding Division of Bethlehem Steel, it went beyond this and proposed that the employer accept a closed shop. In this case, however, a stabilization agreement involving uniform terms for the Pacific Coast shipbuilding industry had been worked out under governmental influence and accepted by all employers in the industry in the area concerned with the single exception of Bethlehem. The reluctance of that company to participate was due to its fear that the terms of the stabilization agreement, which included the closed shop, might become an embarrassment in its relations with the steel workers' union. Under these circumstances the board recommended that the company accept the terms of the stabilization agreement.[6]

Chairman Davis of the board repeatedly explained that no one was compelled to join a union under the membership maintenance clause; where it had been used, he asserted, it had led to stability and had developed disciplined and responsible conduct. "It has been suggested," Davis declared, "that this clause does restrict the worker's freedom of action in some measure, because when he has joined the

[6] *Ibid.*, pp. 25–26, 160–61.

union he cannot get out. But . . . this is in reality a restriction which he has chosen to impose upon himself; and self-imposed restriction is the essense of freedom." Davis emphatically denied the assertions of President L. H. Korndorff of the Federal Shipbuilding and Dry Dock Company, among others, that membership maintenance was equivalent to the closed shop, and that under it a union could arbitrarily force the discharge of a member; on the contrary, Davis declared, union constitutions and by-laws contained provisions for filing of charges, holding of trials, and appeals of a decision before a worker could be deprived of union membership.

It was the Federal Shipbuilding and Dry Dock Company, a subsidiary of the United States Steel Corporation, that first raised in acute form the question as to the enforcement of the board's recommendations. In the dispute in its plant in which finally there was agreement on all issues except union security, the board recommended a maintenance of membership clause that the company refused to accept. Until this time it had not been clear whether the "Mediation" board was in fact *that* or an agency of compulsory arbitration, since its recommendations had never before been flatly rejected. Yet it was evident that, should the Federal Shipbuilding concern successfully defy the board, its usefulness would be ended and the way might be opened for drastic congressional action. President Roosevelt met the challenge by ordering seizure of the company's plant at Kearny, New Jersey, where the disputed clause was then put into effect. The huge shipyard was operated by the government from August 25, 1941, to January 7, 1942. The plant of Air Associates, Incorporated, of Bendix, New Jersey, was also seized by the government to prevent a strike by the UAW-CIO, following failure of the Defense Mediation Board to persuade the company to return earlier strikers to their former jobs.

These cases of defiance of the board by industrial concerns, though serious, did not undermine the board's authority, since the instances remained sporadic ones, unrepresentative of the thinking of business as a whole. Similarly, the first defiance of the board by labor, in the North American Aviation case,[7] was crushed by military force without endangering the board's effectiveness, since the strike and its leaders had been disavowed by the national heads of the United Automobile Workers and of the CIO. Quite different was the angry refusal of the United Mine Workers to abide by the board's recommendation in the "captive mines" dispute, which led to the resignation of the CIO members of the board and its collapse as an agency representative of the disputing parties. Of the 53,000 workers in the "captive" coal mines owned and operated by the steel companies, fully 95 percent were members of the United Mine Workers when Lewis, taking advantage of the country's desperate need for steel, launched his campaign for the union shop in the fall of 1941. Disregarding pleas by President Roosevelt to permit continued production during negotiations in the interests of national defense, Lewis closed the captive mines briefly in September and again on October 27, in a shut-down that threatened to stop quickly almost all steel production in the country.

The result was a storm of abuse and denunciation of Lewis such

[7] See pp. 48–49.

as seldom had been directed at an American by his fellow-citizens. Members of Congress angrily demanded legislation to curb Lewis and outlaw strikes preventing defense production. In a nation-wide radio broadcast President Roosevelt declared, in an obvious reference to Lewis, that defense production "cannot be hampered by the selfish obstruction of a small but dangerous minority of labor leaders." Labor as a whole knew, the President added, that "that small minority is a menace to the true cause of labor itself, as well as for the nation as a whole." [8] The chorus of denunciation that descended upon Lewis came from labor as well as from management and government sources. A leading AF of L publicist, Philip Pearl, called the captive mines strike "not only a betrayal of America, . . . not only a betrayal of the workers involved, but . . . a dastardly and indefensible betrayal of the best interests of all labor in America." [9] All labor would suffer, he said, from the results of such "headstrong and insane" leadership, which had started a new tide of antilabor sentiment and a new wave of antilabor measures.

Three weeks later, returning to the attack, Pearl declared that:

> Lewis today is the most cordially hated man in America. His scornful refusal to consider the best interests of the nation, his deliberate attempts to embarrass the national defense program, his bitter feud with President Roosevelt, his insulting arrogance are more than the American people can stomach.[10]

More restrained was the criticism from the Hillman wing of the CIO, which cautioned that this was no time for business as usual in unions.

On October 30, after the second shutdown had lasted three days, the union agreed to reopen the mines until November 15 on the understanding that the Defense Mediation Board would consider the merits of the dispute in full session, and that neither party was committed in advance to acceptance of the board's recommendations. By a vote of nine to two, the two CIO representatives dissenting, the board on November 10 recommended against the union-shop clause, on the grounds that 95 percent of the captive miners were already union members, the union was capable of organizing the remainder, and the union-shop clause was not necessary to the security of the miners' union. Nevertheless, the majority observed, it was hard to think of reasons why a miner should not join the union; the nonunion miners could make a great contribution to untroubled labor relations in coal and to the national welfare by voluntarily joining the union, at least for the duration of the current contract.

The two CIO representatives, Philip Murray and Thomas Kennedy, both of whom were officers of the United Mine Workers, dissented sharply, arguing that the case was similar to the earlier Bethlehem Shipbuilding dispute in which the board had recommended a closed shop. Denying that the dispute had been considered on its merits, Murray and Kennedy declared that "the National Defense Mediation Board has now decided that henceforth, regardless of the merits of any case, labor unions must be denied the right of normal growth and legitimate aspirations, such as the union shop, and the traditional open-shop policy of the antilabor employers must prevail." Asserting further that "the uncompromising attitude of the majority opinion is in itself

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[8] *New York Times*, October 28, 1941.
[9] Philip Pearl, "Facing the Facts," *American Federation of Labor Weekly News Service*, October 28, 1941.
[10] *Ibid.*, November 19, 1941.

a negation of the basic principles upon which the Board was established," [11] the CIO representatives accompanied their dissent with their resignations from the board, thus destroying its usefulness as a mediation agency. The CIO was incensed by the action of the AF of L members in voting against the union shop, despite the fact that a representative of the Federation, Secretary-Treasurer George Meany, had made the original motion in the board to support the United Mine Workers' position. An alternate had replaced Meany when the vote was taken, however, and Meany later announced that had he been present he would have voted differently.

Following the board's decision the union resumed its strike, with more than 100,000 commercial coal miners stopping work in sympathy. On November 14, President Roosevelt summoned leaders of the employing steel companies and the union to the White House, with an urgent request that they agree on the issues in dispute or submit them to an arbitrator.

> I tell you frankly [Roosevelt stated] that the Government of the United States will not order, nor will Congress pass legislation ordering a so-called closed shop. . . .
>
> The government will never compel this 5 per cent [of nonunion captive miners] to join the union by a government decree. That would be too much like the Hitler methods towards labor.[12]

A week later the miners again returned to work, accepting Roosevelt's proposal that the dispute be submitted to a special board of arbitrators, whose decision would be binding. The board, which was composed of Lewis, President Benjamin F. Fairless of the United States Steel Corporation, and Director John R. Steelman of the U.S. Conciliation Service, handed down its award on December 7, Pearl Harbor Day. Steelman joined Lewis in granting the United Mine Workers a union shop in the captive mines on the ground that, by building unity and increasing coal production, it would help the nation meet the emergency. There was no basis, the majority declared, for the charge that the union took advantage of the national emergency for organizational purposes; since it had almost all the miners organized, it was merely seeking to consolidate its position, requesting the union shop in the normal course of its development. The companies were still to do the hiring, moreover, so that the union in no way would control the labor supply available to employers. In his dissent Fairless charged that the majority decision imposed an unregulated labor monopoly upon the industry, and violated the right of a worker to a job regardless of membership or nonmembership in a union. It would create unrest throughout industry, he argued, with the result that defense production would be curtailed.

By the time the decision appeared, the Defense Mediation Board, for all practical purposes, was dead. Murray and Kennedy had refused Roosevelt's request that they withdraw their resignations, leaving the board without CIO representation. With the CIO thus proclaiming its lack of confidence in the board, there was no hope that it could adjust any disputes involving CIO unions. Equally significant was the fact that in a crisis Roosevelt not only had failed to back up the board, but had undermined it by appointing a new board of arbitrators to

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[11] *New York Times*, November 12, 1941.

[12] *Ibid.*, November 15, 1941. It should be noted that the union shop, not the closed shop, was at issue between the parties.

review—and reverse—its decision. From then on, there could be little expectation that any determined and powerful party would abide by a board recommendation that it disliked. The final judgment of the miners' leaders on the Defense Mediation Board they helped to kill was not a generous one. "After a mediocre existence," they declared, ". . . this Board collapsed as an immediate result of the stupid attitude of a majority of its members in the Captive Mine decision of November 1941." [13]

With each strike wave, with each crisis in industrial relations or in the life of the Defense Mediation Board, a number of measures to regulate strikes or other union activities were proposed in Congress, some in the form of amendments to the National Labor Relations Act and some as wholly new legislation. Sometimes the bills sought to deal only with the current emergency, as by requiring a cooling-off period before strikes could legally be called or by providing statutory authority for the Defense Mediation Board; at other times, taking advantage of the widespread resentment aroused by Lewis' tactics, they sought to use the emergency as the occasion for a thorough overhauling of the nation's labor relations, from which unions would be sure to emerge with sharply curtailed rights.

In March, 1940, a special House of Representatives committee, appointed under the chairmanship of Representative Howard W. Smith of Virginia to investigate the administration of the National Labor Relations Act, issued a majority intermediate report charging the board and its staff with bias, partiality, inefficiency, and misconduct. Shortly thereafter the Smith committee proposed a set of sweeping amendments to the Act, including proposals to separate the judicial from the prosecution functions of the board, subject its findings of fact as well as its decisions to judicial review, permit employers to petition for elections, protect employers' "free speech," and bar the reinstatement of sit-down strikers. The CIO opposed the measure vigorously, whereas the National Association of Manufacturers and the Chamber of Commerce approved the changes while declaring them not drastic enough. President Green on behalf of the AF of L approved the Smith committee proposals on condition that certain changes be made, including one to protect craft bargaining rights, and after these changes were incorporated, the measure was adopted by the House on June 7 by a vote of 258 to 129. Green's action had split the AF of L executive council, however, and he soon shifted his position, telling the Senate Committee on Education and Labor that the AF of L would rather have the Wagner Act unchanged than distorted by the Smith amendments. Because of this and other opposition, the Smith proposals failed to pass the Senate. In November, Harry A. Millis succeeded J. Warren Madden as chairman of the board; Millis and William M. Leiserson, who had become a member the previous year, made a number of changes in board policy and organization that reassured some of the board's critics and helped ward off the passage of the amendments.

Despite the many attacks upon it and its own administrative problems, the board made substantial progress in educating American

[13] *Proceedings of the Thirty-seventh Constitutional Convention of the United Mine Workers of America*, I (1942), pp. 99–100.

industry to conduct its labor relations within the framework of the Wagner Act. In its report on its work for the fiscal year 1940–41 the board proudly noted its shift from policeman to fact-finder, as the number of representation cases for the first time exceeded the number of unfair labor practice charges. At the same time, the increasing percentage of cases adjusted informally showed a recognition on the part of large sections of industry that they must live within the principles of the Act. United States Supreme Court decisions continued on the whole to support the board's interpretations of the Act; in the important H. J. Heinz Company case, for example, the Court upheld the principle that the employer was required, if the union so requested, to embody an agreement in a written and signed document.[14] While the United States with its labor strife in 1937–38 appeared more endangered than Nazi Germany, Dr. Mills observed, we had escaped the sterile repression of Germany, and now labor was learning to use its rights and employers to accept them.

At its convention in November, 1940, the AF of L, continuing its attack on the board, charged that its pro-CIO bias had created an intolerable situation. The executive council defended the amendments that the AF of L had supported in the past as designed to remove basic principles." [15] The convention urged that the Act be amended to protect craft unionism, permit direct court appeals by labor in representation cases, preserve union contracts from attack, eliminate delays, and increase board membership from three to five. The CIO, for its part, criticized the board at its November, 1941, convention for an anti-CIO bias and for "undermining the basic policy of the Labor Act." [16]

In its final report to Congress in December, 1940, the House Committee chaired by Howard W. Smith of Virginia, that had made a detailed investigation of the NLRB, repeated its accusations that the board had been unfair in its decisions, partisan to the CIO, and biased because of its radical tendencies. Charging board members and employees with subversive views, the committee majority urged the dismissal of all who were members of Communist front organizations, who were opposed to the American system of government, or who had a biased attitude toward litigants. In contrast the committee minority defended board personnel, praised the stabilizing influence of the Wagner Act in the defense program, and declared that the seventeen amendments supported by the committee majority would sabotage the Act.

In the state legislatures, meanwhile, antilabor sentiment was increasing. Though Rhode Island adopted legislation of the Wagner Act type in 1941 and New Jersey passed a measure restricting the labor injunction, the forces critical of unionism were more powerful in other states. With the growing power of unions there was more inconvenience to the public from strikes and boycotts, and to many of the states of the South and Southwest, then attracting industry from the higher-wage areas to the North, unionism appeared a threat to their developing industrialization. The defense crisis, there as in Washington, permitted an identification of antiunionism with pa-

[14] H. J. Heinz Company v. National Labor Relations Board, 311 U.S. 514 (1941).
[15] *Report of the Proceedings of the Sixtieth Annual Convention of the American Federation of Labor*, 1940, p. 110.
[16] *Daily Proceedings of the Fourth Constitutional Convention of the Congress of Industrial Organizations*, 1941, pp. 338–39.

triotism. Texas passed a drastic antipicketing act in 1941. Colorado and Georgia placed limitations on strikes, California outlawed secondary boycotts or refusals to handle "hot cargo," and Maryland declared sit-down strikes illegal.

The type of antistrike measure that received most attention in Washington during the defense period was the proposal to require a waiting, or "cooling-off," period before a defense strike could legally be called. Representative Carl Vinson of Georgia introduced such a bill to require a twenty-five-day cooling-off period, and also to give statutory authority to the National Defense Mediation Board and freeze union security provisions for the duration of the emergency. Secretary of the Navy Frank Knox indorsed the "spirit" of the Vinson bill, especially its cooling-off provision. At hearings before the House Judiciary Committee on Vinson's proposal other administration spokesmen opposed strike curbs, testifying that strikes had caused no important delays in the defense program. The *American Federationist*, protesting against "forced labor," pointed out that strikes had been far more numerous in the war year of 1917 than in 1940 without compulsory work legislation having been adopted. "The right to strike," said the AF of L publication, "is an inalienable part of the Bill of Rights of American labor."[17] It was widely charged that, though workers did not want to strike, they were helpless in the hands of their leaders, an accusation that unions hotly denied.

The CIO, vigorously attacking "cooling-off" proposals, charged that, however mild or reasonable they might appear, they were really "as much of a danger to the workers as the extreme plans put out by any wild-eyed labor-baiter in Congress."

> The basic idea of "cooling-off" is to put the blame for strikes entirely on the workers [said the CIO]. It is designated to make a strike look like the work of hot-headed union leaders who need some kind of cold shower to bring them back to their senses. It completely ignores the fact that strikes are caused by real grievances standing over a long period of time. It ignores the fact that CIO unions spend weeks and months in negotiations before they even take a strike vote.[18]

During the cooling-off period, the CIO argued, grievances would not be removed, while all possible weapons would be assembled against the proposed strike. Far from encouraging collective bargaining, cooling-off restraints would negate it; cooling-off provisions, in the CIO view, would delay strikes without avoiding them and would frustrate the will of workers expressed through democratic votes in their unions.

Congressional tempers, which subsided somewhat when the National Defense Mediation Board was appointed in March, 1941, reached two peaks in later months of that year, one in June when there was a rise in the volume of defense strikes, and the other in November and December when the captive miners were on strike and Lewis was flouting the Defense Mediation Board. In June the House tacked on riders to the Army appropriation bill outlawing strikes, providing for compulsory arbitration of labor disputes, and denying compensation to any person, firm, or corporation refusing to comply with Defense Mediation Board recommendations, and the Senate took

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[17] "Forced Labor?" *American Federationist*, February, 1941, pp. 8, 11.
[18] *The Right To Strike—Keystone of Liberty*, Congress of Industrial Organizations, 1941, pp. 11–12.

up the bill introduced by Senator Tom Connally of Texas to empower the President to take over for the government any defense plant shut by strike or lockout. In December the House, angered by Lewis' arrogance, passed a comprehensive antiunion measure fathered by Representative Howard W. Smith of Virginia.

Both the AF of L and the CIO lashed out against the antilabor drive at the 1941 session of Congress. The executive council of the AF of L reported to its convention in October that the numerous antilabor bills introduced in Congress in the past year

> . . . in general were designed to hamstring Labor, provide for cooling-off periods, and prevent Labor's inherent right to strike. . . .
>
> It is apparent to an unbiased observer that certain Labor-hating members of Congress have seized upon the present emergency to endeavor to black-out many of the gains made by Labor over a long period of years.[19]

In his report to the 1941 convention of the CIO, which met in mid-November at the peak of the captive mines controversy, President Murray declared that during the past year labor had been confronted in the legislative field with one of the most formidable attacks ever made on its rights, "aimed not only at the protections secured in recent years, but at many basic rights won by labor in more than a century of bitter struggles." As soon as Congress opened its 1941 session, Murray said, it was apparent that

> . . . strong forces inside and outside of Congress, prompted and supported by the powerful anti-union press, planned to exploit the national defense program for their own reactionary ends, and to use the national defense emergency as a smokescreen for driving through the most drastic anti-labor legislation ever proposed in any democratic country. . . .
>
> These legislative proposals . . . would have clamped upon American workers a system of forced labor. They would have imposed compulsory mediation or compulsory arbitration. They would have permitted the use of the Army and Navy to keep open any strike-bound plant regardless of the conditions which caused the strike. They would have made union shop contracts illegal. They would have suspended the Norris-La Guardia Anti-Injunction Act and permitted widespread use of the anti-strike injunction. They would have placed on a permanent blacklist workers who failed to submit or comply with decisions of the Mediation Board. They would have undermined the Labor Act and permitted employers to dismiss any active union worker on the grounds that the employer regarded such a worker as a "subversive character." They would have imposed punishments which included heavy fines, long prison sentences and even the death penalty.[20]

Murray also attacked the way in which congressional procedures were violated in an effort to rush these bills through. The House Labor Committee was by-passed, drastic bills were hastily reported out without labor representatives receiving opportunity to testify, and long-established labor rights were attacked in amendments to unrelated bills. Murray's bitter denunciation of Congress was matched by the AF of L, whose monthly magazine declared that "labor-haters in Congress are still nursing their wrath and only waiting for what they consider an appropriate time to renew their onslaughts against the trade union movement." [21]

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[19] *Report of the Proceedings of the Sixty-first Annual Convention of the American Federation of Labor*, 1941, pp. 79, 81.

[20] *Daily Proceedings of the Fourth Constitutional Convention of the Congress of Industrial Organizations*, 1941, pp. 100–101.

[21] *American Federationist*, November, 1941 (inside front cover).

On December 3, 1941, when congressional tempers were inflamed and the entire country aroused by Lewis' tactics in the captive mines strikes, the House of Representatives took the sort of action that the labor movement had so long feared and opposed. By a vote of 252 to 136, with little, if any, serious consideration of its provisions, the House adopted the most extreme antistrike bill presented to it, sponsored by Representative Howard W. Smith of Virginia. Under its provisions a thirty-day "cooling-off" period had to expire before a strike or lockout on a defense contract was legal; strikes were forbidden except after a majority vote by secret ballot, conducted by the Conciliation Service; strikes in defense industry for the closed shop were prohibited; unions guilty of illegal strikes were to lose their rights under the Wagner and Norris-La Guardia acts; jurisdictional strikes and boycotts affecting defense contracts were outlawed; and the benefits of the Wagner Act were denied any union that permitted in any appointive or elective office a member of the Communist party, the Young Communist League, the German-American Bund, or anyone convicted of a felony involving moral turpitude. Threats and violence were outlawed, as were picketing by persons not bona fide employees and the picketing of workers' homes. A new National Defense Mediation Board was to be set up. Annual registration of every union with the NLRB was provided for, and a union was to be qualified to serve as collective bargaining agency only if it registered and filed certain required information. The measure was to be in effect for two years, or until a Presidential proclamation declaring the unlimited national emergency at an end.

The labor movement reacted bitterly to this quick passage by the House of the Smith bill. William Green denounced the measure as a "first move toward totalitarianism" and warned that it would provoke, not prevent, strikes; the CIO called it a "traitorous" scheme that would enslave labor and "a stab in the back for the whole national defense effort." [22] The individual unions were equally aroused by the House action. The *United Mine Workers Journal*, for example, termed the day on which the Smith bill was passed "one of the blackest days in American legislative history." [23]

The Pearl Harbor attack, coming just four days later, shelved the Smith bill, for it necessitated a co-operative rather than a partisan and punitive treatment of labor disputes. The nation was at war, and a wholly fresh approach to the problem of industrial peace had to be made.

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[23] *United Mine Workers Journal*, December 15, 1941, p. 12.
[22] *CIO News*, December 8, 1941.

Chapter 10

THE GOVERNMENT AND LABOR

Manpower shortages, along with the need for uninterrupted production, made it inevitable that labor issues would bulk large in wartime government thinking. The avoidance of strikes, the development of a wage policy, and the establishment of machinery for the settlement of labor disputes represented only one aspect of governmental labor policy. Labor's co-operation had to be enlisted in a positive sense and labor's ability to increase productivity utilized to the maximum if the battle of production was to be won. Union leaders wanted more than this; dissatisfied with their secondary role in most wartime agencies, they demanded a larger measure of authority and an influential voice in the determination of policy. While quarrels over issues such as these were occurring in wartime agencies of the government, the peacetime departments were carrying on their labor activities as before. Thus the National Labor Relations Board continued to administer the Wagner Act, while the War Labor Board with its decisions on wages and other contract terms monopolized the spotlight. In Congress numerous measures relating to labor relations continued to be introduced, either of a temporary nature, such as the War Labor Disputes Act, or in the form of permanent legislation.

From the beginning of the defense crisis until the end of hostilities labor was given some representation in government agencies concerned with war production. In a formal sense this influence was at its peak while Sidney Hillman served as associate director-general of the Office of Production Management. After Donald M. Nelson as chairman of the War Production Board had received supreme power over the nation's productive effort, labor's influence was at a lower level, although the labor-management communities fostered by the WPB in defense industry gave local labor groups a greater sense that their abilities were being enlisted in the war effort. The War Manpower Commission had a Labor-Management Policy Committee to advise it, and the Office of Price Administration had a labor policy committee, as did the Office of Civilian Defense. In state and local areas labor representatives likewise served on manpower committees, price and rationing boards, civilian defense committees, and other local units of war agencies.

So far as the formulation of policy was concerned, however, the recognition accorded labor was for the most part a grudging one. Except in the case of the War Labor Board, labor representatives found themselves far outnumbered by men who came from a background of management activities where they were not accustomed to sharing authority with labor. In most instances labor spokesmen had only an advisory role, and often they were fortunate if their advice was sought before a key policy decision was made. Too often they were

asked to approve a policy already decided upon, if indeed they were not in the position of seeking modification or reversal of a decision already announced. Nor did the labor movement consider itself adequately represented when the administration named a union official for a position, without having sought suggestions from labor in advance; certainly the AF of L in no real sense considered itself represented by the President's appointment of Sidney Hillman of the CIO as the leading labor spokesman in the defense effort.

Throughout the war there was an insistent demand from labor for full participation in the determination and administration of policy in the key war agencies. The national conference of AF of L officers held the week after the Pearl Harbor attack urged that in order to "assure an uninterrupted flow of production and the maximum of defense effort, organized labor should be accorded by government adequate and effective representation of its own choosing in all defense planning and execution." [1]

Thereafter both AF of L and CIO repeatedly complained that they were given inadequate representation and little real authority in defense agencies. In his report to the CIO convention in November, 1942, Philip Murray made this one of his major themes.

> In order to gear our country for total war [Murray stated], the CIO has repeatedly urged full and equal representation of labor in all government agencies dealing wtih war problems. This is a people's war. To win it we need all the energy and skill of all our people in the nation's service. Labor in America knows the problems and stakes that are involved. Labor knows production. It knows organization. It knows the steps that are necessary to victory. To ignore labor in planning and in administration the policies of the war program is to leave untapped a vast national resource—the people.
>
> This full and equal representation of labor has not been achieved. Many of our war agencies still cling to the risky notion that total war can be planned and carried out without the total participation of all our people. . . .
>
> Total mobilization cannot operate or be organized except through the direct and the fullest participation of lab—not through any advisory committees but with labor given the highest responsibility in the formulation and execution of all the policies and activities.[2]

Two months earlier the *United Mine Workers Journal* had stressed the same point. In the constant shuffling of government war agencies, the *Journal* observed, "There seems to be just one fixed premise, and that is that foresight is always exercised to see that labor is left high and dry of authority." [3]

Despite this insistent clamor for greater representation in policy-making positions, the labor movement had relatively few men to supply to important posts when opportunities arose. Partly this was the result of the recent and rapid expansion of the organized labor movement, which made every experienced and capable official at or near the top level of authority invaluable to his own organization. In addition there were understandable limitations in the training and experience of many union leaders. More important, however, was the fact that unions were political bodies, whose leaders could obtain leaves of absence, confident that they could resume their posts after the war emergency had passed, only where they enjoyed the kind of control that Hillman had achieved within the Amalgam-

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[1] *New York Times*, December 17, 1941.
[2] *Daily Proceedings of the Fifth Constitutional Convention of the Congress of Industrial Organizations*, 1942, pp. 43–44.
[3] *United Mine Workers Journal*, September 1, 1942, p. 9.

ated Clothing Workers. More typically there were other leaders of ambition and ability who might take advantage of the temporary absence of incumbents to entrench themselves in the posts left vacant—if indeed the absence of a key official did not provide an opportunity for a rival factional group to rise to power. The heads of important unions were the ones best qualified to fill top policy-making positions in the government, yet they were the very ones who were least able to assume government office, except on a part-time basis. Lesser elected officials of unions could be spared more readily, but they could not expect to obtain leading government posts, nor to command the respect of industry representatives if they were named to them. As a result many of the full-time positions created to give labor representation in war agencies were filled by union staff members, frequently those with a professional rather than a shop background, who had obtained their union positions by appointment and who had no political interests to protect. Top industry officials, by way of contrast, could readily return to posts from which leaves of absence had been given, because of the very different structure of authority within management organizations.

The War Production Board was one of the important war agencies in which labor's relative lack of authority remained a sore point with the union movement. In the fall of 1942 a congressional committee headed by Representative John H. Tolan of California, commented on the low estate to which the Labor Production Division, the unit of the War Production Board in which labor representation was then concentrated, had fallen:

> Mr. Nelson's falure to formulate and establish a clear-cut policy of labor participation in the War Production Board has caused a rapid deterioration of the Labor Production Division, and a scattering of manpower functions among several divisions and committees within the Board. Mr. Wendall Lund, Director of the Labor Production Division, stated to the committee that the extent of labor participation in War Production Board policies was extremely unsatisfactory. . . . Recommendations of the Division are ignored, or shelved for protracted periods. Employees of the Division not infrenquently are treated as outsiders and their presence resented by industry branch representatives.[4]

Yet when Nelson tried to strengthen labor's representation within his agency he had difficulty in persuading leading union officials to accept such assignments. It continued to be true that the industry divisions, which were supposed to obtain guidance on labor issues from the labor units of the board, "did not always welcome what could be construed as an intrusion by an outside group upon their operating responsibilities"; on several occasions the labor units "felt aggrieved over their exclusion from, or perfunctory inclusion in, discussions of major policy having important implications for labor." [5]

The reluctance of leading union officials to accept government posts explained in part the inferior position that labor obtained in war agencies of the government; to a greater extent, however, this position was a reflection of the relative economic power of management and labor in the community, as in part it was also the result

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[4] *Sixth Interim Report of the Select Committee Investigating National Defense Migration*, House Report No. 2589, 77th Congress, 2d Session, 1942, p. 18.

[5] Civilian Production Administration, *Industrial Mobilization for War: History of the War Production Board and Predecessor Agencies, 1940–1945*, Vol. I: *Program and Administration* (1947), pp. 748, 749.

of the background and prejudices of the men chosen for positions of authority in government agencies concerned with the war effort. Rear Admiral Emory B. Land, chairman of the United States Maritime Commission, was a somewhat extreme case in point. The principal obstructors of the shipbuilding program and the war effort generally, Land told the Investment Bankers Association in the fall of 1942, were "union organizers, profiteers, typewriter strategists and needle boys"; so far as the union organizers were concerned, Land went on, "for the duration, in my opinion, they ought to be shot at sunrise." [6] Some other governments officials, it should be noted, differed from Land more in their choice of language than in their point of view.

If labor was given relatively little influence and power within government defense agencies, at least one of the agencies, the War Production Board, sponsored a type of activity in defense plants that depended for its very existence on the co-operation of labor on an equal basis with management. In early March, 1942, when the War Production Board urged the formation of labor-management production committees in order to increase war production, the reaction both in labor and in management ranks ranged from enthusiasm to skepticism or even hostility. To some labor groups the proposal sounded simply like a speed-up device, or one that would degenerate into company unionism. Many employers, on the other hand, feared the entry of labor into an area of decision-making that in their view belonged to management alone, or hesitated to establish machinery that might increase union prestige. According to *Business Week*, Chairman Nelson's intent was "(1) to sell the scheme to labor, warding off the stretch-out label, and (2) divert the unions from their demand for a bigger voice in the management of industry (the Murray plan)." [7] Nelson found it necessary to announce that the proposal was purely a plan for increasing production and that it does not "put labor into management or . . . management into labor."

Some 20,000 war contractors were asked by the War Production Board to establish labor-management committees: in the first two months of the drive committees were established in more than 700 plants, and by the end of the year there were almost 2,000 committees, covering some 4,000,000 workers, in existence. At the peak about 5,000 union-management production committees, covering more than 7,000,000 workers, were registered with the War Production Board. Large numbers of suggestions came from labor members of these committees with regard to production-scheduling, care of tools and equipment, salvage, improvement of quality, and related subjects. In the manpower area the committees dealt with such problems as absenteeism, turnover, recruitment, worker transportation, safety, housing, and health. They also concerned themselves with such widely separated matters as war bond drives and plant recreation. Collective-bargaining issues, on the other hand, were reserved for the normal union-management channels.

Where there was suspicion or hostility in union-management relations, the chances were slim for the formation of a labor-management

[6] *New York Times*, October 20, 1942.
[7] *Business Week*, March 14, 1942, p. 5.

production committee or for its successful functioning if formed. Where a better relationship existed, however, and the leaders of both groups supported the joint production committee idea, considerable progress was made in solving both production and manpower problems. Perhaps the most important result of the committees' work was an improvement in labor-management relations. Relatively few of the committees, however, were continued into the postwar period, since both management and labor regarded them as wartime undertakings.

Dorothea de Schweinitz, who was associated with the War Production Drive Division of the War Production Board, has made this estimate of the effectiveness of the labor-management committees:

> It is estimated that the 5000 registered committees could be divided functionally in this fashion: several hundred committees registered but never functioned; another several hundred served to conduct one patriotic rally; about 1500 to 2000 conducted war activities such as rallies, the distribution of literature, the display of posters and the use of bulletin boards, bond drives, community fund and blood donor campaigns; another 1000 to 1500 covered war activities, but also operated a joint suggestion system, handled employee transportation, had joint subcommittees on absenteeism, safety, and the like; and, finally, upward of 500 conducted most of the above activities but gave considerable attention to production methods, improving quality of work, conservation of materials, care of tools and equipment, and the discussion of production schedules. Some of the committees did creditable work for short periods of time but then ran into difficulties and distintegrated. It is not likely that more than 3000 committees functioned at any one time at any level of performance.[8]

While the government was promoting labor-management production committees and settling collective-bargaining issues through the War Labor Board, its permanent machinery for handling industrial relations issues continued to function. Despite the many attacks made upon it, the National Labor Relations Act had entered the war period without amendment, as it was destined to survive the war period unchanged, except for limitations embodied in appropriations acts. Although the war presented some peculiar difficulties, notably in the form of a great increase in the number of representation or election-type cases and the question of how to handle rapidly expanding bargaining units, the basic problems with which the National Labor Relations Board dealt remained unchanged. Basically the principles worked out by the board since the establishment of the constitutionality of the Wagner Act in 1937 withstood court tests and continued to guide the board in its day-to-day work. Among the problems that confronted the board were the so-called "Frey rider" to its appropriations, which arose out of AF of L opposition to certain board decisions, and cases involving employers' "free speech" and the right of foremen to the protection of the Wagner Act.

Criticism of the board by the AF of L, which had diminished somewhat after Harry A. Millis became the chairman in 1940, mounted again with wartime decisions setting contracts aside because too few workers had been employed when a bargaining agency was recognized and a union security clause agreed upon. The leading case involved three West Coast shipyards operated by Henry J. Kaiser's companies. The board charged that in May, 1941, one of the Kaiser companies, the Oregon Shipbuilding Corporation, entered into a contract with AF of L unions requiring union membership as a condition of

[8] Dorothea de Schweinitz, *Labor and Management in a Common Enterprise* (Cambridge: Harvard University Press, 1949), p. 19.

employment, though only 66 employees were at work at the time and employment was expected to expand to more than 10,000 within six months; and that the other concern, Kaiser Company, Incorporated, had only 191 employees in one yard and none at another in April, 1942, when it entered into a similar contract. Subsequently the three yards employed about 40,000 workers, all of whom were required to join the AF of L affiliates under the union security clauses. Some 700 employees were discharged for failure to keep up their memberships in the AF of L unions. Under the Wagner Act, the board pointed out, a contract making union membership a condition of employment was illegal unless the union making the contract had been chosen by a majority of the workers as their bargaining agent.

The board's issuance of a complaint against the Kaiser companies brought a cry of rage from William Green, who called the board's action "the outstanding Axis victory of the month." The result of labor-management co-operation in the Kaiser shipyards, Green stated, had been the kind of record-breaking production that America needed to win the war. If now the contracts were to be invalidated and new elections held, Green went on, union rivalry and discord would be substituted for harmony, production would decline, and Hitler would be the only gainer. If the Kaiser contract was illegal, he argued, so were the contracts under which construction firms and the government itself built army camps, naval-training stations, and airfields. The AF of L would carry its protests to the highest government officials, Green declared, and if this was unavailing it would ask Congress for legislation to "throw the present incompetent, unfair and unrealistic administrators of the National Labor Relations Act out of office." [9] When hearings on the board's complaint got under way, Green wrote to each congressman denouncing the board, and asserting that its action will "interfere with production, lower morale of the employees, create internal warfare, and substitute bitterness and hatred for the harmony and goodwill that now prevail." [10]

The board refused to reverse itself, despite pressure from the AF of L, from high government officials, and from a congressional subcommittee that recommended continuance of the Kaiser contracts on the ground that they had resulted in stable labor relations and heightened war production. The AF of L thereupon sought and obtained from Congress as amendment to the 1943–44 appropriation bill that would prevent the board from invalidating contracts that had been in effect for three months or more. The amendment, popularly called the "Frey rider" after its sponsor, President John P. Frey of the Metal Trades Department of the AF of L, read as follows:

> No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed: *Provided*, That hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person.

After the House, seldom friendly to the board, had adopted this amendment by the overwhelming vote of 169 to 11, the board termed

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[9] *New York Times*, November 21, 1942.
[10] *Labor*, January 16, 1943.

the action "undoubtedly inadvertent," declaring it "inconceivable that a branch of Congress which has so recently passed such legislation as the Hobbs bill and the Connally bill . . . would intentionally immunize the most lucrative labor racket which has perverted the war production program." [11] This statement was branded "insulting" and "venomous" by the AF of L; William Green asserted that the board had written its own death sentence and urged the President to remove from office the present members of the NLRB "who have distorted the law they were assigned to administer out of all reason and made it an instrument of oppression against labor." [12]

The Senate likewise adopted the amendment by a vote of 40 to 25. In addition Congress reduced the board's appropriation by $500,000, a cut which the AF of L had urged, ostensibly on the ground that the board's work would be reduced by the adoption of the amendment. The executive council of the AF of L recognized that the amendment might work hardships on some Federation affiliates, but argued that this would be offset by the overwhelming good that would result from the preservation of numerous AF of L contracts which the board otherwise would have destroyed. "This should stop raiding by the C.I.O. with the aid of the National Labor Relations Board, in plants where American Federation of Labor unions have contracts," the executive council announced. "It should also stabilize employment and prevent demoralization of workers in war plants." [13]

Employing this undesirable technique of amending the law through the back door of an appropriations bill, Congress had made an important breach in the defenses that the Wagner Act had erected around labor's rights. By protecting a contract from attack once three months had gone by, Congress was placing a whole series of undesirable labor relations practices beyond scrutiny by the board. Company unions were protected along with bona fide ones, and "sweetheart" agreements made with unions without members in the plants were made legitimate. The essential provision of the Wagner Act that workers were entitled to bargain through representatives of their own choosing was weakened. The amendment served public notice that the board enforced the law against politically powerful parties at its peril.

As a result of the rider some fifty-six pending cases, most of them involving unions charged with being company-dominated or company-assisted, had to be dropped in whole or in part. Many of these cases, the board pointed out, were quite unlike the Kaiser situation, but were nevertheless covered by the broad language that Congress had used. The Frey rider, the board asserted in its subsequent annual report,

> . . . strikes at the heart of some of the basic principles of the National Labor Relations Act. Under its protection an employer and a minority union may by collusive action override the democratic principle of majority rule and destroy the freedom of choice guaranteed employees under the Act.

By this "serious limitation" on its use of its funds, the board declared, Congress had prohibited the board from enforcing the prin-

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[11] *New York Times*, June 18, 1943.
[12] *American Federation of Labor Weekly News Service*, June 22, 1943.
[13] *Report of the Proceedings of the Sixty-third Annual Convention of the American Federation of Labor*, 1943, pp. 59, 69.

ciples of the Wagner Act.[14] In writing subsequent appropriations bills for the NLRB, Congress repeated the Frey rider, with minor variations.

Though the Kaiser issue was the most important one in dispute between the AF of L and the board during the war years, it was not the only one. Again and again the AF of L returned to its old themes that board and staff members of the NLRB were biased against the AF of L and prejudiced in favor of industrial unionism. The doctrine particularly complained of was that enunciated by the board in the American Can case of 1939, under which a history of bargaining on an industrial basis under certain conditions was held to preclude a separate election among craftsmen within the larger unit. In 1944 the executive council of the AF of L complained that

> . . . in the light of the attitude expressed by the majority of the Board . . . , the personnel employed by the Board in the various regions have demonstrated real bias and prejudice against affiliates of the American Federation of Labor. The situation is becoming most intolerable. . . .
>
> The present Board has refused to rectify this gross injustice [the American Can doctrine] perpetrated by its predecessors, in that it still clings to this vicious decision wherein it was held that a past history of bargaining in any particular unit on an industrial basis fixes such unit for all time in the future.[15]

It was therefore more imperative than ever, the council concluded, that the Act be amended to protect craft unit integrity, and to provide for direct court review in representation cases.

These attacks upon it by the AF of L did not endear the NLRB to the CIO; indeed, at precisely the same time the board was brought under vigorous attack by the CIO:

> Organized labor [Philip Murray reported to the November, 1944, convention of the CIO] should justly have increasing concern over the series of decisions and administrative rulings by the National Labor Relations Board during the war period. Recent acts of the board reflect a retreat from the basic policies and principles underlying the National Labor Relations Act and actually deprive the workers of the nation of the fundamental rights which the Act was intended to guarantee to them.

As one illustration Murray listed a decision justifying the discharge of workers who struck because their employer would not agree to wage demands exceeding the level fixed by the Stabilization Act. He also charged the board with "floundering" and with issuing conflicting decisions in foreman cases, and with issuing a regulation which "threatened the existence of labor unions," under which an employer, at the termination of a contract, could request an election on the ground that it questioned the continuing majority of the union.

For these and similar changes Murray held Board Member Gerard D. Reilly responsible; Reilly's decisions, he said,

> . . . are not based upon merit or past precedents of the board but rather upon a determined design to defeat the effort of CIO unions to obtain the protection for their members to which they are entitled under the National Labor Relations Act.
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> Undermining the protection afforded labor by the National Labor Relations Act in peacetime would be serious enough, but this activity carried on during wartime reflects a sense of irresponsibility and a complete lack of understanding of our war problems.

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[14] *Eighth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1943*, pp. 6, 9.

[15] *Report of the Proceedings of the Sixty-fourth Annual Convention of the American Federation of Labor*, 1944, p. 159.

It was more necessary now than ever before, Murray concluded, that the CIO maintain a close watch on board decisions and policies, lest the act be weakened in administration or emasculated by amendment.[16]

The cases involving foremen, referred to by Murray, presented a troublesome issue with which the board wrestled during the war period. Whereas a number of craft unions had long included foremen in their membership and in their contracts, in the mass-production industries they were excluded from both until the war period. With the growth of unions in those industries foremen grew more and more dissatisfied, as they saw workers under them win wage increases, establish grievance procedure, and obtain other benefits that they themselves were denied. Dissatisfaction among foremen in the Detroit area reached a peak after June, 1941, when the Ford Motor Company signed a union shop agreement with the UAW–CIO under which the production workers received substantial pay increases. Irked by their failure to receive corresponding benefits, Ford foremen in September, 1941, launched the Foremen's Association of America, which spread rapidly through Ford and other plants in the Detroit area, and reached a peak membership of 32,000 in the spring of 1945.

The coal fields, where foremen were also organizing, presented the first test case to the NLRB as to whether or not foremen were "employees" within the meaning of the Wagner Act. In its decisions the board majority of Harry A. Mills and William M. Leiserson held that a foreman occupied a dual position: while in his relationship to the workers under him he was an employer, yet at the same time in relation to his employer he was an employee entitled to the benefits of the Act. Gerard D. Reilly dissented on the ground that certification of a unit of supervisors would promote industrial strife and impede collective bargaining.[17]

Under the stimulus of this decision organizing efforts among foremen increased substantially. In February, 1943, the Foremen's Association of America won a consent election among Packard Motor Car Company supervisors, and early the following month it signed an agreement with the Ford Motor Company covering six classifications from shop foreman to general foreman. Meanwhile management spokesmen in the coal, automotive, and other industries were protesting vigorously that unionization of foremen would undermine discipline and reduce production. When the board ordered a hearing on a petition covering foremen in a division of General Motors Corporation, President Charles E. Wilson of the corporation protested to congressional committees that the dual allegiance of unionized foremen would interfere with production and bring about industrial anarchy. Representative Howard W. Smith of Virginia thereupon introduced a bill to prohibit employers from dealing with unions which admitted supervisors to membership. Meanwhile, with the opening of contract negotiations in the coal industry, the United Mine Workers demanded that the next contract cover the 50,000 supervisors in that industry. On May 11, 1943, in a case that arose out of the shipbuilding industry, the board reversed its earlier decision, holding now that

[16] *Final Proceedings of the Seventh Constitutional Convention of the Congress of Industrial Organizations*, 1944, pp. 71–72.

[17] Union Collieries Coal Company, 41 NLRB 961 and 44 NLRB 165 (1942).

units of supervisory employees were not appropriate under the Act on the ground that they would "impede the processes of collective bargaining, disrupt established managerial and production techniques, and militate against effectuation of the policies of the Act.[18] Board Member John M. Houston, newly appointed in Leiserson's place, joined with Reilly to form the majority, while Chairman Millis entered a vigorous dissent.

Despite the board's decision the foreman's movement continued to gain strength, and early in 1945 the issue was again presented to the board in a representation case involving the Foreman's Association of America and the Packard Motor Car Company. Recognizing the importance of the issue and the widespread effects its decision would have, the board invited management groups in other industries to submit briefs, which many of them did. This time Houston joined with Chairman Millis to hold that foremen were entitled to the right of self-organization under the Wagner Act, while Reilly dissented. The board majority based their decision on the change in the position of the supervisor in mass-production industry. Whereas early in the century, they pointed out, the foreman, in his relations with his subordinate workers, had had the power to make decisions, now he had become little more than the "traffic cop" of industry. Accordingly they held foremen to be employes within the meaning of the Act.[19] This decision, later upheld by the United States Supreme Court, prevailed until the passage of the Taft-Hartley Act in 1947.

Even more troublesome than the foreman issue was the problem of "free speech" for employers. In the case of foremen the question was primarily a legal one, that had to be answered either in the affirmative or the negative: Were foremen employees within the meaning of the Act? The free speech issue, however, was much more difficult. It involved the weighing of evidence in the far more complicated unfair labor practice cases, to reach a balance under the facts of each case between the employer's constitutional right of free speech and the Act's mandate that he was not to restrain or coerce his employees in the exercise of their rights to organize and bargain collectively.

The rule that guided the board in its decisions on this troublesome issue was laid down by the United States Supreme Court in the important Virginia Electric and Power Company case, decided two weeks after Pearl Harbor. In this case, the first to reach the highest court on the issue, the board had found coercive a bulletin issued by the company and speeches made by its executives to its employees, in the course of a campaign to encourage them to join an "inside" rather than a CIO union. The company objected that the board's order infringed its right of free speech guaranteed in the Constitution. The Supreme Court, expressing its doubt that the statement by themselves were coercive, laid down a general rule to cover free speech cases:

> The employer . . . is as free now as ever to take any side it may choose on this controversial issue. But, certainly, conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more

[18] The Maryland Drydock Company, 19 NLRB 733, 741 (1943).
[19] Packard Motor Car Company, 61 NLRB 4 (1945).

be disregarded than pressure exerted in other ways. For "Slight suggestions as to the employer's choice between unions may have telling effect upon men who know the consequences of incurring that employer's strong displeasure." [20]

The fact that language merged into a course of conduct, the Court added, did not put that whole course outside the range of otherwise applicable administrative power; in determining whether the company actually restrained or coerced its employees, the board could look at what it had said as well as what it had done. The board thereupon rewrote its decision in the light of the Court's ruling, again finding the company guilty of violating the Act; this time, however, the bulletin and speeches were considered, not in isolation, but as part of a pattern of conduct constituting interference and coercion.[21] This time the board's order was upheld by the Supreme Court.

Meanwhile other important cases involving antiunion letters and speeches by employers were being decided by the board and by the courts. Two such cases, which seemed to set the limits of permissible employer conduct, were decided by the board in 1942, and reached the Supreme Court at the same time. In one, the Trojan Powder Company case, an attempt in 1941 by the CIO to organize was met by the company with a series of letters implying that the volume of work might be reduced unless a no-strike pledge were signed. Certain of the supervisors also made anti-CIO remarks. The board's decision holding that this conduct amounted to interference and coercion was upheld in the Circuit Court of Appeals.

In the other case, that of the American Tube Bending Company, the president of the concern, by letter and speech to the employees, had argued that the issue in the election was whether outsiders could do more for them than he could. In the final analysis, he told his workers, they were voting on whom they wanted for their leader. After listing an employees' association and then the "total strangers" of the International Association of Machinists, he asserted that the last choice on the ballot—that for "neither"—was really for the present management of the company. "In other words, fellows," he concluded, "it boils right down to this. Is your status under my leadership something that you can improve by choosing someone else for your leader?" At the same time, he pointed out that the ballot was secret and that they had freedom of choice. The board, emphasizing the company's false interpretation of the issues and its lack of neutrality, found it guilty of interference and coercion in violation of the Act. The Circuit Court of Appeals, however, reversed the board on the ground that the employer's statements were within the bounds allowed under the Virginia Electric ruling. The Supreme Court declined to review either case, thus permitting the lower court decisions in both to stand.[22] Thereafter "American Tube Bending" letters became common in board elections, with company officials and attorneys seeking to make their antiunion arguments as strong as possible without running afoul of the rule against restraint or coercion.

While the board was attempting to deal with these and the many other problems of the war period, its work was being disrupted by

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[20] National Labor Relations Board v. Virginia Electric & Power Co., 314 U.S. 469, 477 (1941).

[21] Virginia Electric and Power Company, 44 NLRB 404 (1942).

[22] Trojan Powder Company, 41 NLRB 1308 (1942), enforced in 135 F. (2d) 337 (C.C.A. 3, 1943), cert. denied 320 U.S. 768 (1943); American Tube Bending Co., 44 NLRB 121 (1942), set aside in 134 F. (2d) 993 (C.C.A. 2, 1943), cert. denied 320 U.S. 768 (1943).

the demands on its time and funds that arose under the War Labor Disputes Act of 1943. This ill-advised legislation, popularly called the Smith-Connally Act, was adopted by Congress in June, 1943, over Roosevelt's veto, at a time when tempers were aroused by the recurring coal strikes. The Smith-Connally measure required a union contemplating a strike in a war plant to issue a strike notice, to be followed by a thirty-day cooling-off period; on the thirtieth day after the strike notice was filed, the National Labor Relations Board was required to conduct a strike vote. Other provisions gave statutory authority to the War Labor Board, empowered the President to seize any struck facility, penalized by fine or imprisonment a strike once a plant was in governmental possession, and outlawed political contributions by unions in federal elections.

In his veto message President Roosevelt told Congress that he would have signed the measure had it been limited to the sections dealings with plants taken over by the government. But the section providing for strike notices and strike votes, he predicted, would foment slow-downs and strikes:

> It would force a labor leader who is trying to prevent a strike in accordance with his no-strike pledge to give the notice which would cause the taking of a strike ballot and might actually precipitate a strike. . . . Far from discouraging strikes, these provisions would stimulate labor unrest and give Government sanction to strike agitations.
>
> The thirty days allowed before the strike vote is taken under Government auspices might well become a boiling period instead of a cooling period. The thought and energies of the workers would be diverted from war production to vote-getting.

As for the section prohibiting political contributions by unions, Roosevelt termed it obviously irrelevant to a measure prohibiting wartime strikes.

The provisions relating to the strike notice and the government-supervised strike vote reflected far more anger than thought on the part of Congress; they gave a color of respectability to the threatened strike, despite the government's insistence that wartime strikes were illegal. For the government solemnly to conduct a strike vote at a time that it was using every device to discourage strikes was surely a strange performance. Moreover, the Smith-Connally Act was based on the premise that workers were being driven into wartime strikes by unpatriotic and autocratic leaders, whom they would repudiate if given an opportunity. Only persons ignorant of industrial realities, unaware of the frustrations and grievances of workers under the conditions of wartime, could have subscribed to such a view.

Labor leaders, far from recognizing the Smith-Connally measure for the ineffective proposal that it was, reacted with bitterness and anger, heaping upon it virtually every epithet in their vocabulary. In their joint memorandum to the President urging him to veto the bill, William Green of the AF of L, Philip Murray of the CIO, and David B. Robertson of the Brotherhood of Locomotive Firemen and Enginemen saw in its the dstruction of collective bargaining and a Fascist threat to the country:

> The "War Labor Dispute Act" is a wicked, vicious bill. It is the worst anti-labor bill passed by Congress in the last hundred years. It is born of revenge and malice. It is the very essence of fascism. It destroys the philosophy of voluntarism on which free trade unionism is founded.

Its enactment follows the tactics of the Fascists who, as a forerunner to totalitarianism, first attacked and destroyed free trade unions in Germany and Italy.[23]

This set the tone for labor comments that continued long after passage of the measure. In statements that were typical, the executive council of the AF of L denounced the law as imposing involuntary servitude on American workers, and Lewis referred to it as the "infamous Smith-Connally slave act."

A little experience showed, however, that union leaders and workers bore their shackles lightly, ignoring them for the most part and even finding them a convenience at certain times. As bitterly as union leaders denounced the legislation, they soon learned to take advantage of its machinery to build up pressure against employers; and the workers, joining cheerfully in the game, often voted overwhelmingly for strikes in which they had no intention of participating, in order to strengthen their leaders' hands in bargaining. During the first three months that the law was in effect, the NLRB held 53 strike votes under its provisions, 47 of which resulted in a majority vote in favor of striking. In 15 of these cases strikes later materialized; during the same period, however, at least 500 strikes affecting war production occurred. During the last half of 1943, the Bureau of Labor Statistics reported, only 34 of the 1,919 strikes that occurred followed strike votes under the Smith-Connolly provisions. Even during 1945, when many union groups learned to use the strike notice and vote so as to maximize pressure on their employers, fewer than 5 per cent of the stoppages followed strike votes as prescribed by the Smith-Connally Act. Meanwhile the volume of strike votes taxed the limited staff of the NLRB, while the rigid requirement that the vote be held on the thirtieth day after the notice was filed disrupted the board's work, compelling its staff to set aside important business in order to conduct virtually meaningless strike votes.

From the psychological point of view the strike votes had an effect precisely opposite to the one Congress had hoped for. Instead of workers looking upon the vote as a serious plebiscite on the wisdom and patriotism of a strike in wartime, they regarded it rather as a device by which pressure could be exerted on their employers for improved conditions or the prompt adjustment of grievances. It quickly became apparent that an overwhelming strike vote would increase the bargaining power of the union representatives, whereas an antistrike vote would in effect be a repudiation. Since a strike threat might result in government seizure of the plant, which company executives were usually anxious to avoid, the Smith-Connally provisions afforded an additional form of pressure that unions might exert on employers at no cost to themselves. From the point of view of the workers there was everything to gain by voting for a strike and nothing to lose, since a favorable strike vote in no sense bound one to strike. More than that, the prescribed thirty-day period between strike notice and balloting lent itself admirably to union propaganda campaigns and constituted a new form of legalized pressure on the War Labor Board to expedite cases and make its decisions more favorable to labor.

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[23] *New York Times*, June 18, 1943.

Shortly after the Smith-Connally Act was passed, moreover, unanticipated problems arose to complicate its administration and make an intelligent handling of wartime labor relations more difficult. What policy should the board follow when the bargaining agent of a small craft or departmental unit in a large plant filed a strike notice? Since the entire plant would be affected by a strike, the NLRB followed the practice of polling all employees. Where rivalry existed between bargaining agents in the same plant, the result might be to intensify conflict. Far worse was the case where a minority group within a bargaining unit filed a strike notice. Following an opinion of Attorney-General Francis Biddle, the NLRB held itself bound to take a strike vote, even though the notice was filed in a unit in which another union held legal bargaining rights. In effect the resulting balloting became a campaign between the two unions, at a time when a fresh choice of bargaining agency was not possible under the Wagner Act as administered by the board. Taking advantage of the workers' inclination to vote in favor of a strike, the minority union could point to a favorable vote as evidence that it now represented a majority, bringing turmoil into the collective-bargaining relationship.

Although the Smith-Connally Act was the only important labor relations measure enacted by Congress during the war period, there was a great deal of feverish legislative activity, overwhelmingly anti-union in spirit. Of the many labor bills introduced perhaps the one that came closest to adoption was the Hobbs measure to make unions subject to the anti-racketeering legislation, which passed the House early in 1943 but which failed for the time being in the Senate. Many other proposals were introduced relating to strike limitations, violence and coercion, labor conscription, restrictions on the closed shop, Wagner Act amendment, prohibition of political contributions by unions, amendment of overtime provisions, compulsory registration of unions, requirements for the filing of financial data, and the like. In June, 1945, when the war was in its final phase, the comprehensive Federal Industrial Relations Bill was introduced by Senators Ball, Burton, and Hatch. The consideration of this proposal, however, belong more properly to the reconversion period.

The antiunion drive achieved more success during the war years in putting legislation on state statute books. Much of this legislation was enacted in states in the South, West, and Southwest which had achieved relatively little industrialization in earlier years, but to which the war had brought both more industrial employment and more vigorous efforts at unionization. In 1942 California enacted its "hot cargo" act, prohibiting secondary boycotts, and five other states adopted some form of legislation reflecting dissatisfaction with unionism. The following year, when most state legislatures were in session, a dozen states enacted restrictions, some of them quite drastic, on union activities. Colorado and Kansas passed comprehensive measures regulating unions and prohibiting specified unfair labor practices by unions and by employers. Other states, including Florida, Texas, and Alabama, also regulated union affairs. Among the many provisions in these laws were those banning certain types of strikes, restricting picketing, prohibiting violence, requiring the filing of financial reports, controlling expulsions, limiting fees, banning po-

litical contributions, and requiring licenses for union organizers or business agents. During the remainder of the war period the antiunion drive continued somewhat abated, with emphasis upon the outlawry of the closed shop. In some cases this was achieved through legislation and in other instances by means of constitutional amendments. In addition to the measures that were enacted, there was a great flood of anitunion proposals that failed of adoption.

The labor movement fought this legislation as vigorously as it could, both by pressure on legislators before the measures were adopted and in some cases by court challenge of constitutionality. The temper of labor's reaction is shown by the statement of the executive council of the AF of L that the 1943 state legislation

> has one fundamental objective, that is, the complete destruction of labor unions, or the rendering of them so weak and ineffective as to amount to virtual destruction. By these enactments there has been launched in this country the philosophy of the totalitarian states—Fascism—which includes the destruction of free trade unionism.[24]

In this legislative drive to restrict and regulate unions the leadership was taken my men and organizations that had long been critical of the labor movement. What needs to be understood is not their proposals, which had been introduced many times before, but the increasingly receptive mood in which they found legislative bodies and public opinion generally. Whereas in the mid-1930's it was management's excesses that needed curbing, now it appeared to growing numbers of people that unions were in need of similar treatment. This view was carefully cultivated, it is true, by management groups, but behind their propaganda lay many real union abuses, many instances of the neglect by labor leaders of legitimate interests of union members, employers, and the public.

Wartime strikes, needless to say, loomed largest in the public mind during the period of hostilities, though other union abuses such as arbitrary denials of membership, autocratic union administration, unfair expulsions enforced by closed-shop agreements, improper handling of funds, and jurisdictional disputes played their part also. Labor leaders had acquired far greater power with the passage of the Wagner Act, the rapid growth of union membership, and the spread of collective bargaining throughout industry; they had not as quickly acquired a heightened sense of public responsibility or recognized a greater need to govern their own organizations so as to insure honesty and fair treatment to all parties. While building their organizations upon a foundation of guaranteed rights and making union- or closed-shop contracts a leading institutional objective, they insisted that the administration of unionism was a private affair. They freely admitted the existence of abuses, yet made little real effort to eliminate them while vigorously resisting regulation. Such a policy suggests comparison with the practices and attitudes of management that led to the enactment of the Wagner Act.

Labor emerged from the war period with its legislative position substantially weakened. The Wagner Act had indeed been preserved, save for the restrictions in appropriations acts; but the temper of Congress, as shown in its passage of the Smith-Connally Act and the large

[24] *Report of the Proceedings of the Sixty-third Annual Convention of the American Federation of Labor*, 1943, p. 99.

number of antiunion bills introduced, clearly showed a mounting impatience with wartime strikes, with the tactics of some labor leaders, and with the internal practices of many unions. The friendliness of Roosevelt and the need for a high degree of national unity until victory was achieved saved the labor movement from the passage of severely restrictive measures. In the states, particularly those in which industrialization was limited and unionism weak, the great number of antiunion bills introduced and the very substantial number of them adopted offered a forecast of the federal legislation that might follow the war. Nor did it help labor's fight against restrictions and regulation to apply the epithets "slave labor" and "fascism" so freely to the measures that were proposed, at the same time doing little of a resolute nature to stamp out the real abuses that had developed within parts of the labor movement.

Chapter 14

POSTWAR LABOR LEGISLATION

Paradoxically enough, it was while the labor movement was at the peak of its numerical strength that the long legislative drive on trade-union rights culminated in the passage of severely restrictive legislation. Just as employers' callous and brutal treatment of their employees had crystallized public sentiment behind the principles of the Wagner Act, so union indifference to public reactions had helped to create a climate of opinion in which the Taft-Hartley Act was possible. Wartime strikes, undemocratic practices within unions, strikes in violation of contract, denial of equal membership to Negroes, the taint of racketeering, jurisdictional strikes, and other abuses had caused a mounting critical opinion against unions, and the inconvenience suffered by the public in the great postwar strike wave helped solidify this opinion. Had the labor movement showed a willingness to reform itself, perhaps restrictive legislation might have been avoided, or if passed might have been of a mild nature. Instead, while offering no guarantees that they would stamp out offensive behavior on the part of their affiliates, labor leaders attacked every proposed regulatory measure in extreme terms, simultaneously refusing to specify any type of regulation of admitted evils that they would support. They paid the penalty for their short-sightedness with the passage of the Taft-Hartley Act.

There was, to be sure, a sustained propaganda campaign against unions, in which employers' organizations, much of the press, and a great many politicians joined, in which these and other abuses, and many of the more defensible practices of unions, such as the closed or union shop and area or nation-wide collective bargaining, were attacked. The National Association of Manufacturers carried on a vigorous popular campaign against unionism as monopoly, pointing to industry-wide bargaining, the closed and the union shop, and the secondary boycott as evidence of monopoly power. The NAM also proposed that unions be obligated by law to bargain collectively, that a strike be permitted only where a majority of workers had voted for it by secret ballot under impartial supervision, that strikes not relating to wages, hours, or working conditions be outlawed, that mass-picketing and other forms of intimidation be prohibited, and that employers not be required to bargain collectively with foremen. The Chamber of Commerce of the United States advocated a very similar program, likewise proposing a wholesale revision of existing labor legislation, and support for such a move came from many other quarters as well. Yet employers' groups had conducted such campaigns in past years without success; what permitted their efforts to culminate in repressive legislation in the postwar years, in all likelihood, was the existence of real abuses that the labor movement was either unwilling or powerless to remedy.

The large number of measures introduced in Congress during wartime to restrict the legal rights of labor or to regulate unions in one way or another became a veritable flood once hostilities ceased. Although peacetime strikes, even during the critical reconversion period, aroused less opposition than did wartime stoppages and gave less opportunity to congressmen hostile to the union movement to present their proposals under the guise of patriotism, the unprecedented volume and seriousness of the 1946 strike wave aroused congressional tempers at a time when the peculiar wartime need for national unity no longer existed.

The legislative proposal that attracted most attention in the summer and fall months of 1945 was the Ball-Burton-Hatch bill, introduced by these three senators in June, 1945. This complex measure, which had been drafted by a group headed by Donald R. Richberg, was modeled in part on the Railway Labor Act and included provisions for cooling-off periods, adjustment boards to handle grievances, voluntary arbitration, and fact-finding boards. Under the proposed legislation strikes that would work severe hardship on the public could be prevented by compulsory arbitration, with injunctions and damage suits available where such arbitration awards were violated. Employees and unions, as well as employers, could be found guilty of unfair labor practices. Union security clauses were to be restricted, and union acts interfering with management rights outlawed. Federal jurisdiction over labor disputes was to be reduced, with wide areas currently under the authority of the NLRB left to the states.

The labor movement denounced this measure in the most vigorous language. The AF of L called it "a bill tailored as a strait-jacket for Labor," Philip Murray termed it "a brazen and arrogant endeavor to shackle labor and destroy trade unions," and the CIO attacked it as "a perfect labor code patterned after the Fascist system."

> The Ball-Burton-Hatch bill [the CIO declared] is undoubtedly the most bald-faced and arrogant attack against labor ever launched in the history of this country.
>
> Under the cloak of misleading slogans such as "Equality of treatment for employer and employee alike," the measure actually seeks to undermine the very existence of labor unions. It nullifies in large measure the protections extended to millions of employees under the Wagner Act, imposes upon labor organizations harsh and unjustifiable requirements, and for the few unions that may survive, it devises further iron clad restrictions. Not only does the bill leave unions powerless to combat open shop employers but it actually invites and facilitates the adoption of open shop policies by employers.[1]

The *United Mines Workers Journal* asserted that

> the Ball (and chain) Bill . . . is unquestionably the most vicious measure designed to undermine organized labor, destroy collective bargaining, regiment American workers and promote strife that has ever been introduced in the Federal Congress.[2]

The labor movement pointed out that the supposedly impartial committee which prepared the bill consisted primarily of management attorneys and businessmen, with no representative of labor participating or even consulted.

Action on labor legislation was withheld while Congress waited to see the results of the labor-management conference of November,

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[1] Congress of Industrial Organizations, *B–B–H, An Evil Bill: Analysis of the Ball-Burton-Hatch Bill*, undated, p. 7.

[2] *United Mine Workers Journal*, July 1, 1945, p. 12.

1945. The failure of the conference to agree on most of the basic issues, followed by a series of strikes that paralyzed the national economy, brought Congress reconvening in January in a mood to act. The measure that best suited the temper of the legislators was the one introduced by Representative Francis Case of South Dakota, which would require five days' notice of a strike or lockout, and require the parties to maintain the status quo for a total of thirty days from the time of giving notice if the proposed tripartite mediation board assumed jurisdiction. The bill would also outlaw boycotts, permit unions to be used for contract violations, restore to the federal courts some of their power to issue injunctions in labor disputes, deny the protection of the Wagner Act to persons guilty of violence or threats, and exclude supervisors from the the provisions of the Wagner Act. In a highly unusual procedure the Rules Committee, controlled by a coalition of Republicans and southern Democrats, cleared the measure for House consideration the day after it was introduced, without any opportunity having been provided for public hearings on the merits of the proposal. With some changes the House passed the Case bill on February 7 by a vote of 258 to 155.

At hearings on the measure before the Senate Committee on Education and Labor, union spokesmen lashed out at the Case bill. William Green called it "monstrous," declaring that it violated the Thirteenth Amendment to the Constitution forbidding slavery. Murray denounced the principle of the cooling-off provisions of the bill, asserting that months of negotiations, requiring a high degree of patience, often preceded strike calls. Secretary of Labor Lewis B. Schwellenbach also denounced the measure as a "hodge-podge" that would reverse the progress of the last fifteen years, set the country on the road to industrial warfare and government by injunction, and crowd the federal courts with labor disputes. The National As-sociation of Manufacturers gave the measure qualified support, indorsing it in principle but declaring it inadequate because it failed to control jurisdictional strikes, and monopolistic practices of unions, prohibit strikes with political objectives, or remove inequities in the Wagner Act.

The Senate committee rejected the principles of the Case bill and reported instead a measure to encourage mediation and voluntary arbitration, with a provision to ban interference by unions with the delivery of perishable agricultural products. On the Senate floor, however, the advocates of more drastic labor legislation were in control, and the measure was substantially rewritten. In its final form it required the parties to refrain from strikes or lockouts for sixty days if a proposed Federal Mediation Board proffered its services, authorized fact-finding by a presidential commission in public-utilitiy disputes, outlawed secondary boycotts, permitted unions to be sued in the federal courts for breach of contract, excluded supervisory employees from the protection of the Wagner Act, outlawed interference with interstate commerce by "robbery" or "extortion" as these terms were defined, and made welfare funds illegal unless set up for specified purposes under joint employer-union administration. This new version of the Case bill came up for final action at the height of the controversy over the nation-wide railroad strike. On May 25, a few hours after President Truman had a joint session of Congress for emergency powers to end strikes against the government in vital industries, the

Senate adopted the Case bill by a vote of 49 to 29. A few days later the House accepted the Senate's version of the measure.

The labor movement urgently appealed to Truman to veto the bill, arguing that it would not promote industrial peace and that it was designed by antiunion forces to weaken organized labor. Philip Murray wrote Truman that

> the ill-assorted conglomeration of provisions . . . is a menace to sound labor relations. . . . Not one of them will reduce strikes or shorten their duration. All of these proposals are merely servings from a warmed-over anti-labor stew which has been kept brewing for the past 10 years.[3]

On June 11 Truman vetoed the measure, condemning it as one that hit at symptoms while ignoring the underlying causes of industrial strife. The bill would not stop strikes, he said, and it would force employees to work under compulsion for private employers during peacetime. The President declared that the proposed Mediation Board would not be established under sound principles of administration, and that its creation would not have affected any of the major disputes of the past months. He asked that Congress postpone the passage of permanent labor relations legislation pending a study of the basic causes of labor disputes. The House vote to override the veto was 255 to 135, five votes short of the two-thirds majority necessary to pass the measure.

Congress was more successful in 1946 with more limited legislation aimed at particular union practices of which is disapproved. In April the President signed into law a measure establishing criminal penalties for attempting to coerce radio broadcasters to submit to "featherbedding" practices. The measure, aimed at tactics employed by President James C. Petrillo of the American Federation of Musicians, prescribed penalties of fine and imprisonment for trying to force broadcasters to hire more employees than they needed, pay for services not performed, pay unions for the use of phonograph records, or pay again for broadcasting the transcript of a previous program. Three months later Truman gave his approval to the antiracketeering bill sponsored by Representative Sam Hobbs of Alabama, which made it a felony to obstruct, delay, or interfere by robbery or extortion with the movement of goods in interstate commerce. This measure had been part of the vetoed Case bill, and had been specifically objected to by the President in his veto message as failing to protect legitimate strike and picketing action. Nevertheless Truman signed the antiracketeering provision when it was enacted separately, although Congress failed to add any of the safeguards that he had requested.

The day before President Truman vetoed the Case bill, a Supreme Court decision in a relatively little-known case created a precedent for damage suits that were to complicate and antagonize labor-management relations for months to come.[4] Five years earlier a local CIO union had lost a strike against the Mt. Clemens Pottery Company in Michigan. A suit was then filed against the company, alleging that the employees were required to be at the plant fourteen minutes before their official work period began, in order to grease their arms, put on aprons and gloves, and otherwise get ready for the day's work. Similarly, they were kept at comparable tasks for fourteen minutes after

[3] *CIO News*, June 10, 1946.
[4] Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (June 10, 1946).

their work-day was officially over, and for all this time, they declared, they were entitled to overtime compensation under the Fair Labor Standards Act.

In a number of industries, especially in mining, varying and often substantial amounts of time had to be spent on the employer's premises before productive work could be begun. Much of this time was consumed in getting to one's place of work, and the rest was spent, as in the Mt. Clemens Pottery, in preparatory work on equipment or person. In the mining industry in Europe the workers were traditionally aid on a portal-to-portal basis, but in this country the practice of face-to-face pay had developed and was preferred both by employers and miners, who jointly had requested and obtained a face-to-face interpretation of working time from the wage-hour administration following passage of the Fair Labor Standards Act. Not until wartime, when the United Mine Workers were seeking loopholes in the wage stabilization policy, was portal-to-portal pay sought under the Fair Labor Standards Act, and in 1945, by a 5-to-4 decision, the U.S. Supreme Court had held travel time in mines to be work within the meaning of that statute.[5]

When the Mt. Clemens Pottery case reached the Supreme Court in the following year, this doctrine was expended to include preparatory work on equipment and person as well as travel time. This upset the customary concepts of working time held by by unions and by employers and made the issue of portal-to-portal pay an acute one throughout much of industry. Employers protested that the amount of unpaid time required for a job was normally considered when the rate was set, and there were some unionists who agreed that morally they had no claim to additional compensation. Such doubts generally were cast aside, however, as unions saw an opportunity to collect substantial sums, or at least hold the possibility as a threat over the employer's head in order to win other concessions in bargaining. Within a short time literally thousands of suits were filed by unions or by groups of employees asking billions of dollars in back wages and liquidated damages. In the state of New Jersey alone some three hundred suits were filed, asking a total of a billion dollars in portal-to-portal compensation and damages. The AF of L opposed the institution of such suits for back pay by its affiliates, urging them instead to settle differences over working time at the bargaining table; the overwhelming majority of portal suits were filed by CIO unions.

In the Mt. Clemens case the Supreme Court, after stating the principles that should apply, remanded the case to the District Court to determine the amount of compensable time involved, disregarding it if negligible. The district judge later found that the preparatory activity never required more than three minutes and that the unpaid walking time for the employee farthest from the time clock was slightly over six minutes; all this, he ruled, was negligible, and he therefore held that no compensation was due.[6] This collapse of the leading case, however, in no way changed the principles of the law, nor did it affect

[5] Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America, 325 U.S. 161 (May 7, 1945). In March, 1944, the Supreme Court had held the underground travel time of iron-ore miners to be working time under the Fair Labor Standards Act. Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590 (March 27, 1944).

[6] Anderson v. Mt. Clemens Pottery Co., 69 F. (Supp.) 710 (Feb. 8, 1947).

the claims of workers who were required to put in more substantial amounts of uncompensated time.

Here was an issue ready-made for a Congress that was bitterly critical of the labor movement. With a show of moral indignation Congress enacted the Portal-to-Portal Act of 1947, ostensibly as emergency legislation to relieve employers from liability under the Supreme Court ruling in the Mt. Clemens case. Actually the legislation went far beyond this, abolishing important rights that workers had enjoyed since the passage of the Fair Labor Standards Act. Under the Portal-to-Portal Act, employees were to be paid only under the express provisions of a contract or a practice in effect at their place of employment, thus barring preliminary working time that had been compensable prior to the Mt. Clemens decision under court rulings or the regulations of the wage-hour administration. Since unions could change the terms of their contracts in the future, the chief effect of these provisions would be felt by unorganized workers covered by the Fair Labor Standards Act—workers who in general received the lowest rates and were most in need of protection by governmental action. The Portal-to-Portal Act also established a two-year limitation statute for wage and hour claims, permitted court judgements for back pay to be compromised, and relieved employers of all liability under the Fair Labor Standards Act if they could show that they relied in good faith on any administrative ruling of any federal agency.

The entire labor movement, whatever its attitude toward portal suits, bitterly resented this congressional action stripping workers of long-established rights and giving employers immunities that they had not possessed before the Mt. Clemens decision was handed down. The rest of the labor movement generally subscribed to the biting comment of the *United Mine Workers Journal* that the "anti-portal pay bill of 1947 creates a virtual paradise for chiselers." [7]

By the time the portal-to-portal controversy reached its climax a thorough revision of the country's basic law was well under way. When the Eightieth Congress assembled early in January, 1947, after the sharp swing to the right in the 1946 congressional elections, President Truman sought to head off drastic changes in the labor law by offering, in his State of the Union message, a moderate four-point program to reduce industrial strife. The President proposed that unjustifiable practices such as jurisdictional strikes, secondary boycotts in pursuit of improper objectives, and strikes or lockouts to control the interpretation of existing contracts be outlawed; that facilities within the Department of Labor for assisting collective bargaining be extended; that socal legislation, covering social security, housing, national health, and minimum wages, be extended and broadened to alleviate the causes of workers' insecurity; and that a temporary joint commission be appointed by Congress and himself to inquire into the entire field of labor-management relations. The subjects that the commission would examine were to include nationwide strikes in vital industries, the best methods for carrying out the collective-bargaining process, and the underlying causes of labor-management disputes.

The dominant elements in Congress were in no mood for such a mild program. On the very day that Congress met, seventeen labor bills

[7] *United Mine Workers Journal*, May 15, 1947, p. 7.

were introduced in the House, with the Senate not far behind. Within two weeks, more than a hundred bills aimed at the labor movement had been introduced. A number of these, including revised versions of the Case bill, were designed to overhaul the nation's basic labor law; others had more limited objectives, such as to outlaw the closed shop, prevent industry-wide bargaining, prohibit union political activity, restrict the right to strike, or limit the establishment of health and welfare funds. "Union-Busting Is the Favorite Capitol Hill Sport These Days" read the headline on a Washington story in the organ of the Amalgamated Clothing Workers.[8]

The antilabor drive in Washington was matched by one in the state capitals. In 1946, though relatively few of the state legislatures were in regular session, a number of measures aimed at the closed shop and other union practices were enacted. This was but a trickle of antiunion legislation, however, compared to the flood that followed in 1947, when over thirty states passed laws restricting the rights of the labor movement. These laws forbade the closed shops, limited the use of the checkoff, restricted the right to strike, established unfair labor practices for unions, banned union political activity, required unions to register and file financial reports, regulated union fees and elections, prohibited secondary boycotts, limited picketing, regulated disputes in public utilities, and in other ways limited the rights that unions had previously enjoyed. This tremendous outpouring of antiunion legislation in the states went hand-in-hand with the legislative drive in Washington that culminated in the Taft-Hartley Act.

As the attack on the principles of the Wagner Act mounted, there was a visible change in NLRB decisions, evidently in response to the temper of Congress and in the hope of warding off drastic amendment of the Act. The board noted, in a statement submitted in March, 1947, to the Senate Committee on Labor and Public Welfare, that since July, 1945, it had made significant changes in policy with regard to "free speech" of employers, strikes in violation of contract, lack of good-faith bargaining by unions, strikes against the certification of rival unions, the sanctity of contracts, supervisory personnel, and other issues. Almost all of these changes, it should be noted, were in the direction of narrowing the rights that unions had previously enjoyed under board rulings.

In his report to the 1947 convention of the CIO, Philip Murray asserted:

> Even prior to the passage of the Taft-Hartley Act, the National Labor Relations Board in administering the Wagner Act was in headlong retreat from the policies originally established under the Wagner Act.
>
> As a result of the Board's decisions, the rights of strikers under the Act were watered down and made meaningless. The obligation to bargain collectively became an empty formula as a result of backward interpretations of the Act. Likewise, the Board . . . commenced the practice of refusing to disestablish labor organizations which it found to be company-dominated. Finally . . . the Board made a dead letter of the provisions of the Act dealing with employer interference, coercion and restraint.
>
> In matters of representation the Board's record was also disappointing. In case after case the Board insisted upon carving out crafts from established industrial units.[9]

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[8] *The Advance*, January 15, 1947.

[9] ***Final Proceedings of the Ninth Constitutional Convention of the Congress of Industrial Organizations*, 1947, p. 86.**

The board's administration of the Wagner Act, Murray concluded, constituted an open invitation to employers to attempt to destroy unions built up after years of struggle. At the same time, the board continued to be under attack from the AF of L for prejudice, particularly in the regional offices, in favor of the CIO, and for its "biased and odious" policy with regard to the separation of craft groups from industrial-bargaining units.

While the NLRB was under attack by Congress, by employers' organizations, and by both the CIO and AF of L as well, one of its most controversial rulings received the approval of the United States Supreme Court. After changing its mind several times in foremen cases, the board had finally held, in the Packard Motor Car Company case, that the Wagner Act required an employer to bargain collectively with the union representing its supervisory employees. In a five-to-four decision the Supreme Court on March 10, 1947, upheld the board's ruling that foremen were employees within the meaning of the Wagner Act, and that they could not be denied the rights thereby conferred on employees because they acted in the interests of the employer.[10] The decision, coming when it did, created almost a certainty that it would be reversed in the legislation that Congress was then fashioning.

In his testimony before the House Labor Committee on February 26, 1947, William Green vigorously condemned the various bills that had been introduced to ban the closed shop and the checkoff, forbid secondary boycotts, impose cooling-off periods, require compulsory arbitration, outlaw jurisdictional strikes, and weaken the Wagner Act. Green denied that it was defeatist or negative, as some charged, to oppose legislation of the type that had been proposed; on the contrary, he asserted,

> opposition to legislation that is ill-considered, that will produce incalculable harm to our national economy and welfare, is the affirmative duty of every constructive citizen and group. The truth is that the sponsors, not the opponents, of anti-labor legislation are defeatist and negative. It is they who proceed on the completely repudiated premise that the organized American worker is callously indifferent to his duties and obligations.[11]

Nevertheless Green, in the most significant admission that he had yet made, conceded that some changes in the Wagner Act might be desirable. The AF of L, he stated, would not oppose amendments to guarantee "free speech" to employers; to compel the registration of unions, so long as licensing was not involved; or to require the filing of union financial statements.

The conduct of the hearings held by the labor committees of both the House and the Senate showed conclusively that bills severely restricting union rights would be reported favorably by both bodies; and there was little doubt, in view of the voting on the Case bill the previous spring, that a powerful antiunion coalition existed in each house of Congress. The labor movement, in the crucial late winter and spring months of 1947, sought to mobilize all the political pressure it could to defeat the measures being shaped against it. "Defend your union!" Philip Murray urged all CIO affiliates in March.

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[10] Packard Motor Car Co. v. National Labor Relations Board, 330 U.S. 485 (March 10, 1947).

[11] *Amendments to the National Labor Relations Act.* Hearings before the Committee on Education and Labor, House of Representatives, 80th Congress, 1st Session, 1947, p. 1660.

Your union is in trouble [Murray warned]. Its strength to bargain for higher wages is being attacked in Congress. The House and Senate are considering more than 200 bills to hog-tie labor. Some bills ban union security. Some forbid industry-wide bargaining. Some would force unions and employers into lengthy and expensive suits in court. Nearly every form of union activity is attacked in one bill or another.[12]

The labor movement felt keenly that both the House and the Senate committees were prejudiced against it, that antilabor majorities in both groups had closed minds where the interests of organized labor were concerned. Nowhere was this antilabor bias more apparent, from the point of view of union leaders, than in the choice of committee consultants and technical advisers, who included several management attorneys who had long opposed the union movement in court proceedings. What particularly infuriated the union movement was the appointment of Gerald D. Reilly, former member of the NLRB whose rulings labor had bitterly opposed, as consultant to the Senate committee. In a letter to Chairman Robert A. Taft of the Senate committee Philip Murray demanded that Reilly's appointment be rescinded because of his bias and partisanship and his "known and demonstrated animus toward organized labor." [13]

The House committee, of which Representative Fred A. Hartley, Jr., of New Jersey was chairman, was ready to act first. Its bill, reported favorably to the House on April 11, prohibited the closed shop, restricted collective-bargaining to a company-wide basis, denied bargaining rights to unions officered by Communists, provided for a seventy-five-day "cooling-off" and fact-finding period enforced by injunction in the case of work stoppages threatening public health or interest, outlawed strikes unless at least five union-management conferences had been held and the majority of workers in the plant had voted to reject the employer's final offer, prohibited the use of coercion or the refusal to bargain collectively by employees, regulated internal union practices, prohibited mass-picketing and secondary boycotts, made some types of strikes subject to suit under the antitrust laws, required union registration and annual reports to the Department of Labor, prohibited union contributions in elections involving federal office, specifically permitted unions limited to a single company provided they were not company dominated, required craft unionism where a majority of the craftsmen desired, provided that unions might be sued for breach of contract, and excluded supervisory employees from the provisions of the bill. This comprehensive and complicated measure, which according to Hartley was adequate but "tough" compared to the one likely to emerge in the Senate, came before the House on April 15 under a rule that limited general debate to six hours. Two days later the House passed the measure by a vote of 308 to 107. The CIO summarized the Hartley bill for its members under the heading, "20 Ways to Wreck Trade Unions!" [14]

On the same day that the House acted, the Senate committee reported favorably a measure that was mild only by comparison with the Hartley bill. The Taft bill established unfair labor practices in which unions were prohibited to engage, outlawed the closed and regulated the union shop, required a sixty-day notice for termination or modifi-

[12] *CIO News*, March 10, 1947.
[13] *Ibid.*, March 24, 1947.
[14] *Ibid.*, April 21, 1947.

cation of a contract, permitted employers to adjust grievances with individual employees, protected craft bargaining units, permitted petitions for elections to be filed by employers, made provision for decertification petitions by groups of employees, restricted the right of strikers to vote in bargaining elections, provided for the registration and the filing of annual reports by unions with the Secretary of Labor, limited the period in which unfair labor practice charges could be filed, required the board to give priority to certain charges that could be filed only against unions, eliminated an employer's duty to bargain collectively with unions of supervisors, facilitated damage suits against unions for violations of contract, made administrative changes in the NLRB, and provided for injunctions, cooling-off periods, and boards of inquiry in strikes affecting substantially an entire industry and imperiling national health or safety.

Senator Taft and several of his colleagues, while supporting the committee bill as a substantial step forward, expressed regret that certain evils were not covered at all, or covered inadequately. They would offer amendments to the bill, they stated, to outlaw interference or coercion by unions with the rights of employees, give unions local autonomy in bargaining rights, require joint employer-union administration of welfare funds, and outlaw secondary boycotts and jurisdictional strikes. The committee minority asserted, on the other hand, that

> this bill is designed to weaken the effective program of labor legislation which has been, with great pains, built up over the years. It would be destructive of much that is valuable in the prevention of labor-management conflicts. It contains many barriers, traps, and pitfalls that can only make more difficult the settlement of disputes. Its principal results would be to create misunderstanding and conflict, and to aggravate the imbalance between wages, prices, and profits which already endangers our prosperity.[15]

The Senate amended the committee's bill to make coercion of employees by unions an unfair labor practice, to prohibit the certification of unions officered by Communists, and to expressly authorize "free speech" for employers and employees. However, it defeated, by the margin of a single vote, Taft's effort to restrict industry-wide bargaining. The Senate then adopted the bill by the overwhelming vote of 68 to 24. The measure that emerged from the conference committee that reconciled the Taft and Hartley bills resembled the Senate measure more than its even more extreme House counterpart.

On June 20 President Truman vetoed the bill on the grounds that it was a clear threat to the successful working of our democratic society and that it would go far toward weakening trade unions and destroying national unity. He analyzed the complicated measure section by section to make clear his many objections and to show in what specific ways the bill violated the principles he found essential to the public welfare. Taken as a whole, Truman declared, the bill would

> reverse the basic direction of our national labor policy, inject the Government into private economic affairs on an unprecedented scale and conflict with important principles of our democratic society. Its provisions would cause more strikes, not fewer. It would contribute neither to industrial peace nor to economic stability and progress. It would be a dangerous stride in the direction of a totally managed economy. It contains seeds of discord which would plague this nation for years to come.[16]

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[15] *Federal Labor Relations Act of 1947, Minority Views,* 80th Congress, 1st Session, Senate Report 105, Part 2, 1947, p. 1.

[16] *New York Times,* June 21, 1947.

Unmoved by the President's plea, the House at once overrode the veto by a vote of 331 to 83, and three days later the Senate followed suit by a vote of 68 to 25. In both houses a substantial number of Democrats joined the Republican majority to place the Taft-Hartley measure on the statute books, for the first major revision of our labor relations legislation since the adoption of the Wagner Act twelve years earlier.

As the legislative fight neared its climax, the labor movement sought by every means at its command to arouse its membership and the general public and to bring pressure on the White House and on members of Congress. The AF of L widely attacked the Taft-Hartley measure as a "slave labor" bill, and Philip Murray denounced it as "the first real step toward the development of fascism in the United States." Attacks of this nature, bordering on the hysterical, may have served their purpose in arousing union members, but bore little relation to the substance of the bill. Equally unfounded were the passionate arguments of the bill's defenders, many of whom presented it as a bill of rights for the individual workingman, as a "worker emancipation" act that would free employees from the tyranny of labor leaders. The truth, of course, lay well between these extremes.

Nor did Philip Murray contribute to an understanding of the legislative process by declaring, after the measure was enacted by Congress, that

> the Taft-Hartley bill was conceived in sin; that it was a sinful piece of legislation, and that its promoters were diabolical men who, seething with hatred, designed or contrived this ugly measure for the purpose of imposing their wrath upon the millions of organized and unorganized workers throughout the United States of America.[17]

An AF of L publication was nearer the truth when it stated, in the final days before passage, that "the entire Bill is conceived in a spirit of vindictiveness against unions, rejection of collective bargaining and the principle of equality between employer and union."[18]

This is not the place to attempt a complete analysis of the complicated Taft-Hartley Act,[19] which opened up a new chapter in American labor law. If the roots of Taft-Hartley were to be found, at least in large measure, in the industrial relations conflicts and the controversial practices of unions during the war and reconversion periods, its enactment marks the most convenient point of demarcation between the reconversion period proper and the postwar era. Yet the conclusion is inescapable that Congress was interested less in curing union abuses than in using them as an excuse for weakening the organized labor movement. This is seen, for example, Taft-Hartley's exaggerated concern for individual bargaining, its requirement that the NLRB give priority of attention to offenses of which only unions could be guilty, and its inclusion of remedies against every real or fancied union abuse, whether germane or not to the primary purpose of the measure.

Congress lost an opportunity to contribute to sound labor relations and industrial peace by its failure to encourage union growth and col-

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[17] *Final Proceedings of the Ninth Constitutional Convention of the Congress of Industrial Organizations*, 1947, p. 22.

[18] *Labor's Monthly Survey*, American Federation of Labor, June, 1947, p. 1.

[19] For such an analysis see Harry A. Millis and Emily Clark Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* (Chicago: University of Chicago Press, 1950).

lective bargaining while curbing the exercise of arbitrary union power against the legitimate interests of union members, would-be members, employers, and the general public. This could not be accomplished by a measure obsessed with protecting the rights of those workers, however, few they might be, who had no faith in collective bargaining, nor by a law more concerned with putting legal weapons into the hands of employers than with encouraging them to reach mutually acceptable agreements with their organized employees. The losers were not likely to be labor leaders of the John L. Lewis type, whose behavior helped from the climate of opinion in which the Taft-Hartley Act was possible, but whose power could not easily be broken by changes in the basic labor law; nor were they likely to be the members of unions strong enough to withstand financial loss and organizational setback. The real losers, more likely, would prove to be those least able to withstand loss—the small, struggling unions and the millions of workers still unorganized, whose path to successful organization and economic gain now became more difficult.

20. (Source: Harry A. Millis and Emily Clark Brown, chs. 8, 9, and 10 of *From the Wagner Act to Taft-Hartley,* Chicago, The University of Chicago Press [1950])

CHAPTER 8

THE BACKGROUND OF THE TAFT-HARTLEY ACT. I. LABOR, EMPLOYERS, AND GOVERNMENT

In the Labor-Management Relations Act of 1947 national labor policy turned sharply toward the "right," after fifteen years of following the road marked by the Norris-La Guardia and the Wagner Acts. Although inevitably modified in some respects during the war, the major reliance for working out problems had been upon free collective bargaining, once the inequality of bargaining power which had resulted from the employers' economic position and from court restrictions on union activities had been reduced. In contrast with congressional attitudes in 1935 when the Wagner Act met little serious opposition in Congress, in 1947 the Taft-Hartley Act was passed by an overwhelming majority in the House of Representatives and by the two-thirds necessary to override the presidential veto in the Senate. The new legislation not only met the clear need for limited amendments to the Wagner Act but also went much farther into detailed regulation of labor relations. Drastic changes were made not only in the Wagner Act but also in the basic law of labor. The dramatic shift in the climate of opinion in Congress, and in state legislatures also, reflecting changes in public attitudes, needs more analysis than we can give here. Nevertheless, some major factors in the extremely complicated situation out of which the new legislation came can be indicated. The next two chapters will then consider the development of legislation in the states and in Congress from 1935 to 1947.

During the fifteen years from the depth of the depression, organized labor had grown greatly in membership and power. It had added some twelve million members to its rolls, under the influence of the protection afforded by the Wagner Act along with new methods and attitudes in organizing and the expansion of industry and shortage of labor accompanying the defense, war, and postwar periods of prosperity and full employment. Many organizations survived which might not have survived under the old "bare knuckles" order. And collective bargaining, although some of it the result of "shotgun weddings," had become more and more the general fact in most important fields of industrial endeavor. There were more big unions—Teamsters, Steelworkers, Automobile Workers, Mine Workers, and others—as well as the building crafts, railway workers, and others whose power had not essentially changed during these years. Unions powerful in terms of members and financial resources could in time of stress conduct huge strikes with

paralyzing effects upon large sections of the economy and drastic repercussions in the press and upon attitudes of much of the public. The unions for the most part survived the test of the major 1945–46 strikes and reconversion stresses and were continuing strong in the second postwar year. This was in marked contrast to 1920, when two years after the Armistice a number of major strikes had been broken, and a well-organized open-shop offensive was already under way and showing its effects in many industries and many sections of the country. Changes in the balance of power in many sectors of industrial life had become very clear by two years after the close of World War II. Those who sought to curb union power therefore turned to the legislative field.

Most of the arguments for changes in the labor laws, both federal and state, from 1939 on, can be summed up in three major points: (1) under existing laws organized labor had come into a dominant position in industry; it had too much power and there was need to effect a balance; (2) many of the unions had not developed a necessary sense of responsibility to industry and the public, or to individual employees and union members, correlative to their protected rights; and (3) labor organizations should be under the same or equivalent limitations and responsibilities as rested upon employers; the need was for a national labor policy which would "equalize" the law and insure "equitable" administration of laws. In the name of equalization, also, some would relieve management from at least a part of existing limitations under federal law or weaken the administration of that law where it was thought to rest too heavily upon employers.

First, a few preliminary comments on these points are needed. The word "power" needs to be defined in meaningful terms. Does it mean power to question management rules or certain of those rules adopted in nonunion days? Does it mean power to press seriously for bargaining about practices which have become the accepted rule in other plants or industries? Does it mean power of a single union dealing with many small employers to get standardized wages, hours, and other conditions and make them common to all firms in the market, to the exclusion of substandard conditions and firms? Does it mean power to close down the operations of the many plants of a huge corporation or to close down an industry crucial in a locality or the nation? Or, to change the drift of the question, does it mean power greater than is possessed by the employer with whom the union deals? Situations vary. There may be powerful unions and associations of employers, as in Pacific Coast shipping; strong unions facing great corporations in mass production; division among unions as they face nation-wide operations such as those of Western Union; unions in many areas in the early stages of dealing or trying to deal with large chain-store companies; strong unions like the Teamsters, in highly strategic position as they deal with thousands of employers, many of them small; a great union and associations of small employers organized in order to meet the union on a more equal footing; great textile mill chains in many of whose mills unions have never achieved even a precarious hold; and many other combinations and permutations of power relationships. In spite of the impressive over-all figures indicating union strength, the disparities are very great, with the balance

on this side here, and the other side there. No indiscriminate weakening of the power of unions could be expected to do justice or promote equality.

With respect to irresponsibility, experience with arbitration and in the National Labor Relations Board shows many instances of deficient sense of responsibility both among officers and members of labor organizations and among employers. On the other hand, most experienced men have a sense of fairness when they come to know the facts. It must be noted too that for responsibility, both union and employer must have sufficient power to maintain their organization and perform their functions. The problem is then how to make a sense of fairness and responsibility more general. What will assist in effectuating and what will militate against this end?

"Equalizing the law" is an old plea, increasingly used in the later years. Much of it was sales talk with little basis in fact. Some, though not all, of the proposals to "equalize the Wagner Act" were unrealistic, based on misunderstanding of the facts or seemingly with other objectives behind them. Yet the slogans were highly appealing and received a great deal of support. The need was for careful analysis and carefully drawn legislation to remedy any situations lacking a proper balance between organized labor and management from the standpoint of public interest. Much of the attack upon the Wagner Act with its demand for restrictive legislation, however, in spite of the slogans was in reality aimed simply at reducing the power of unions. It reflected a struggle over industrial and political power.

Turning from these generalities, we consider some factors in actions of unions, employers, and government which contributed toward the 1947 "legislative climate" and the new framework for the relations of labor and employers.

UNION FACTORS

Organized labor and collective bargaining on the whole had functioned well when the essentials of the Wagner Act and the assumptions underlying it had been complied with. Certainly during the years of preparedness and the war the great mass of unions were very loyal, minimizing strikes and slow-downs, consenting to longer hours of work, relaxing working rules, and seeking intensive individual application by those on jobs, so that more was accomplished and more goods and weapons turned out than had been thought possible. Union and worker attitudes and efforts made their great contribution to the result, along with technological advance and management efficiency.

While the general labor record was an excellent one during the perilous years of 1941–45, there were "quickies" and stoppages, most of them officially disavowed and sometimes the leaders disciplined. Some stoppages and slow-downs will inevitably occur, especially when most unions are still young, when many of their members have not yet become union men at heart, and many if not most of their officers are inexperienced. Management, from top management to supervisors, likewise was frequently inexperienced in collective bargaining, immersed in solving its produciton problems, and sometimes not possessed of the best judgment. Management sometimes caused impatience and low morale by saying to workers, "Of course you should have more

money, but the War Labor Board bureaucrats won't let us give it to you." Sometimes, too, manpower was being wasted, at least temporarily, and foremen said, "What's the hurry?" But the most troublesome factor where there were "quickies" or stoppages or bad morale appears to have been failure to recognize the importance of good grivance machinery and its timely and considerate use. Sometimes this was due simply to inexperience on both sides. Not infrequently, however, it reflected failure of management fully to accept collective bargaining and the need for working out as many issues as possible at home. Instead, too often it was said, "Take it to the Labor Board." And delays in the government's handling of cases added to the widespread unrest. During the war the immediate responsibility for stoppages and slow-downs seems to have rested about equally upon management and upon the unions in organized trades. The War Labor Board in some cases penalized unions for irresponsibility in violating the no-strike pledge. In a number of important cases during or after the war, management and unions worked out "union responsibility" and "management security" clauses in an effort to meet this problem.[1] But some thought that the solution was to be found in new legislation "to make unions responsible."

Wartime federal agencies which necessarily were established to handle industrial relations problems on the whole functioned well. Yet it became necessary, or at any rate advantageous, for both management and unions "to run to Washington" for aid in resolving their problems or for authoritative settlements. Indeed, some strikes were designed to get cases acted on quickly or favorably. Suggestions or directives from Washington extensively replaced collective bargaining, especially where union-management relations were new. For the war years, therefore, the lessons concerning normal procedures and the sense of responsibility which develop with collective bargaining experience failed to be learned by many managers or by many union officials and the rank and file. On V-J Day there were large "awkward squads," who had still to a considerable extent to learn these lessons.

In occasional cases, also, unions both young and old engaged in behavior which gave some basis for the frequent claim that unions failed to "bargain in good faith." Sometimes it was the inexperienced official of a new union, sometimes the rather arbitrary demand of an old and strong union, which brought forth this comment. An occasional union negotiator acted as though the obligation to try to reach agreement was all on the other side of the bargaining table. When a powerful union laid down its contract with a "Sign here" ultimatum, even though this was the standard contract established by collective bargaining in the area, the employer's resentment was understandable. When such a union was prepared to back its ultimatum by a boycott, although it had not always been careful to organize a majority of the employees first, the employer's resentment was thoroughly justified. When the International Typographical Union insisted that its international laws, some of which dealt with working conditions, were not subject to negotiation or arbitration, its action was more appropriate to an earlier time when only the workers were

[1] Cf. the Ford and Kaiser agreements. *New York Times,* January 10, 1946; February 25, 1946; May 21, 1946.

organized and working conditions were decided by union action than to one of modern collective bargaining.

Another source of friction and considerable grief to employers and the public as well was found in the active division of the labor movement. Some of this was inevitable during the phenomenal expansion in union membership and collective bargaining which followed the rise of the CIO and its stimulus to the older unions. More and more money was spent on organizing campaigns. Some of the increasing number of paid organizers were of limited and short-range vision. The major part of the efforts, at least in earlier years, was devoted to organizing the unorganized. But as the larger plants and the major industries were increasingly brought within the fold, the temptation to expand by annexing the other fellow's members was substantial, and considerable energy was expended in such efforts. Competition between rival unions and the possibility that workers could shift their affiliation from one union to another exerted considerable influence for democratic, honest, and effective unionism. But the competition and raids created difficulties also. Lasting agreements not to raid were the exception; promises with respect to wage advances, job security, and improved working conditions all too frequently greatly exceeded what could reasonably be expected; shortcomings of management at times were exaggerated in the union's propaganda; and a premium was placed on secessions from one organization and signing up with another; needed discipline was frequently sacrificed by militant unions. Factionalism and the left-right struggle, within and between unions, frequently intensified the conflicts. Related problems arose from the expansion of the jurisdictions of many of the international unions. Frequently these jurisdictions seriously overlap, even among unions within the same national federation. This causer more jurisdictional disputes. Many an employer willing to do the "right thing" found himself "in the middle."

Such disputes were commonly solved by elections conducted by the NLRB. Nevertheless, they were not always "solved." Unless the results of an election were really conclusive and the losing organization lost hope of a "comeback," it frequently renewed its organizing efforts and then petitioned for a new election, when an existing contract did not clearly constitute a bar, and sometimes when it did. The Board, of course, developed rules under which these petitions were processed or dismissed. But, in any event, bargining for the new contract was held up while the question of representation was being settled. There was delay of some weeks, frequently, even for a consent election, and of many months for a hearing and ordered election. In a minor but increasing number of cases still more time was reqiured to investigate and rule on challenges and objections to elections. Freqeuntly "stalling" entered in. All this inevitably had an influence on the morale and efficiency of the workers and on production. Then, if a new organization became the representative of the employees, the new contract had to be thrashed out and new representatives dealt with. This rivalry between competing unions all too frequently became a management "headache." A divided, competitive labor movement, in spite of its indications of vitality, levied a heavy tax on management and on public understanding.

Nor is this the entire story. Important unions sometimes used their power by strikes, picketing, or boycotts to force employees to join the union, or to change their union affiliation, regardless of the results of elections or other evidence of their free choice, or while a representation issue was still unsettled.[2] The problem of such coercion by a union to force an employer to violate the law, by recognizing a union other than one representing the majority of his employees, had found no complete solution under the Wagner Act. A New York State court, however, held that picketing by a defeated union of an employer who had entered into a contract with a certified union could be enjoined.[3] The ULRB in many cases sought, by setting aside collusively made contracts, to protect its authority in representation cases and the freedom of workers to choose their bargaining representative. But the breakdown of jurisdictional lines, extreme competition for members, and the willingness of a minority of powerful unions to turn from the election process to persuasion supported by picketing or boycotting in some cases wrought serious damage to the rights of employees under the Wagner Act and to the sense of justice of employers who were willing to live in accordance with the law. Jurisdictional disputes over work assignments when these resulted in strikes also seemed to employers and the public a particularly unjustifiable kind of strike.

Abuses under closed-shop contracts, too, in rival union situations, gave the labor movement another black mark. Occasionally the incumbent union used its contract to try to perpetuate itself in power, regardless of the desires of its members as to affiliation, by expelling and then demanding the discharge of any who wished to advocate a change to a different union.[4] This occurred even or perhaps especially when the origin of the closed-shop contract was somewhat questionable. Here again the failure of the union movement to eliminate these abuses gave support to the demand for regulation by law.

Picketing and boycotting took various forms and frequently led to charges of irresponsibility against the unions. Some of the criticized practices occurred in connection with rival union disputes, some merely in an effort to extend organization in unorganized sectors. Some of them were clearly beyond the bounds of reasonable action from the standpoint of public interest or that of employers and of other employees.

Most picketing was still of an old simple type with a few employees stationed near a struck plant to apprise workers of the fact that a strike was in effect and to persuade them not to work as "scabs." It might be accompanied only by trivial remarks, or it might involve serious "intimidation," "coercion," or even "violence" as these terms are used by the courts. For some years, however, with rapid organization and with many large plants involved in strikes, and with considerable protection of picketing under the Norris-La Guardia Act, much was heard of mass picketing, by very large groups, running up to hundreds or even thousands on occasion, with the aid of large numbers of supporters normally employed elsewhere and of sympathetic members of the community. Sometimes access to the plant was

[2] *Supra*, ch. 6, pp. 216–33.
[3] *Infra*, ch. 12, pp. 457–58.
[4] *Supra*, ch. 6, pp. 210–16.

denied to management and to clerical and other employees not directly involved in the dispute. If the plant tried to operate—less frequently done under the Wagner Act than when unionism was less strong—there was danger of violent clashes between strikers and strikebreakers. In the "stay-in" strike, considerably used in the early years of rapidly expanding organization as an improvement on picketing, management was locked out and kept off the job, of course without sanction at common or statute law. While strike violence apparently decreased during the life of the Wagner Act in direct ratio to the extent to which the right to organize was accepted, coercion and violence are more likely to occur when picketing is on a large scale. Mass picketing has been widely condemned as coercive.

Boycotts are of a great variety. They had been used in recent years more widely than at any time since the 1880's when both the AFL and the Knights of Labor tried to bring them under control. Their increased use is to be explained partly by the rivalry between AFL and CIO, partly by the fact that labor was "on the march," largely by the effect of the Norris-La Guardia Act in limiting the issuance of restraining orders by the federal courts, and seemingly by a rather general feeling that any behavior not enjoinable under that Act, as interpreted by the Supreme Court, had been made lawful. Some unions attempted to organize retail outlets of various sort, by picketing and boycotting restaurants and small stores, rather than by directly organizing the workers themselves; when successful they often obtained closed shops without regard to the desires of the employees. Teamsters frequently used their power of refusing to haul materials in or out, either to support efforts of other unions to organize certain plants or stores or to induce employers and employees to accept and sign contracts with the Teamsters. Boycotts of "nonunion" materials and tools were freqeuntly used in many different situations. A retailer might be picketed because he sold a product of a nonunion manufacturer who paid substandard wages. Or members of one union might refuse to work on material hauled or delivered or processed by nonunion men, this again in an effort to protect workers in the industry from substandard labor conditions in unorganized plants. Another type important particularly in New York was a boycott against products made elsewhere, sometimes even under contract with unions affiliated with the same international, in order to protect local employers and craftsmen from any outside competition from products manufactured and sold at lower prices. Such well-known attempts at "balkanization of the market" as that of AFL Electrical Workers and employers in New York City illustrate this much-criticized practice.[5]

Even such summary discussion as this indicates differences among these situations and in the extent to which they might be justified by efforts of a union to organize and eliminate substandard conditions which threaten the welfare of its members. But it is clear that certain unions were much criticized, and open the criticism, for unjustifiable actions in this area. Some of their methods were coercive of employees, employers, and the public and contrary to the rights of others under the Wagner Act as well as of other public interests. They gave support to the frequent arguments that "union monopolies" were endangering the public interest.

[5] Allen Bradley Co. v. Local Union No. 8, IBEW, 325 U.S. 797 (1945).

Another set of union actions which led to serious criticism had to do with the internal affairs of unions. Although many unions, probably the great majority, are democratic in government and responsible toward their membership, well-known abuses of a minority created much unfavorable publicity. Thus certain unions capitalized on war conditions and charged excessive dues to war workers under closed-shop contracts.[6] The fact that "there is no evidence that dues are generally exorbitant . . . and relatively few unions charge exorbitant initiation fees, and not many workers are affected by them" [7] was less well understood by the public than the fact that abuses did exist. Most unions also make financial reports to their members, and many publish them so that they are available to the public, but some unions have been lax.[8] Although the problem of racketeering in unions had apparently decreased greatly from its heyday in the 1920's and 1930's, glaring instances of financial dishonesty of union officers still appeared in the court. In addition, the admission requirements of some unions were open to criticism, when they still discriminated on racial grounds, or when they used their closed-shop provisions with restriction on membership to limit entrance to the industry. They were also enough complaints that rights of individual members were sometimes abused by arbitrary union discipline, expulsions for vague offenses or for "political" purposes, and by undemocratic "union bureaucracies" to arouse feeling for governmental regulation in this area.

Union leadership was fully aware of these serious problems in its own house. Behind the scenes there were discussions of whether labor could work out its own "bill of labor rights and duties." But individual union autonomy, lack of unity in the labor movement, fears of internal opposition and of giving encouragement to antiunion forces, all prevented any proposal from labor itself to deal with the admitted abuses.[9] All this made it easier for others to obtain support for rather drastic revisions of the laws, when more constructive solutions might have been found in law or otherwise, had labor leadership taken more responsibility on these points.

Finally, probably most important of all in supporting the wide impression that unions were too powerful and irresponsible were wartime strikes by a few unions, notably the United Mine Workers, and the great strike wave in the reconversion year of 1945–46. But before these matters can be discussed we need to turn to factors on the employers' side of the picture and to things done and not done by government itself, which by 1947 helped to bring about the crisis over labor laws.

EMPLOYERS AND EMPLOYER ASSOCIATIONS

Employers no more than labor organizations can be spoken of as all reflecting the same views, influenced by the same customs and

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[6] This is however to be blamed partly on the government, which early in the war permitted unions with few members to collect dues from all new workers. Later the situation was to some extent rectified under government pressure.

[7] Philip Taft, "Dues and Initiation Fees in Labor Unions," *Quarterly Journal of Economics*, 60 (1946), 231–32.

[8] The Hod Carriers Union in 1941 made its first financial report in thirty years, covering over-all totals of monthly receipts and expenditures for each year. American Civil Liberties Union, *Democracy in Trade Unions* (New York, 1943), pp. 59–60.

[9] Cf. "The Congress, the Public, the Unions," *Labor and Nation*, 1 (February–March, 1946), 23–26; A. H. Raskin, "Labor Missed the Boat," *Labor and Nation*, 1 (June–July, 1946), 29–30; *Business Week*, March 1, 1947, p. 6.

experience, and motivated in the same way, either at one time or at all times throughout a twelve years' history. With few exceptions employers who were vocal from the introduction of the Wagner Bill to its enactment into law expressed opposition. From then on the major associations in industry followed a fairly consistent line of opposition, although this necessarily took somewhat different form after the basic principles of the Wagner Act appeared rather thoroughly established in law. Individual employers varied extensively among themselves and over the years. Their attitudes were affected by experience and by other factors in the environment; but many of them came to a much greater degree of acceptance of the Wagner Act and of collective bargaining than seemed to be true of major spokesmen for the business community.

Employer associations

The National Association of Manufacturers, with its affiliated and co-operating organizations, led the opposition to the Wagner Act from the start until sweeping amendment was achieved in 1947.[10] It fought the passage of the Act, organizing pressure against it in 1934–35.[11] After the failure of this effort the NAM argued that the Act could not be applied to manufacturing industries and that the majority-rule principle was unconstitutional, and for some time it encouraged an attitude of noncompliance on the part of its members. In December, 1935, it recommended repeal of the Act.[12] Prominent members of the NAM were among those whose injunction suits to prevent the NLRB from holding hearings were effective in interfering with the administration of the Act in its first two years.[13] Some of them were large users of labor spy systems during this period.[14] Other associations, too, played their part in the opposition, prominent among them the National Metal Trades Association, which told its members that the Act was unconstitutional and unenforceable. The Liberty League's report, to the same effect, had wide publicity.[15]

When to the great surprise of the business community the Supreme Court in April, 1937, upheld the constitutionality of the Wagner Act, a shift in the character of the opposition was necessary. But, to say the least, the attitudes expressed by the major spokesmen of business toward the new national labor policy were negative and grudging. The Chamber of Commerce of the United States late in April, 1937, began a campaign for amendment of the Act to add regulation of certain "unfair labor practices" of employees.[16] It pointed out that,

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[10] In 1947 the NAM reported a membership of 16,500, and affiliation through the National Industrial Council with 347 other employers' associations with over 40,000 members, in 35 state associations, 185 trade associations, and 150 local associations. Carroll E. French, *The Role of Employers' Associations in Industrial Relation* (New York: Industrial Relations Counselors, Inc., 1948).

For an analysis of NAM history and policy, criticizing it or "extreme conservatism" and "rationalization of narrow group self-interest," and claiming that, led by representatives of a very small number of large industrial firms, it was not truly representative of its membership or of American industry as a whole, see Alfred S. Cleveland, "NAM: Spokesman for Industry?" *Harvard Business Review*, 26 (1948), 353–71. Cf. also "Renovation in N.A.M.," *Fortune*, 38 (July, 1948), 72–75, 165–69.

[11] U.S. Senate, Committee on Education and Labor, *Violations of Free Speech and Rights of Labor, National Association of Manufacturers*, Report No. 6, Pt. 6, 76th Cong., 1st Sess., 1939, pp. 75–122, cited as *La Follette Committee Reports*.

[12] *Ibid.*, pp. 122–32.

[13] *Supra*, ch. 2, p. 39.

[14] *La Follette Committee Reports, National Association of Manufacturers*, pp. 130–32, 142–53.

[15] *Infra*, p. 295.

[16] *New York Times*, April 28, 1937. The Chamber was reported in 1946 to have some 2,500 affiliated local Chambers of Commerce.

while the Act was constitutional, issues as to the wisdom of the policy were still open. It gave no indication of full acceptance of the policy of the Act but emphasized the lack of control over labor activities. It suggested that employers should secure the advice of counsel as to "the extent of their obligations, if any, under the statute," and that they should raise the question of jurisdiction and enter "a vigorous and complee defense" if a complaint were filed. A resolution adopted by the Chamber on April 29, 1937, made no mention of collective bargaining and recommended "equalizing" amendments to the Act and state and federal legislation to regulate union activity.[17] The NAM, shortly after the Supreme Court decisions, distributed for bulletin-board use an analysis of the Act which conspicuously failed to emphasize the positive rights provided for employees or the parallel duties of employers. It argued that employee representation plans were not outlawed and distributed suggestions on how to transform them into "independent unions." In May, 1937, it adopted a labor relations program which indicated preference for individual bargaining and went only so far as to say that, if this became impossible, then there should exist "means of cooperative collective negotiation between individual employees and managements." The board of directors approved suggestions for amendment of the Act and voted "its opposition to the primary basis of government efforts to prevent labor disputes by stimulating union recognition." [18] The amendments proposed included a provision against "coercion from any source," restriction of the right to be recognized as bargaining agent to organizations which met given tests, and restriction on certain types of strikes. Concern was expressed for he rights of those who did not want unions and should be free from coercion to join.[19] It is understandable that to the NAM, long committed to an "open-shop" program, the walls of its world must have appeared shaken when the Supreme Court permitted the government to interfere with old antiunion practices, and when in the mass movement of the 1937 strike wave the CIO encroached on the strongholds of antiunionism. The General Motors agreement with the UAW–CIO, following the sit-down strike, had been signed in February, 1937, and the Carnegie-Illinois Steel agreement with the Steel Workers Organizing Committee, CIO, in March.

The drive for amendment of the Act then began in earnest, as part of a real power struggle. The NAM had begun in 1937 a long-range program to influence public opinion. It attempted by various types of publicity and by working with various community groups to promote understanding of industry and of the free-enterprise system as the sponsors understood it. This propaganda campaign in its earlier years was described in some detail in reports of the La Follette Committee. Using radio, news, cartoons, editorials, advertising, leaflets, and other devices, often with their source not disclosed, the "educational program" reached every important industrial community. It was summarized thus by the La Follette Committee:

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[17] Chamber of Commerce of the United States, *Federal Regulation of Labor Relations* (Washington, D.C., May 1937), esp. pp. 13, 19–20.

[18] *La Follette Committee Reports, National Association of Manfauctures,* pp. 135–37, 140–42; cf. also U.S. Senate, Subcommittee of the Committee on Education and Labor, *Hearings, Violation of Free Speech and Rights of Labor,* 75th Cong., 3d Sess., Pt. 17, pp. 7624, 7628, 7645–65, and 76th Cong., 1st Sess., Pt. 35, pp. 14071–76.

[19] *New York Times,* April 22, 1937; July 1, 1937.

Its message was directed against "labor agitators," against governmental measures to alleviate industrial distress against labor unions, and for the advantages of the status quo in industrial relations, of which company-dominated unions were still a part. Antiunion employers and local employers' association executives used the propaganda material . . . to combat the organizational drive of unions in local industrial areas.[20]

How the belligerent employers' associations in some of the states encouraged antiunionism, organized resistance to collective bargaining even after the passage of the Wagner Act, and promoted anti-closed-shop and other restrictive state legislation is shown in the La Follette Committee's reports on employers' association in California.[21]

By 1938–39 both the Chamber of Commerce [22] and the NAM [23] had approved detailed programs for amendment of the Wagner Act, and they supported the moves in Congress for investigation of the Board and revision of the Act. Both groups argued that the Act had increased strife and created new inequalities in industry. It must be said also, however, that by this time the American Federation of Labor, disturbed by Board policies which in some instances supported CIO unions against the AFL, was proposing amendments too, and thus gave considerable aid to the employers' drive against the Act.[24] In June, 1940, after the House had passed the Smith Bill amending the Act, the NAM called on the Senate to act promptly, in order to enable industry "to make its maximum contribution to national defense." It stated without qualification—for the first time so far as we have seen—that the NAM "does not oppose collective bargaining," but it sought "to correct unsound legislation so that it may operate for the social benefit of the whole people." [25]

The 1938–40 drive for abridging, corrective, "equalizing," or emasculating amendments failed, because of lack of merit or because the Senate Committee on Education and Labor was opposed to them, at any rate at that time. Perhaps the revelations by the La Follette Committee, with its discrediting evidence on antiunion acivities of employers and employer associations, helped to defeat the move. But there must have been some correlation between this drive and the fact that the movement for restrictive legislation got well under way in the states in 1939, with the first laws extensively regulating union activities adopted in four states, two of which had earlier enacted "Baby Wagner Acts." [26]

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[20] *La Follette Committee Reports, National Association of Manufacturers,* p. 218, chs. 5, 6.

[21] For a summary, see *La Follette Committee Reports, Employers' Associations and Collective Bargaining in California, General Introduction,* Report No. 1150, Pt. 1, 77th Cong., 2d Sess., 1942.

For a brief account of some of the numerous local and sectional organizations which later carried on antiunion and prorestrictive legislation propaganda, often with support from large corporations, see Victor H. Bernstein, "The Antilabor Front," *Antioch Review,* 3 (1943), 328–40. A study under way at the University of Chicago by Professor Avery Leiserson on "Public Opinion and National Labor Policy" will throw light on these matters. A brief analysis of the later policies and legislative campaign by the NAM appears in Clark Kerr, "Employer Policies in Industrial Relations, 1945–47," in Colston E. Warne *et al.* (eds.), *Labor in Postwar America* (Brooklyn: Remsen Press, 1949), pp. 43–76.

[22] Chambers of Commerce of the United States, *Amendment of the National Labor Relations Act* (Washington, D.C., March 23, 1939); *New York Times,* April 2, 1939.

[23] National Association of Manufacturers, *Why and How the Wagner Act Should Be Amended* (New York, June, 1939); *New York Times,* March 26, 1939, October 21, 1939. For the major changes proposed by business groups at this time see *infra,* ch. 9, pp. 349–50.

[24] *Infra,* pp. 347–49, 351–53.

[25] *New York Times,* June 17, 1940. In 1942 the NAM quoted with approval as still its position a statement in its 1935 platform to the effect that harmonious cooperation in industry required that "employer and employees be free to bargain collective or individually in such forms as are *mutually satisfactory to them* (italics ours) without coercion from any source." National Association of Manufacturers, *Employer-Employee Cooperation* (New York, 1942), p. 30.

[26] *Infra,* ch. 9, pp. 318–21.

With the war came a respite in attempts to amend the Wagner Act, as employers and Congress turned their attention to other matters. The needs of full production in a time of great shortage of labor was sufficient explanation. The NAM in 1943 published two pamphlets which were quite straightforward accounts of major governmental policies in regard to labor relations, with suggestions as to how to make collective bargaining work effectively.[27] But by 1943 a coal strike brought to a head growing agitation for antistrike legislation. When the Smith-Connally War Labor Disputes Act was under consideration, the NAM announced its support. The passage of this bill over the presidential veto in June, 1943,[28] gave warning that anti-union feeling was growing in Congress and might become a force to be seriously reckoned with later. The NAM published an address of one of its leaders in January, 1944, in which suggestions were made in rather general terms for amendments of the NLRA.[29] And in 1943 and 1944 the movement for restrictive legislation in the states made considerable headway, especially in the West and South.[30]

During 1945, as the war moved swiftly toward its close, there were many signs of trouble ahead on both the industrial and the legislative fronts. An effort was made under the leadership of Eric Johnston, then president of the Chamber of Commerce of the United States, to secure agreement by industry and the major union federations on a charter of principles to promote full production and industrial peace. A statement of principles initialed late in March by Johnston, and by Philip Murray and William Green for the CIO and the AFL, was ratified by the boards of these three organizations. It was hoped that the NAM would join, but that organization held back lest it interfere with its efforts to obtain new legislation. NAM members on the Automotive Council for War Production were reported as especially opposed. The CIO had headlined the agreement "It's Industrial Peace for the Post War Period," but the high hopes collapsed, and no meeting was held of the joint committee planned to implement the charter. The final blow was given when the AFL Executive Council, under pressure from the Carpenters and others, decided that it would not sit with the CIO in joint sessions.[31] Meantime it had been disclosed that a joint NAM-Chamber of Commerce Committee was working on a program of restrictive legislation. It was clear that there was dissent from the Johnston approach in the Chamber of Commerce as well as in the NAM. An NAM publication in March, 1945, suggested that it was "time for management to act," assuming that much of industry would continue to deal with organized labor but that law could establish rules which would provide an atmosphere more conducive to "mutual respect and equality of bargaining strength."[32]

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[27] National Association of Manufacturers, *Collective Bargaining, a Management Guide* (New York, July, 1943), *Collective Bargaining, Management Obligations and Rights* (New York, November, 1943).

[28] *Infra*, pp. 298–99. The adoption of the "Frey rider" to the Board's appropriation, in July, 1943, at the request of the AFL metal trades unions, also reflected at least an anti-Board and anti-CIO feeling; *supra*, ch. 6, pp. 207–9.

[29] H. W. Prentis, Jr., *Government's Place in Postwar Labor-Management Relations* (New York: National Association of Manufacturers, 1944).

[30] *Infra*, ch. 9, pp. 322–26.

[31] *New York Times*, March 29, 1945; April 24, 1945; May 6, 1945; June 10, 13, 15, 1945; *CIO News*, April 2, 1945; May 21, 1945.

[32] National Association of Manufacturers, *Labor Relations Today and Tomorrow* (New York, March, 1945).

The Ball-Burton-Hatch Bill, introduced in the Senate in June, 1945, was the first step in the final serious attempt to revise the federal laws. Labor papers began to point to signs of a rising antiunion drive like that which followed World War I and to charge conspiracy on the part of big employers to foment strikes in preparation for a legislative drive. They found some support in the widely quoted and distributed pamphlet by John W. Scoville, economist for Chrysler, which after an attack on all collective bargaining as monopolistic and therefore against public interest, declared: "As industrial turmoil increases, more and more people will see the evils generated by collective bargaining, and we should look forward to the time when all federal labor laws will be repealed." [33] The active drive for legislation waited upon the outcome of the Labor-Management Conference in November [34] and the new congressional session. But the comment of *Business Week* on the tenth anniversary of the Wagner Act was significant:

> The fact remains that industry still is not reconciled to what it believes is a one-sided statute against industry's interests. It seems safe to predict that unless they succeed earlier, more than another decade will go by before employers give up their attempt to amend or repeal the law. . . . The more impressive the Board's record, the more heated that argument will become, for behind every case that NLRB closes in favor of employees is an employer who has had to change his personnel practice.[35]

The propaganda campaign continued. The NAM in February, 1946, began a series of newspaper ads in which among other points it called for "establishing a labor policy that will treat labor and management exactly alike, and above all be fair to the public." [36] The great postwar strikes of early 1946 gave occasion for extensive, full-page newspaper ads by "struck" corporations, and answering ads by the unions. The American Iron and Steel Institute and the United States Steel Corporation, for example, carried on a campaign in the country newspapers during the steel strike by "canned" stories and editorials and advertising.[37]

Influential groups in industry in 1946 still wanted to seek repeal of the Wagner Act,[38] but both the Chamber of Commerce [39] in May and the NAM [40] at its December meeting defeated such proposals. Apparently the policy was to be to accept collective bargaining but to attempt to curb union power. The Chamber called for extensive "equalizing amendments" and for legislation against monopolistic practices of unions and various types of strikes. It suggested that other states consider the experience of those with labor relations laws. In the NAM a minority argued strongly for complete repeal of the Wagner, Norris-La Guardia, and Wage and Hour Acts. But the program adopted was a more moderate one for amendments to the Wagner Act and legislation to restrict strikes and promote union responsibility,

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[33] John W. Scoville, *Collective Bargaining*, address before Kiwanis Club, Detroit, August 8, 1944, distributed without charge by Newspaper Statistical Service, Detroit. A sheet inclosed urged that the reader inform his congressmen of his views.

[34] *Infra*, pp. 306–11.

[35] *Business Week*, July 14, 1945, pp. 97–98.

[36] National Association of Manufacturers, *The Challenge and the Answer* (New York, 1947), p. 6.

[37] P. Alston Waring and Clinton S. Golden, *Soil and Steel* (New York: Harper & Bros., 1947), pp. 34–40.

[38] The National Founders Association put itself on record favoring repeal. *New York Times*, November 9, 1946.

[39] *Ibid.*, May 5, 1946. Chamber of Commerce o fthe United States, *Policy Declarations, Industrial Relations in America*, adapoted May 2, 1946.

[40] *New York Times*, December 6, 1946; December 23, 1946.

similar to that presented in the massive two-volume work on *The American Individual Enterprise System*, published by the NAM in 1946.[41]
and committees and conference rooms and on the floor of both houses

The year of reconversion crises came to an end with the only new federal labor relations legislation the Lea Act, directed against the Musicians, and the Hobbs Act, directed against the Teamsters.[42] The Case Bill had failed of passage when the House mustered only 255 votes against 135 for overriding the President's veto.[43] But in several more states in 1945 and 1946 restrictions upon unions had been added to the books by statute or constitutional amendment.[44] And a new Republican Congress was about to meet, with a "mandate" from the people, although not a clearly defined one.

In 1947 as the final chapter was written in congressional hearings and committees and conference rooms and on the floor of both houses, the propaganda campaign was continued. We can only guess at all its ramifications as it was carried on through state and local organizations directly or indirectly affiliated with the national assocations, through the local and trade press and radio, and by contacts with women's clubs, education, farm leaders, and other groups. The NAM frankly described its public relations methods in a pamphlet published in 1947. The "targets" were: "The great, unorganized, inarticulate, so-called 'middle-class'; The younger generation . . .; and The opinion-makers of the nation."[45] Its ads which appeared in the *New York Times* indicated the character of the campaign. In January, 1947, a full-page ad headlined "For the good of all," called for cooperation and a "fair" program for industrial harmony. It asked for equality of obligation upon unions and employers, prohibition of monopolistic practices by either, freedom to strike except under certain conditions, freedom from coercion, prohibition of compulsory union membership and of any requirement that employers bargain collectively with foremen, and for "impartial administration of im-

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[41] National Association of Manufactures, Principles Commission, *The American Individual Enterprise System* (New York: McGraw-Hill Book Co., 1946), Vols. I and II, esp. 1, pp. 215–24; *cf.* also National Association of Manufacturers, *The Public and Industrial Peace* (New York, 1946). This work had called the Norris-La Guardia Act class legislation which should be repealed or substantially modified, along with amendments to the Wagner Act.

[42] *Infra*, ch. 9, n. 51.

[43] *Ibid.*, pp. 360–62. The cut in NLRB appropriations had also been significant.

[44] *Ibid.*, pp. 326–28.

[45] National Association of Manufacturers, *The Challenge and the Answer* (New York, September, 1947), p. 3. This was published in connection with a drive for three million dollars to carry on the program. It described in detail the extent and nature of its activities. Among those directed to the public was its newspaper ad campaign, starting in January, 1947, with full pages in 73 metropolitan dailies, and continuing in April and May with five ads appearing in "287 daily newspapers in 193 key industrial centers, having a combined total of 38 million readers"; "Views were presented constructively, not argumentatively, and 'in the *public* interest'" (italics and quotation marks in original). *Ibid.*, p. 11. Weekly transcribed programs, supplied free, were used by more than 350 radio stations. A press service clipsheet went to 5,665 weekly newspapers and 2,500 trade and employee publications. Monthly periodicals specially prepared for each group went to 40,000 teachers, 40,000 club women's leaders, 20,000 farm leaders, and 25,000 clergymen. "In all this work the NAM reaches the people whose opinions in turn influence many millions of Americans in every walk of life." *Ibid.*, p. 16. Labor legislation was a major point of emphasis in 1946–47. The pamphlet suggested, "For the box-score to date, check this three-point program against the record to date." *Ibid.*, p. 6.

Cf. also a headline in the *NAM News*, January 25, 1947, "Congress Will Pass Effective Labor Legislation Only If Firmly Reassured by Staunch Public Support," and the statement, "If the majority of the people think strong labor legislation is essential—and let Congressmen know their views—the chances are that the people will get what they want." Quoted from Kerr, *op. cit.*, p. 59. Later numbers of the *News* indicated considerable resentment at the barrage of labor opposition to which Congressmen were subjected. The NAM pamphlet, *Americans Won't Stand for Monopolies* (New York, April, 1947), received wide distribution. For a comment on the unions' counterpropaganda campaign, see *infra*, pp. 294–95.

proved laws primarily designed to advance the interests of the whole public while still safeguarding the rights of all employees." It said also: "The preservation of free collective bargaining demands that government intervention in labor disputes be reduced to an absolute minimum." [46] The general tenor of later ads, in April and May, can be seen from their headlines: "How about Some Pro-Public Legislation?"; "Industry-wide Bargaining is No Bargain for You"; "The Road to Freedom for the American Worker"; "Who Wants the 'Closed Shop'?" [47] The ads were made up for the most part of appealing slogans, with little detail. They were designed to appeal to any anti-union sentiment in the name of fairness and equity, the interests of individuals, the "right to work," and equality. In addition, the *NAM Law Digest* by detailed analyses of state regulation of unions and its constitutional basis, and of proposals under consideration in Congress, encouraged its members and affiliated associations to work on the legislative front.[48]

Meantime, the Chamber of Commerce adopted at its May, 1947, meeting a program going far beyond its earlier ones. It now put major emphasis on protecting the public from interruption of operations, called for limitations on strikes, for the outlawing of any coercion and of compulsory union membership, for control of monopolistic practices of unions, exclusion of foremen from bargaining, accountability at law for any injurious conduct by employees and unions as well as by employers, and in general for "equality" of the laws and equitable administration. It called on the states as well as the federal government to act on these and other points.[49] The program was in generalities, some unexceptionable, some debatable. No one could object to the statement of the need for continuing improvement of legislation and for "intensive study" of problems by the state and federal legislative bodies. But details were still to be worked out, and some of them would be a far cry from the Chamber's stated desire for "that minimum of control that will encourage voluntary rather than government-imposed settlement of labor disputes."

To summarize, over the years the major national associations of employers, with the NAM in the lead, had started with outright opposition to the Wagner Act and obstructionism, and only belatedly came to accept, verbally at least, the right to collective bargaining through majority representatives and its protection by law. But from 1937 on they continued to talk of the "unfairness" of the law and to call for amendments. And after V-J Day they went much further, relying on a public reaction aroused against unions by the postwar strike wave and inflamed by continuous publicity attacks. The campaigns were made not in the name of the interests of employers, so much as in the more appealing name of the interests of the public and of individual employees. The fact that they involved primarily a struggle over industrial and political power was concealed only from the uninitiated. The long propaganda campaign was directed in part at real problems on which experience clearly showed need for new legislation. But it went much beyond that; it used typical propaganda methods of

[46] *New York Times*, January 8, 1947.
[47] *Ibid.*, April 28 and 30, 1947; May 11, 1947; June 1, 1947.
[48] "State Regulation of Labor Union Practices and Affairs," *NAM Law Digest*, 9 (December, 1946); "Pending Labor Legislation," *ibid.*, January, 1947, Supplement No. 2.
[49] Chamber of Commerce of the United States, *Policy Declarations, Industrial Relations in America*, adopted May 1, 1947.

appealing slogans, half-truths, misinterpretation and possibly known misrepresentation, as well as failure to disclose real motives; and by these means it prepared the way for seriously weakening the protection of the right to organize against the many employers who were still antiunion, of the freedom of unions to function in the interest of their members—and of the freedom of employers and unions to work out their own problems by collective bargaining—as well as for restraints upon abuses of power by some irresponsible unions.

It may be asked whether all this was not the normal and to be expected opposition and propaganda of those who disapproved of the Act. But its significance is the influence of a well-organized and very well-financed group who did not necessarily represent fully either the opinions or the long-run interests of the majority of employers. The long campaign was successful only when other elements in a complicated situation made the times propitious for the final drive. Nevertheless, it appears that a large share of the responsibility for the character of the 1947 legislation is to be attributed to this organized movement, which history may say overreached itself.

A word should be said about other groups who did not follow the line of the NAM. The American Management Association, with its background of interest in scientific management and personnel administration, in its annual meetings considered rather practically matters of how to deal sensibly with problems which arose under the new national policy, and much good advice was given by experienced men. While different points of view were expressed, the net effect must have been to promote acceptance of collective bargaining and a realistic consideration of the needs of the future. Somewhat similarly the Committee for Economic Development in its statement on national policy early in 1947 put emphasis on ways of making collective bargaining work better on a voluntary basis. It presented a limited program for legislation to supplement existing policy by supporting free collective bargaining, outlawing interferences with it, and outlawing such union activities as jurisdictional strikes, strikes to compel violation of laws, and union monopolies which are clearly evasions of the antitrust laws.[50] But it is doubtful whether these organizations had as much influence upon employers, or certainly upon the public, as did other groups with their extreme campaigns for a change in national labor policy.

Individual employers

If these were the attitudes and policies of the major associations which acted as spokesmen for employers, what of the attitudes of individual employers themselves? In attitudes and activities employers formed several different groups; and, as a result of legal decisions and changing labor market conditions, union policies, and personal and group experience, in many instances employers shifted from one group to another.

Always there was a minority of employers opposed "on principle" to the Wagner Act *in toto*. They thought in terms of personal government rather than of representative government in industry. They usually avoided any dealings, or at least any effective dealings, with

[50] Committee for Economic Development, Research and Policy Committee, *Collective Bargaining: How To Make It More Effective* (New York, February, 1947).

unions. Some of these were employers whose personal experience, as they interpreted it, or the experience of others which had come to their attention, was unfortunate, so that they thought in antiunion terms. At the other extreme were many who from the start accepted and practiced rather carefully whatever was called for by law. There were also many, perhaps a majority, who were converted by experience, brought to dealing with the unions by pressure of the law and union strength, but who found collective bargaining not too difficult a way of handling labor relations, sometimes even with some advantages. Some of this moderate group were not frightened by any issue of power and had few, if any, fears of things to come as they worked out problems with the unions. Many of these, however, had reservations: they feared that unions might get too much power; they wanted the Wagner Act "equalized" and perhaps that certain union practices should be eliminated by law. A final group gave at least lip service readily enough but were prone to avoid the law and to "cut second base" in so far as they thought they could succeed; they evidently did not accept either existing national labor policy or union strength as permanent and requiring complete adjustment to the needs of a new relationship. These would follow the militant leadership of the NAM when conditions were propitious, or under other conditions go along with the more moderate group.

When employers' attitudes changed, this reflected many factors, such as particular experiences with labor organizations and collective bargaining. Changes in the market for the product and for labor and problems of manpower during conversion and then postwar reconversion had their effects, too, on employers' minds. Postwar fears of depression stiffened the resistance of many. Many employers in their attitudes reflected the widespread opposition to any part of the "New Deal." Many were influenced in addition by the campaigns for restrictive legislation and adopted those attitudes as their own even when they got on well with their own unions.

The points most on the minds of employers in 1947 as they thought of their experience under the Wagner Act and of the possibility of new legislation are shown by testimony from many, though somewhat selected, employers before the congressional committees in 1947 and from numerous others in interviews. Most frequent of all were the problems of boycotts and strikes to coerce violations of law, or against the desires of employees, or in jurisdictional disputes. Very frequent was dislike of union security, either on "principle" or because it increased union strength. A great many employers were at least somewhat concerned over the "free-speech issue," especially because of uncertainty as to the extent to which they were limited. A considerable number were concerned, particularly as they thought of the past, over what seemed unfair administration of the Act. Many were worried over problems of union responsibility and stoppages, and some over "union refusal to bargain," especially in connection with industry-wide bargaining or the influence of the international unions in local situations. Many were worried, too, about "management prerogatives" and the scope of collective bargaining required by law. To some the issue of bargaining by foremen was important. But, in spite of all this, many were not greatly worried about the

laws and did not expect to be particularly affected by any change. The temper of most in individual discussion was rather more dispassionate than was the growing heat of the public campaign for amendments.

Later trends in NLRB cases suggest a changed psychology on the part of at least a fraction of the employers after V-J Day. Certainly some labor spokesmen thought that this was so, and their attitudes were affected by that conclusion. Reconversion, with expanded organizing drives especially in the South, again brought changes in the character of the work of the NLRB. The number of representation cases continued to increase, but the relative increase in complaint cases was even more. The change was in part to be expected. But the increase in charges of refusal to bargain collectively was probably significant. This was no doubt affected somewhat by the fact that the War Labor Board was no longer available, and by the fact of a large number of union represenatives who had become unused to collective bargaining and to the need for presenting carefully considered demands if that process was to be effective. Yet many employers apparently came to be of the same mind in their relations with the unions as most were following World War I. The increased number of complaint cases and the decreased proportion that could be adjusted informally indicated a stiffening of resistance by employers in the last three years of the Wagner Act. The same was true of the increasing effort of a large fraction of employers to influence representation elections.

The experience with Board elections may be regarded as something of a barometer of employers' thinking and behavior, whether based upon "principle," experience, or fear. Especially after "free-speech" decision in the American Tube Bending case it became not at all exceptional for an employer to act as though he were "running against the union," going beyond merely answering any misleading and exaggerated statements made by the union in its campaign.[51] In the later years more and more companies became active in these elections. To say the least, the inference was that these employers objected to such representative government as was in prospect, if not to all such representative government, and would prevent it if possible, even though they might accept it if an election were won. The steadily declining proportion of elections won from 1944 on must have been related to these activities.

All these indications of opposition by employers, even though a minority, to the basic purposes of the Wagner Act or to the increase in union power, or both, along with the growth of the propaganda for basic changes in the governmental labor policy, both state and federal, made a deep impression on the minds of workers and union officials and affected their actions. Increasingly in 1946 and 1947 union papers charged that there was a "conspiracy" led by big employers, comparable to the open-shop drive after World War I, to provoke strikes, stimulate antiunion organizations and sentiment throughout the country, and provide a pretext for the passage of

[51] Cf. *supra*, ch. 5, pp. 166–69; ch. 6, pp. 174–89.

antiunion legislation.[52] The unions countered through their own papers and later through ads and the radio. But their access to the "public" was never as extensive as that of the organized employers. Also, it was too largely in terms of slogans to bring about much real understanding of issues. And its countereffectiveness must have been limited by the fact that the unions failed to admit and offer solutions for the real abuses in parts of their own field which made them vulnerable to attack. The press was of course generally hostile to the unions and the Act.[53] And in 1947 the drive of employer groups, with considerable support from "the general public," to impose substantial legal curbs upon unions, was successful to varying degrees in some thirty states and in Congress.

A word must be added on the influence of lawyers in all this. The widely distributed report in late summer of 1935 on the "unconstitutionality" of the Wagner Act by the National Lawyers Committee of the American Liberty League, signed by fifty-eight lawyers, many of them eminent members of the Bar, had great influence on employers' attitudes and practices.[54] Some of this group continued to be among the most active and determined opponents of the work of the NLRB. Throughout the country the influence of individual attorneys could be seen in the patterns of conduct which many of their clients followed in relation to the Act and the Board.[55] Many became known as masters of obstruction, delay, and subtle violations of the spirit of the Act which were difficult to prove. Some of them were largely responsible for the continuing resistance of groups of employers who fought the law and the unions with all the weapons available to them, rather than devoting constructive efforts to working out problems with the representatives of their employees. Certainly many found a profitable business in encouraging employers' resistance. The "free-speech" campaigns of course showed the hand of counsel who found employment in the preparation of employers' campaign literature. To the credit of the profession it must be said that many attorneys, and an increasing number, counseled a sensible attitude of acceptance of the purposes of the Act and attempts to solve problems by collective bargaining. But there were too many who either "on principle" or for less creditable motives encouraged at least part of industry in the failure ever fully to accept the basic policies of the Wagner Act. Advice of counsel must have been influential both in individual busi-

[52] Cf. James A. Brownlow, "This Is Not the 1920's," *American Federationist*, 54 (May, 1947), 15–17; Ruben Levin, "Take Heed America," *Machinists Journal*, 58 (April, 1946), 86–87; Philip Murray, statement in *CIO News*, June 3, 1946, p. 1; editorial, *ibid.*, pp. 4–5.

That some of these fears were felt by others, too, is shown in an address by Gerard D. Reilly in May, 1946, while still a member of the NLRB, to the Southern Labor Conference, AFL, in Asheville, N.C. The text, as given in an NLRB release, May 11, 1946, stated: "As I see it, in the very near future the acceptance and practice of collective bargaining in certain areas may well be put to as severe a test as any of our other institutions have had to face. Let us not forget what happened after World War I, when the 'Open Shop Plan' swept certain areas and left a wake of disrupted unionism. . . . All concerned should be careful lest, either through ignorance, anxiety to do away with strikes or to put one over on the other team, they surrender irreplaceable and basic liberties."

[53] For an analysis of the treatment in the periodical press from April 1, 1947, through January 31, 1948, of the issues involved in the Taft-Hartley Act see Philip Ash, "The Periodical Press and the Taft-Hartley Act," *Public Opinion Quarterly*, 12 (summer, 1948), 266–71. "The viewpoints of organized labor, presented in positive terms, did not appear in any of the major periodicals of wide circulation . . . the viewpoints of management and related groups that favored the Act appeared frequently . . ." (p. 271).

[54] For the list of signers and the report, see U.S. House of Representatives, Committee on Labor, *Hearings, Proposed Amendments to the National Labor Relations Act*, 76th Cong., 1st Sess., 1939, Vol. 8, pp. 2241–87.

[55] Cf. *supra*, ch. 4, pp. 121, 127. Every Regional Director could cite instances.

nesses and in the decisions of the NAM and other associations which carried on the long fight, even while the larger group of employers, probably the large majority, were accepting the national labor policy. And the law which resulted in 1947 was above all the handiwork of lawyers.

PERFORMANCE AND NONPERFORMANCE BY GOVERNMENT

Policies and actions of the federal government, both the Administration and Congress, in relation to industrial disputes in the war and postwar periods, also played their part in developing the complicated situation out of which came the new legislation of 1947. Failure to prepare adequately and wisely for postwar problems and the resulting instances of "crisis government" were of major significance in bringing about the bitter strikes of the postwar years, which made possible the drastic 1947 legislation.

The brief reliance for industrial peace and uninterrupted production during the war was upon the no-strike pledge which the unions voluntarily gave the nation after Pearl Harbor. But there was need for adequate machinery to settle disputes. The National Defense Mediation Board, established by the President in March, 1941, to supplement the work of the Conciliation Service, came to an end in November, 1941, in a conflict over the United Mine Workers' demand for a union shop in the "captive mines" of the steel corporations. It had been handicapped by the lack of agreed-upon principles as a basis of its work, although such principles might have been established had the opportunity for an early representative conference been grasped. After Pearl Harbor the President called a conference of industrialists and labor leaders, from the NAM, the United States Chamber of Commerce, the AFL, and the CIO. They agreed readily on a no-strike, no-lockout policy for the duration of the war, and for the establishment of a new agency to settle disputes, but they failed to agree on policy as to union security. The unions were unwilling to freeze the status quo as was done in the last war, and employers opposed any extension of the closed shop. Instead of insisting upon a resolution of this issue, the President rather abruptly announced that agreement had been reached on policies to avoid interruption of operations and that a National War Labor Board would be established to handle labor-management disputes which the parties failed to settle by other means. On January 12, 1942, an Executive Order established a tripartite twelve-man Board, with power to determine *all* disputes certified to it by the Secretary of Labor. Developing its principles on a case-to-case basis and refusing to consider disputes until strikers went back to work, and decentralizing as much as possible of its work through regional boards, the Board had a large degree of success in settling disputes which the Conciliation Service had been unable to resolve. Despite some serious clashes of interest and opinion within the Board, it held together with its management, labor, and public membership and was able to carry on its important public service all through the war years.[56]

[56] For a valuable analysis of this experience see George W. Taylor, *Government Regulation of Industrial Relations* (New York: Prentice-Hall, 1948), chs. 3 and 4. The official history is National War Labor Board, *Termination Report* (Washington, 1947); cf. also E. E. Witte, "Wartime Handling of Labor Disputes," *Harvard Business Review*, 26 (1947), 169–89; Dexter M. Keezer, "Observations on the Operations of the National War Labor Board," *American Economic Review*, 36 (1946), 233–57.

The issue of union security was one of the War Labor Board's most difficult problems in view of the lack of agreement between industry and labor. The "maintenance-of-membership" compromise proved a workable solution, although employer members were never reconciled to it; and it prevented strikes which otherwise might have occurred over this issue. During the war closed-shop and union-shop agreements increased only a little in the proportion of workers covered, but "maintenance-of-membership" agreements covered nearly three in ten of workers under agreement by 1945. With the end of the war and a return to "free collective bargaining" unions sought to obtain the stricter forms of union security, and by 1946 closed-shop and union-shop clauses covered nearly 7.5 million workers, half of those under agreement.[57] This effort of the unions to extend union security, especially strong because of their fears of an antiunion campaign, was one of the factors leading to the increased drive for anti-closed-shop legislation, which again accentuated the union's feeling of insecurity.

The War Labor Disputes Act and strikes

While the number of employees and the proportion covered by collective bargaining agreements rose greatly during the war years, the great majority of agreements resulted from bargaining by the parties without any intervention of government agencies. And the great majority of all agreements and disputes settlements were reached without strikes. Time lost by strikes dropped sharply in the first war year, but in 1943 it increased, with the result that antistrike legislation began to receive serious consideration in Congress. The issue came to a head with the coal-mine stoppages in May and June. AFL and CIO unions reaffirmed their no-strike pledge.[58] Nevertheless, although the legislation was opposed, as no solution for strikes, by the Secretaaries of Labor, War, and the Navy, the WLB, and the Chairman of the War Production Board, both House and Senate passed the Smith-Connally War Labor Disputes Act and on June 25 overrode the President's veto.[59] The Act gave statutory authority to the War Labor Board and authorized the President to seize and operate struck plants; the latter had of course already been done under the existing war powers, but now instigating a strike in such a plant was made subject to penalty. Most controversial were the provision for thirty days' notice of a labor dispute which might interrupt war production, and provision for a secret ballot by the NLRB on the thirtieth day thereafter, if the dispute had not been settled, on the question whether the employees wished to permit an interruption of production over the issue involved. Anyone failing to meet the requirement as to strike notices might be held liable for damages incurred as a result of a strike in which the required notice had not been given. There was also a provision, entirely irrelevant to the stated purpose to prevent strikes but giving insight into underlying attitudes, prohibiting political contributions by labor organizations in connection with a national election, with penalties of fine and imprisonment.

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[57] *Monthly Labor Review*, 64 (1947), 767.
[58] *New York Times*, May 15 and 18, 1943.
[59] 57 U.S. Stat. 163 (1943), Cf. *infra*, ch. 9, pp. 354–56.

The President's veto had been directed especially at the provision for strike votes which, he pointed out, ignored the no-strike pledge and might in effect encourage strikes. It is worth while to consider the experience under this provision. Strikes did not decrease; rather, with ups and downs the generally upward trend continued through the war, reflecting increasing tensions. The provision for notice and strike-vote elections proved expensive and disrupting. It was difficult for union leaders, most of whom were loyally trying to maintain the no-strike pledge, to explain to their members that the government, which was providing the machinery for a strike vote, had not meant to make strikes legal or proper. Strike notices were filed in large numbers as a means of bringing disputes effectively to the notice of government agencies and putting pressure on them and on employers for a settlement. Sometimes this stirred up strike sentiment and made it more difficult to control. The thirty-day waiting period, especially where a strike vote was actually conducted, served more for "boiling up" than "cooling off." The unions naturally used the strike notice and ballot as an organizing and bargaining device. In general, in the strike polls they won a large vote in favor of striking—but then did not strike. Most strikes which occurred during this period were regardless of the provisions of the Act. Where polls were held the votes in favor of a strike rose from 68 per cent in 1943 to 72 per cent in 1944 and to 84 per cent in 1945. But work stoppages followed such favorable votes only in 34 out of 102 cases in 1943, in 69 of 271 in 1944, and in 213 of 1,249 in 1945.[60]

After V-J Day and the end of the no-strike pledge the unions made more use of the system both as a bargaining device and for protection against any charge of illegality, since the Act was still on the books. The NLRB was swamped by the necessity of conducting these votes,[61] some of them on a nation-wide basis, as in the cases of the Ford, General Motors, and Chrysler employees and the steelworkers in November, 1945. Faced with the problem of a stoppage of administration of the NLRA because of concentration on strike polls, and the enormous cost involved, Congress finally ordered the Board to expend no more funds on such polls, effective December 28, 1945.[62]

This experience indicates that when governmental intervention in a labor dispute takes the form of asking workers publicly to support or repudiate their leadership, they tend strongly to do the former. The comment of John L. Lewis was significant, after the bituminous coal vote which cost the government over $160,000, in March 1945, when he expressed his pleasure at receiving an "overwhelming vote of confidence." [63] Altogether the Act had relatively little total effect on wartime labor relations, but what it had was more often hurtful than constructive, although it was a very expensive experiment. The damage-

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[60] *Monthly Labor Review*, 58 (1944), 941; 60 (1945), 970; 62 (1946), 734. The complete figures on cases filed under the War Labor Disputes Act are reported by the NLRB. Polls were held in 1,571 cases, or 2,168 separate units, of which 1,850 voted for a strike Nearly two million votes were cast; 26,630 separate employers were involved. *Eleventh Annual Report*, pp. 68–69, 91.

[61] Cf. *supra*, ch. 2, p. 61.

[62] Until the Act expired in June, 1947, however, unions continued to file the notices, and in increased numbers, probably chiefly to avoid the possibility of damage suits in a time of increased conflict. By May a total of 4,159 had been filed during 1947. *New York Times*, June 11, 1947.

[63] *Ibid.*, March 30, 1945.

suit provision was little used, apparently.[64] The provisions as to the powers of the WLB and of the President in seizing struck plants were helpful to some degree. But the punitive antiunion approach was not calculated to promote an atmosphere in which disputes could most easily be settled.[65]

A summary picture of the trends of industrial disputes—strikes and lockouts—is needed since they were so significant a factor in building up the complicated situation out of which came the 1947 legislation.[66] This resulted partly from the great number of persons involved or affected, in part from the great sensitivity of most people to industrial disputes, and in part from Washington policy.

For some fifteen years the number of disputes had been considerably larger than it was during the 1920's and the early 1930's when unionism was at low ebb. The number in each year 1944–46 (4,750 or more) and in 1937 (4,740) exceeded the previous high of 4,450 in 1917; and strikes were almost as numerous in 1941. As to the number of employees directly involved, however, no years until 1945 with 3,470,000 and 1946 with 4,600,000 were at all comparable to the previous peak of 4,160,000 in 1919. The number of employees directly involved in strikes might be expected to grow as the number employed, and especially the number of union members, increased greatly over the years. But the proportion of all employees who were involved in strikes in the year in 1943 and 1944 was only slightly above that of the earlier war, and even in 1945 with 12.2 per cent involved in strikes, and 1946 with 14.5 per cent, this was far below the 1919 peak of 20.8 per cent. Thanks to more and better machinery for the conciliation and arbitration of disputes, to the strong pressure exerted by public opinion as war approached and then became a reality, also to the no-strike pledge, the average length of stoppages was much less than it had previously been. Even in 1945 the average length of strikes increased only to 9.9 days, from a little more than half as many in 1944; and not until 1946, when the great strikes of the winter brought the average duration up to 24.2 days was it at all comparable to the late twenties and thirties. The index of man-days lost as a direct result of stoppages increased, however, from 1935–39 as 100, to 224 in 1945 and to 684 in 1946, as against only 25 in 1942, the first year of the War Labor Board, and 136 in 1941. The previous high, from 1927 when this series began, was 1937, a year of great organization drives and of efforts to "up" wages when business had improved. The percentage of estimated working time that was lost directly by strikes for the entire period of World War II was only 0.11, although for the first postway year it rose to 1.62 per cent.[67]

The years 1945 and 1946 were therefore relatively bad strike years, in terms of the annual figures. Yet they should not be considered as a

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[64] Dr. Witte reports that some cases were pending in 1947, but there had been no recovery by that time. Witte, *op. cit.*, p. 182. A settlement out of court in a suit against the Teamsters for $500,000 damages for losses in a strike in which no notice was filed, was reported in the *Baltimore Federationist*, March 9, 1945, according to an *NLRB Press Release*, March 14, 1945. One group of miners was prosecuted and sentenced for a strike while the mines were under government operation, but only one of the miners was actually imprisoned, when he violated his probation by instigating work stoppages, according to the *New York Times*, June 2, 1945.

[65] For other appraisals cf. Witte, *op. cit.*, pp. 181–83; Taylor, *op. cit.*, pp. 165–69.

[66] Full details are available in the annual reports by the U.S. Bureau of Labor Statistics. Cf. *Monthly Labor Review*, 64 (1947), 782.

[67] *Ibid.*, 63 (1946), 883. For calendar year 1945 it was 0.47 per cent; for 1946 it was 1.43 per cent.

whole. V-J Day in August, 1945, brought considerable change in the trend. Man-days idle in industrial disputes had been rising through the spring months as workers became more restive over "frozen wages." But it was not until after V-J Day, when no-strike pledges were considered no longer binding—some had of course thought this earlier—that the figures really jumped. Then as the great strike wave of winter and early spring developed, man-days lost rose to seemingly astronomical figures in January and February, 1946, nearly 23 million in the latter, then declined and for the last half of the year remained around the level of September, 1945. In 1947 again they decreased, until the coal, telephone, and maritime strikes sent them soaring in April, May, and June.[68] Even at the peak in February, 1946, the percentage of estimated time lost directly by the strikes had been only 4.19. This, however, was little measure of the disruption of the economy by the strikes in basic industries.

This, then, was the immediate background of the demand for anti-strike legislation which rose in Congress in 1946 and resulted in the vetoed Case Bill in June of that year, as well as other proposed anti-strike measures. But several things need to be said. The first is that the record for the war period was relatively good in comparison with World War I, when union membership was far less general and the number employed much less. The second is that for every stoppage there were scores of peaceful settlements. In other words, strikes were a decided exception to the general rule, especially during the war, but also even during the difficult reconversion period. The third point relates to the causes behind the strikes. Careful consideration of policies, procedures, and causes as well as the results of strikes is needed, in addition to the bare facts of their numbers.

In most years for which we have data, wages or wages and hours have been the largest and generally the dominant cause of strikes and lockouts.[69] Though "fringe issues," such as maintenance of membership, travel time, seniority rights, and the like, became more and more important causes of disputes during the life of the War Labor Board, the cause of causes was still to be found in wages and hours. And most dramatically was this true in the great strikes of the first postwar year. In strikes involving 1,000 or more workers from V-J Day to June 30, 1946, with a total of nearly 4 million workers involved

[68] The monthly figures of man-days lost in strikes were as follows in thousands:

Month	1945	1946	1947
January	199	19,700	1,340
February	388	22,900	1,230
March	775	13,800	1,100
April	1,470	14,300	8,540
May	2,220	13,700	6,730
June	1,890	4,580	3,960
July	1,770	3,970	3,970
August	1,710	3,900	2,520
September	4,340	4,880	1,970
October	8,610	6,220	1,780
November	6,930	4,980	829
December	7,720	3,130	590

Source: Monthly Labor Review, 64 (1947), 789; 66 (1948), 483.

[69] Harry A. Millis and Royal E. Montgomery, *Organized Labor* (New York: McGraw-Hill Book Co., 1945), pp. 699–702.

and more than 104 million man-days lost as a direct result, wages and hours were the major issue for over 77 per cent of the strikers and nearly 86 per cent of the lost time.[70] We shall return to these postwar strikes after a consideration of certain factors in governmental and industrial policy which were significant in bringing them about.

Reconversion issues

The end of the "shooting war" brought industrial relations problems incidental to reconversion that were as difficult as, perhaps more difficult than, those involved in prosecuting the war. Events during this period, and especially what government did and failed to do before and during those crucial months, weighed perhaps even more than factors discussed earlier in the final decisions as to new federal labor policy in 1947. In our view, certain things of fundamental importance failed to be recognized and appropriately acted upon.

War had greatly changed the industrial situation and the modes of thought of many groups of people. But neither the Congress nor the Administration developed before V-J Day or later a well-thought-out, well-co-ordinated and comprehensive reconstruction policy. President Truman announced immediately after V-J Day that controls should be removed as soon as possible. The War Labor Board was to be terminated, although no plans had been made for government's role in the inevitable labor conflicts during reconversion to "free collective bargaining" as well as to a postwar "free economy."[71] Wages and purchasing power must be kept up, the Administration said repeatedly, but a large part of any increased labor cost could and should be absorbed by business; any necessary price adjustment would be considered when the need became evident. In no event must there be inflation with its natural offspring of deflation, depression, and unemployment.[72] Labor and certain others agreed, fearful of a specter of serious unemployment; not so some other powerful groups. The concerted drive to eliminate or emasculate price control was largely successful within the first year after V-J Day and almost complete a few months later. Congress, also, presumably under the same pressures as those which wanted the end of war controls, failed to accede to the President's request for expansion of the unemployment insurance system, retention of federal control over the employment service at least during reconversion, or an increase in the minimum wage under the Fair Labor Standards Act. Action on the urgent problem of housing also was hesitant. It was the same at most points on the domestic situation and the problems of reconversion.

The details of all this need not detain us. The immediate point is that lack of consistent and constructive consideration of problems and neglect of causes breeds fear and bad industrial relations. It also breeds narrow, selfish groups. So it was in the two postwar years in America. In this situation each group in the population tended to develop pressure tactics to promote or to protect its own nearsighted interest, and all—industrial organizations, farmers, real estate groups, among others—employed methods not dissimilar to those for which unions were then being criticized. Many of the pressure groups ob-

[70] *Monthly Labor Review* (1946), 886.
[71] Cf. discussion in Taylor, *op. cit.*, pp. 196–206.
[72] See especially the President's statement after V-J Day and his September message to Congress, *New York Times*, August 17, 1945; September 7, 1945.

tained at least a part of what they desired. Certainly the barrage of propaganda and counterpropaganda left the people more confused, bewildered, and divided than enlightened. At the same time some who were neither confused nor bewildered, and who "knew the ropes," could turn the situation to their advantage. All this was unfortunate, for the people of the country faced perhaps the greatest problems in their history and needed to find their way out with some degree of unity and good will. In this confused situation in which emotions ran high, there was the rash of strikes which we have seen, and organized labor lost greatly in prestige. It became more difficult to make necessary accommodations in many sectors of industry, and the opportunities for normal growth in collective bargaining were sacrificed in considerable part. The Labor-Management Conference of November, 1945, was one effort, with only a limited success, to cope with some of these problems.

The dominant immediate issue in industrial relations in the first postwar year was that of wages and their relation to prices. In the background of course were issues as to power, with growing resistance to the unions by important sections of industry, and increasing fear and insecurity on the part of organized labor. For more than two decades organized labor had held the doctrine that wages must increase in step with industrial advance, the standard of living must be improved in good times and must not be permitted to sag in time of unemployment, in terms of wage rates relative to the cost of living. In contrast to some other countries, no exception has been made willingly even during a war when it was difficult to maintain the standard of living already attained. Thus demands for wage-rate increases were insistent during the lift of the National Defense Mediation Board even though workers were being paid for more hours per week, some of this at overtime rates, and the number of wage-earners per average household was increasing. The same was true in the earlier days of the War Labor Board until the adoption of the Little Steel Formula, which permitted a 15 per cent cost-of-living increase in wage rates over those of January 1, 1941. Under the Stabilization Act of October, 1942, the Little-Steel Formula continued as an effective brake, although increases were permitted by the War Labor Board to remove inequities and substandard wages. Also, because of manpower shortages and employers' desire generally to "hold labor" or "attract labor" by increasing wages, indirect ways of accomplishing the result were frequently resorted to by granting holiday pay, vacations, merit increases, incentive pay, and other "fringe" items.[73] As a consequence, increases in the basic wage-rate structure were held to moderate proportions, and for many important industries general increases were little more than 15 per cent. But in addition selective adjustments to individuals and small groups raised the average of rates. And hourly and weekly earnings increased sharply as a result of longer hours of work, overtime rates, shifts to higher-paid industries, upgrading, incentive systems, and other factors. The contents of the weekly pay envelope increased on the average considerably more than the cost of living, although increased taxes and social security deductions, plus War Bond deductions widely made, left actual "take-home" pay for many

[73] National War Labor Board, *Wage Report to the President on the Wartime Relationship of Wages to the Cost of Living, February 22, 1945* (Washington, 1945), pp. 4–11.

individuals only a little, if any, larger in purchasing power than before 1941.[74] Union attacks upon the validity of the Department of Labor's cost-of-living index and attempts to obtain the abandonment of the Little Steel Formula failed to bring about modification of wage policy during the war period.

With the end of the war and the cancellation of war orders, the favorable earnings situation was threatened by reduced hours, less overtime, shifts to lower-paid industries, downgrading, and a decrease in the number of wage-earners per family as many, young women especially, withdrew from the labor force. In addition, there was a reappearance of the problem of unemployment, fears of which were very real in both official and unofficial circles at the time. By October, 1945, average weekly earnings in manufacturing industries had decreased to $41.04 from April's $47.12, or 12.9 per cent, while the cost of living was drifting upward.[75]

Accordingly organized labor, especially in the durable goods industries where there were the greatest cutbacks, demanded increases in wage rates so that with the shorter hours there would be little if any sacrifice in take-home pay. Increasing wage rates and keepings down the cost of living by maintaining effective governmental control of prices were regarded as equally necessary in order to insure purchasing power to support full employment against the specter of mass unemployment. Wage questions, therefore, were the central issue which had to be settled in collective bargaining in the reconversion year. A large degree of freedom of action was given by the Executive Order of August 18, 1945, permitting voluntary wage increases when possible without increases in prices; and later relaxations of the stabilization policies permitted price relief following wage increases under some circumstances. The assumption was, as the President indicated in his address of October 30, 1945, that "there is room in the existing price structure for business as a whole to grant increases in wage rates." It was inevitable that disputes over wages would be difficult. But the War Labor Board was in process of dissolution, and, while its stabilization functions were turned over to a National Wage Stabilization Board, there was no adequate plan for solving the serious disputes which should have been foreseen.[76]

The labor-management conference

Collective bargaining in the fall of 1945, therefore, in its first crucial test after the war, had to deal with a wage problem made more difficult because it was involved in national price policy. The problem would not be settled until political decisions were made on a national scale. In addition, there were controversies over contract clauses such as those on union security, union responsibility, and "management prerogatives" which needed to be worked out now that the War Labor Board was no longer available to settle such disputes and col-

[74] *Monthly Labor Review*, 62 (1946), 538; "Spendable Earnings of Factory Workers, 1941–43," *ibid*, 58 (1944), 477–89.

[75] *Ibid.*, 62 (1946), 290, 304, 343; see also "Workers' Experiences during Reconversion," *ibid.*, 62 (1946), 707–17.

[76] For useful summaries of this period, see "Wage Policy and the Role of Fact-finding Boards," *Monthly Labor Review*, 62 (1946), 537–49; "Money and Real Earnings during Defense, War and Reconversion Periods," *ibid.*, 64 (1947), 983–96. By June, 1946, there had been a decrease from April, 1945, of 8.1 per cent in average weekly money earnings and 12.4 per cent in real earnings; from June, 1946, to February, 1947, money earnings increased 9.2 per cent, while real earnings decreased 4.7 per cent, as the consumers' price index showed its steepest rise in history. *Ibid.*, pp. 989, 996.

lective bargaining was once more free from wartime controls. Fears and resentments on the part of both labor and management growing out of wartime experience and the economic uncertainties of the future also complicated the situation. Increasingly talk was heard in many circles of a coming "showdown."

There had been some little discussion as much as a year before V-J Day of the desirability of a labor-management conference to seek agreement on some of the problems which would face labor and industry as well as government upon the end of the war, but nothing had come of it. Early in 1945 the effort by a liberal group of the Chamber of Commerce to obtain agreement of employer and labor groups on ways to promote peace and co-operation also had fallen by the wayside. Finally, the idea of a labor-management conference under government auspices, which had been "in the air" for some time, was crystallized by a suggestion of Senator Vandenburg to the Secretary of Labor, and the plan for such a conference was approved by the major organizations of both groups. The President announced the plan, but it was not until early September that a representative committee went to work on the plans,[77] and not until November 5 that the Conference convened. By that time the strike crisis was already well under way, and it was too late; at any rate, the Conference failed to avert the major immediate conflicts. The emphasis was upon long term "major causes of industrial strife and the methods of reducing them." The immediate problems of conflicts over wage-price issues, or of a solution when negotiations failed to bring agreement, were not on the agenda.

The Conference, which met on November 5, 1945, consisted of eighteen delegates representing the AFL, CIO, the United Mine Workers and the Railroad Brotherhoods, with alternates; eighteen representing the NAM and the Chamber of Commerce, again with alternates; the Secretary of Labor, the Secretary of Commerce, Chief Justice Walter P. Stacy of the Supreme Court of North Carolina, chairman, and George W. Taylor, secretary. The public members were without vote. The delegates constituted an able, fairly representative, and responsible conference group. Marked differences within each group, however, both among the labor representatives and between the liberal management attitude represented by the president of the Chamber of Commerce and the more militant attitude represented by the NAM, were a hindrance to the most effective work.

President Truman in his opening address called upon the Conference to provide a "broad and permanent foundation for industrial peace and progress." He stressed the imperative need to avoid industrial strife and his conviction that if labor and management were to approach each other with the realization that they had a common goal they could find a way to resolve their differences without stopping production. And he warned them: "If the people do not find

[77] A committee of six, with Major Paul H. Douglas as chairman representing the Secretary of Labor and others representing the Secretary of Commerce, the AFL, CIO, U.S. Chamber of Commerce and the NAM, agreed upon plans which were unanimously approved. The membership of this committee and of the conference itself is available in "Labor-Management Conference on Industrial Relations," *Monthly Labor Review*, 62 (1946), 37–42; U.S. Department of Labor, Division of Labor Standards, *Summary and Committee Reports, The President's National Labor-Management Conference, November 5–30, 1945*, Bulletin No. 77, 1946. The complete documentation of the conference, in processed form, is available also in most university and other leading libraries.

the answers here, they will find them some place else. For these answers must and will be found."

The Conference committees, each of them bipartisan, worked diligently and reached agreement on a number of important problems; on others their agreements and disagreements clarified issues between management and labor representatives. But on major immediate problems which were behind the growing strike crisis they found no basis for an agreed solution.

The first of these issues was that of wages. Philip Murray for the CIO early introduced in the executive committee a resolution pointing out that collective bargaining had broken down over this issue, and calling on labor and management to engage in genuine collective baragining in an effort to resolve the question within the framework of the President's recent message in which he had held wage increases imperative in order to "cushion the shock" of reconversion and sustain adequate purchasing power. Other labor groups objected to the particular formula, although they supported immediate increases arrived at by collective bargaining. Management held that wage increases could not be given without price increases. No agreement was reached, and opportunity, perhaps necessarily so at this late date, was provided for the bitter struggles over the wage-price issue which followed.

A second major question was as to what could be done when collective bargaining broke down. On one point at least the Conference seemed to be in complete agreement—its opposition to anything approaching compulsory arbitration. Great public interest was evident at this time in the possibility of some form of public fact-finding with compulsory "cooling-off periods" in critical disputes, but this matter was not definitely assigned to any of the working committees, and there appeared to be marked reluctance to tackle the issue. The executive committee discussed the matter at length but never reached agreement, and so made no report, and there was no Conference action on the matter. Clearly both sides were fearful of increasing government intervention in collective bargaining, although the president of the NAM stated frankly that it was an aim of the management group "to attempt to reduce strikes to the minimum," and that a cooling-off period would help attain that result. So the Conference failed to find a solution for the immediate problem of the great and paralyzing strikes which were threatened and in fact already under way before its adjournment on November 30.

Greater progress was made on matters of procedures and attitudes which would make collective bargaining work better in the long run. Three committees made unanimous reports which were adopted by the Conference. Two of them wrote sound and constructive statements of established good bargaining practice, the first as to the making of initial agreements, the second, on existing collective agreements. Both emphasized the role of conciliation and, "*where mutually agreed to*, arbitration." Compulsory arbitration, however, not agreed to by the parties, was opposed.

The third committee which reached unanimous agreement and whose report was adopted by the Conference was that on conciliation services. It recommended that every effort be made to establish the U.S. Conciliation Service as "an effective and completely impartial agency

within the U.S. Department of Labor," with a representative Advisory Committee from labor and management: the parties to disputes should make every effort to settle them by collective bargaining before requesting conciliation services, and as far as possible disputes should be settled at the plant level. This report also specifically rejected compulsory arbitration.

On the other hand, three committees, on collective bargaining, on representation and jurisdictional disputes, and on management's right to manage, agreed on some phases of the problems before them but disagreed on others. Accordingly separate reports were submitted by the labor and management members and no action resulted by the Conference. The disagreements were due in part to the complexities of the situation facing labor and management and the fact that the Conference was held in the midst of conflicts rather than a year earlier when some of the problems might have been resolved in advance. But they reflected also basic cleavages in attitudes toward collective bargaining. In all these committees, nevertheless, there was partial agreement which added something to the accomplishments of the Conference. In fact, as a whole there may have been more agreement than disagreement between the labor and management members on these committees.

The committee on representation and jurisdictional disputes was in sharp disagreement. Management wanted jurisdictional disputes eliminated by law if the unions failed to resolve these disputes by their own machinery; strikes, boycotts, or lockouts over representation questions should be eliminated by being made unfair labor practices; employers should have a right to petition the appropriate agency for an election when in doubt as to a union's claim to represent a majority of the employees; multi-plant bargaining units were opposed except where agreed to by employers or established by prior bargaining practice. Labor representatives, on the other hand, opposed any amendment of the Wagner Act or any limitation on the right to strike, although they recommended that unions should set up and abide by the results of determinations by their own jurisdictional dispute machinery; no union should strike or boycott against the result of voluntary noncollusive recognition agreements or determinations by federal or state agencies of representation disputes. But they thought that the management proposals would be subject to abuse by antiunion employers and that management sought crippling legislation for the purpose of weakening unions.

In the important committee on collective bargaining there was agreement on many points as to the meaning and process of bargaining in good faith. But management insisted that there was need for guaranties of responsibility and legal enforcement of contracts, along with protection against unlawful acts and control of union activities. Labor, on the contrary, thought that good relations and responsibility could better be promoted by voluntary means and cooperation and refused to agree to any legal regulation of these matters.

As might be expected, "management's right to manage" brought the greatest disagreement. Management, fearing an extension of union power, wished to have areas of management control defined, though recognizing that at certain points the union had a right to raise questions under the grievance procedure. Labor, on the other hand, knowing of much variation in customs and experience, and

perhaps wishing to extend collective bargaining in many instances into new fields, held that it was impossible to define such areas, and strongly opposed management's defensive plan. Labor, here, as at other points, emphasized co-operation and mutual confidence based on experience, while management tended rather to want definitions and limits set to the evolving institution of collective bragaining.

The Conference adjourned with a feeling of deep disappointment on the part of many, and its members went out, many of them at least, to lead the bitter conflicts already starting. Nevertheless, agreement had been reached on long-run methods for making collective bargaining work, to an extent that was highly significant. While this Conference was unable at that late date to solve the extremely difficult problems that then faced labor, industry, and government over collective bargaining disputes, it stayed together until it had formulated substantial areas of agreement and clarified at least some of the issues on which there was basic conflict. All this showed a substantial change in climate since the 1919 conference, which broke up on the issue whether employees had a right to claim recognition of national unions as their bargaining representatives.[78] In 1919 management representatives after the failure of the conference began their big "open-shop" drive. In 1945, however, somewhat comparably, some of the management representatives said as they left that they were convinced of the need for legislation on certain points where no agreement had been reached. The failure of labor and management to reach agreement on many of these issues prepared the way for the 1947 legislation which was to impose new restrictions upon unions and upon collective bargaining itself, as well as for the bitter and paralyzing strikes which were already beginning.[79]

Postwar strikes

Almost immediately after the Conference adjourned, President Truman on December 3 sent a message to Congress asking for legislative provision for fact-finding with cooling-off periods in major disputes in key industries. Opposition developed immediately, both from the unions who objected to the cooling-off period, and from General Motors and others who objected to the right to subpoena "the books." A number of antistrike bills [80] were promptly introduced and received serious consideration as the trial by combat continued in the industrial field. But already without waiting for new legislative authority fact-finding panels had been appointed for the oil dispute and in the General Motors and the steel disputes, the latter two directly by the President.

The strikes themselves were of a sort to arouse extreme public interest and concern—large strikes in key industries affecting huge groups of employees and sometimes the consuming public very directly. On a smaller scale but with great emotional impact were strikes of public utilities, electric power, or local transportation systems. The effect is frequently not indicated at all adequately by the mere figures, limited to what happens in struck plants. In such conspicuous strikes as those after V-J Day emotions are aroused also by

[78] Cf. *supra*, ch. 1, p. 17.
[79] For a more extensive and very valuable analysis of the Conference and its accomplishments and failures see Taylor, *op, cit.*, ch. 5.
[80] *Infra*, ch. 9, pp. 356 ff.

much information and misinformation disseminated in the public press and over the radio. This was true in the case of the corporation-wide General Motors strike, which began before the November Labor-Management Conference adjourned; of the earlier coal strike of September-October over the organization of foremen; of the CIO Electrical Workers' strike against General Electric, General Motors, and Westinghouse; of the packing-house strike; of the nation-wide steel strike which began in January; and again of the bituminous coal strike starting in April. The coal strike ran into May, when the country-wide railway stoppage occurred because of refusal of the Trainmen and Engineers to accept a settlement agreed to by other unions. The General Motors strike led to chaos in the motor industry, partly because of relations between the large manufacturers and the smaller companies which supply parts. Worse still in its effects was the steel strike, which sooner or later interfered with industry after industry dependent upon steel for its raw materials. The coal strike which ran for several weeks caused short hours and layoffs in plant after plant and "dimouts" and "brownouts." This stoppage inevitably involved hundreds of thousands who were not on strike but were affected as consumers or as employees of other industries by its effects on transportation and industry generally. Though fortunately short, the stoppage by the Trainmen and Engineers halted practically all rail transportation throughout the country, and from the point of view of industry, employment, and the whole population, was, while it lasted, much worse than the Shopmen's strike of 1922.[81]

It must not be forgotten that during these months thousands of new agreements were being negotiated peacefully, most of them with wage increases. To what extent the failure to do the same in the basic industries meant that collective bargaining was made more difficult by a real challenge to union strength, and by answering resentment and resistance by the unions, no one can be sure. Without such an issue as to future power, even this difficult wage-price conflict might have been more quickly resolved. But in some of the major cases strikes could not, or would not, be settled until a national "wage pattern" was set and a new national wage-price policy established. The General Motors strike lasted 113 days, that of General Electric 58 days, of Westinghouse 115 days. Unions considered their demands for wage increases to maintain take-home pay, as well as other issues involved, worth fighting for, and their wartime treasuries were well enough stocked to make a fight possible. Many corporations stood on principle in refusing increases of the extent demanded until price relief was available. Moreover, they could offset losses to some extent by refunds from the Treasury on portions of their wartime excess profits taxes.

The "wage pattern" on which most of the strikes were settled was evolved from reports of fact-finding panels and the President's own intervention in the steel strike, but not until after the President on February 14, 1946, by Executive Order, permitted the National Wage Stabilization Board to approve any wage increases consistent with the "general pattern" of increases which had been established in the

[81] Accounts of these strikes and their settlements are available in "Postwar Work Stoppages Caused by Labor-Management Disputes," *Monthly Labor Review*, 63 (1946), 872–92; "Wage Policy and the Role of Fact-finding Boards," *ibid.*, 62 (1946), 537–49.

industry or area by that date, thus giving a basis for price relief. The major disputes were settled in the next month or two on approximately the same basis as the first one, in steel, with its 18½-cent wage increase and price relief. There was some skepticism about the awards of the various fact-finding panels, with suspicion of influence by persons in high places; and certainly there was too much expression of opinion by them while panel work was in process. In several cases the recommendations were rejected by one or the other party to a dispute. However, the rough formula arrived at, largely through government action, was regarded by many if not most men experienced in industrial relations as "about right." In any event, the pattern set by big industry exerted great influence on wage adjustments in other industries.

It was the coal and railroad strikes that put the final touches on the acute case of nerves from which the public and the government were suffering. The coal strike was settled on May 29, after the government took over the mines, by agreement between the Secretary of the Interior and the United Mine Workers for an 18½-cent increase and a 5-cent per ton levy for a health and welfare fund. Meantime, the railroad crisis had come and gone, during which President Truman had asked Congress for emergency legislation permitting him to take over an industry, providing for injunctions against strikes and for criminal penalties against union leaders for violating the provisions, for loss of seniority rights by strikes, and for drafting strikers. But the strike was settled almost simultaneously with the President's appearance before Congress on May 25. The President's proposed bill was passed immediately by the House, but on later consideration its drastic provisions were not approved by many. With this background, however, the Case Bill was revised and passed by both houses, although it failed to be carried over the President's veto on June 11. The President called for further study before permanent legislation. But the public agitation resulting from this wave of strikes had come very near to putting a hastily drawn and very drastic anti-strike bill on the lawbooks. Part of this bill was separately passed as the Hobbs Anti-racketeering Bill, directed against the Teamsters, and was signed by the President on July 3, 1946.

During the next twelve months strikes were at a somewhat lower level, but there were enough newsworthy strikes causing inconvenience to substantial groups of the public to keep the flames alive. As price control was emasculated and finally killed, prices rose and wage demands with them. Wage stabilization came to an end in November, 1946, and the "second round" of wage increases was for the most part achieved without major strikes. But there were maritime strikes in September and October; the coal strike of November in a dispute with the government which led to the injunction and the finding of Mr. Lewis and the United Mine Workers in contempt of court; a New York City trucking strike; a Pittsburgh light and power strike; and then in April, 1947, another coal stoppage; and in April–May the nation-wide telephone strike, with all its inconvenience to the public; and in June again a maritime strike and another coal walkout. Meantime, the election had brought in the new Congress, and the campaign for amendment of the laws and control of union activities had gone on. And June 23, 1947, saw the passage of the Taft-Hartley Act over the President's veto.

CONCLUSIONS

The industrial conflicts of the first year of reconversion played a major part in creating a climate in which the 1947 legislation could be accomplished. If, as we think, better long-range planning on the part of the Administration and Congress could have avoided the necessity of forging postwar wage-price policy in the heat of industrial battle, then we might have seen long-range legislation developed with less heat and anger and more real statesmanship. The administration's emergency proposals made little contribution toward a sound program. And back of that immediate situation which put the match to an inflammable mixture were the other factors which had prepared the fuel.

Actions by some unions had made all unions vulnerable to attack and aroused irritation, fear, and resentment; and the labor movement, unfortunately too little sensitive to public opinion about strikes and other union actions, was adamant against any revision of the Wagner Act and failed to propose solutions for problems on which the public was with some justice aroused against labor. The hostile press of course contributed. The public naturally assumes that the union is responsible for a strike, without inquiring whether management is in some cases equally or even more responsible because of failure to seek a reasonable basis of settlement. In addition, while the National Labor Relations Board had in reality met most of the reasonable criticisms by improving its administration, perhaps at some points going even too far in response to criticisms, the Administration had been slow to admit issues on which amendment of the NLRB was desirable. Administration, labor, and other supporters fought a defensive battle to preserve the Wagner Act, rather than by positive constructive proposals cutting some of the ground from under the feet of those who wanted legislation for other purposes. And much of the credit, if it be such, must go to the long, patient, persistent campaign for amendment and change of the national labor policy by groups who feared, resented, and fought the shift of power resulting from a strong union movement. It was a campaign astute in its effort to lead and remake public opinion, changing its line in some respects with changing conditions, but never losing sight of basic objectives. Its success was made possible by the events and conditions in the two years after V–J Day which aroused extreme resentment against labor.

In the name of equalizing the laws and protecting the public interest and free enterprise, rather than repealing the Act which had received an increasing amount of acceptance through the years, legislation was finally achieved which effectively revised the basic law of labor and the framework of collective bargaining. This revision included far more than the changes on which there was an objective case for new law. The extent to which it relieved antiunion employers from their obligations under the former law, and set unions back into an earlier type of restrictive environment, in addition to bringing government further than ever before into peacetime collective bargaining, would only become fully apparent when it had been tried out and tested in the courts, and if a time of less than full employment gave opportunity for its maximum use, should industry so choose, to weaken the union movement.

CHAPTER 9

THE BACKGROUND OF THE TAFT-HARTLEY ACT. II. STATE LEGISLATION AND ATTEMPTED LEGISLATION IN CONGRESS

DEVELOPMENTS IN THE STATES, 1937–47

Before turning to the attempts in Congress from 1937 to 1947 to amend or drastically to change the national labor policy expressed in the Wagner Act, significant developments in the states must be noted.[1] The Wagner Act, "designed to give more nearly equal rights to management and to labor by limiting the activities of the former when they transgressed the rights of the latter." [2] left to the common and statute law of the states matters of policing external relations of the unions or regulating their internal affairs, except in so far as the regulation of interstate commerce and the granting of restraining orders by federal courts were concerned. Yet the regulation of employers' "unfair labor practices" inevitably served as an invitation to regulate unions. Such regulation was proposed when the Wagner Act was under consideration in 1935 and was rejected then and on several occasions later. But the factors which led to these proposals in Congress were operating in the states even more directly, and their effects were seen first in state legislation. The fights for restrictive legislation in various states affected also the congressional election campaigns and were carried over into Congress. The correlation between these campaigns in the states and in Congress was marked, and success in the states helped then to bring results in Washington.

With the main features of the Wagner Act declared constitutional and New Deal philosophy not yet worn thin, it was expected in 1937 that many states would adopt similar legislation, but only five did so in that year. They were New York, Wisconsin, Massachusetts, Pennsylvania, and Utah. The trend of state legislation in the decade following, contrary to what was expected, was chiefly one of increasing efforts to regulate unions in various respects, while at the same time weakening or omitting protective features found in the National Labor Relations Act. In addition, the new legislation frequently provided for the establishment of new or further machinery for the conciliation and settlement of industrial disputes. The years 1938 and 1939 saw attempts on the Pacific Coast to restrict union activities through local antipicketing ordinances and drastic state laws limiting strikes and picketing sponsored by open-shop associations. And in four states in 1939, the year when the first serious attempt to amend the Wagner Act got under way, omnibus labor relations acts were

[1] Much of the material here appeared first in H. A. Millis and H. A. Katz, "A Decade of State Labor Legisation: 1937–47," *University of Chicago Law Review*, 15 (1948), 282–310, and in H. A. Millis and R. E. Montgomery, *Organized Labor* (New York: McGraw-Hill Book Co., 1945), pp. 533–35, 547–54, 616–20.

[2] Millis and Katz, *op. cit.*, p. 282.

passed which imposed restrictions upon unions as well as upon employers. Wisconsin and Pennsylvania amended or replaced their "Baby Wagner Acts" by this new type of "equalizing law," and new laws were adopted by Michigan and Minnesota. In 1941 Rhode Island put itself on the list of states with "Baby Wagner Acts," and there was only a little restrictive legislation in other states. But by 1943 resentment against the Wagner Act and the growth of union strength accompanying the wartime growth of industry, especially in the South and Southwest, brought an active campaign for restrictions upon unions; and in that year a total of twelve states wrote into their laws restrictions, many of them drastic, upon union activities. The new laws in the South and West were for the most part simply restrictions upon unions without correlative obligations upon employers. Colorado, however, wrote a comprehensive labor relations law of the "equalizing" sort. The Kansas law, primarily restrictive of labor, included a few unfair labor practices of employers but did not establish any administrative agency to enforce the law. In addition, the drive to outlaw the closed shop put through "right-to-work" constitutional amendments in two states, Arkansas and Florida, in 1944, a statute in South Dakota in 1945, and constitutional amendments in Arizona, Nebraska, and South Dakota in 1946. In 1945 one more industrial state, Connecticut, adopted a "Baby Wagner Act," while a handful of states tightened existing restrictions upon unions or adopted new laws. And in 1947 the active drive for such restrictive legislation, spearheaded by the National Association of Manufacturers and the Chamber of Commerce,[3] as we have seen, bore fruit in a flood of legislation adding further restrictions upon union activity in some thirty of the states.

There is no need here to analyze this state legislation in great detail. Its significance for present purposes is how it reflected the problems and pressures which finally brought revision of federal labor policy, and how it contributed to the development of the new policy. Much of what appeared finally in the Labor Management Relations Act of 1947 had already been written into the law of various states, as well as having long been on the program, more or less specific at different dates, of the National Association of Manufacturers and other employer associations.

Labor relations acts, 1937 and 1939

The "Baby Wagner Acts" as adopted originally in 1937 in five states, and in 1941 and 1945 by two other industrial states, differed in relatively few and unsubstantial respects from the federal pattern.[4] All these laws were procedurally of the administrative type, with "preliminary investigation by state employees, the encouragement of settlements between the parties consistent with the policies of the acts, the winnowing out of weak or friolous cases which might otherwise be pressed to hearing by over-zealous private litigants, the elimination of protracted hearings wherever possible, and the evolution of a unified governmental policy on labor relations." [5] By 1947 only New York, of

[3] *Supra*, ch. 8.

[4] The New York and Wisconsin acts made it an unfair labor practice by discrimination "to encourage membership in any company union," thus apparently leaving the employer free to encourage membership in a bona fide labor organization. The New York Act limited the Board's discretion by requiring it to find craft units appropriate for collective bargaining when the majority of the employees of a craft so desired.

[5] Paul M. Herzog, "The Labor Relations Acts of the States," *Annals of the American Academy of Political and Social Science*, 224 (1942), 22.

the original group, with Rhode Island and Connecticut, still had laws of the Wagner Act type, limited to the protection of labor's right to organize against interference by employers. The others had all replaced or amended their laws by the addition of restrictions upon "unfair labor practices" of employees and unions.

The second chapter in labor relations legislation began to be written in 1938. Among the earlier rumblings against a liberal labor policy were those on the Pacific Coast, and especially in California, where the articulate organized fruit growers and processors and the open-shop associations sought city and county ordinances and state legislation as well as amendment of the Wagner Act.[6] Drastic ordinances to control picketing were enacted in such places as Los Angeles and the county of Shasta, only to be declared invalid.[7] Attempts were made also in the three Pacific states to secure adoption by popular vote of highly restrictive laws based more or less directly on the Los Angeles restrictive picketing ordinance. All these states had been torn by controversies "incidental to the attempts of workers to organize, by the awkward and questionable activities of newly established unions, by the activities of alleged racketeers, by the stopping off of work by unions contesting for power, by hostile employers' associations not at all inclined to share power with labor or to observe in good faith the National Labor Relations Act, and by farmers angered by labor activities of almost any kind."[8] The referendum votes in California and Washington failed, but Oregon in November, 1938, adopted by substantial majority an extremely restrictive measure. It outlawed all strikes, picketing, and boycotting except in disputes directly relating to wages, hours, and working conditions where a majority of the employees of an employer were involved. Any interference with transportation, manufacturing, processing, and marketing of agricultural and other products was made unlawful. The courts were given a free hand in restraining any such activities. The acts prohibited were also punishable as misdemeanors. There were limitations also on union dues. No limitations were put on management activities. This Act was promptly invalidated in 1940 by the Oregon Supreme Court in a five-to-one decision.[9] But during its brief life it had considerable effect in hampering the activities of labor organizations and weakening their bargaining position.[10] Moreover, it was more or less influential in shaping labor legislation in other states, especially in 1939.

Four industrial states in 1939 adopted the policy of imposing restraints upon both employers and unions. In Wisconsin the La Follette period was at an end, and farmers were in revolt against its policies. There had been serious strikes which disturbed the public. The 1939 legislature repealed the Labor Relations Act and adopted in its stead an Employment Peace Act. Pennsylvania, also, the scene of bitter conflicts during the adjustments necessary to the new na-

[6] For details on the drive on the Pacific Coast see U.S. Senate, Committee on Education and Labor, *Violations of Free Speech and Rights of Labor, The Organization of Resistance to Collective Bargaining in California,* 1935–39, Report No. 398, Pt. 1, 78th Cong., 1st Sess., 1943, esp. pp. 771–75.

[7] People v. Gidaly, Superior Court of Los Angeles, July 18, 1939; Carlson v. California, 310 U.S. 106 (1940).

[8] From H. A. Millis and R. E. Montgomery, *Organized Labor* (1945), p. 617. Courtesy of McGraw-Hill Book Co.

[9] AFL v. Bain, 106 P. 2d 544 (1940).

[10] For a discussion of its operations and effects see Herbert Harris, *Labor's Civil War* (New York: A. A. Knopf, 1940), pp. 215 ff.

tional labor policy, drastically amended its Labor Relations Act. Michigan and Minnesota approached the problems differently. They both had seen bitter and violent strikes and now adopted measures which emphasized the conciliation and mediation of disputes, with notice and waiting period before strikes, but included also prohibition of certain unfair labor practices on the part of both employers and labor. Wisconsin and Pennsylvania modified enforcement of their acts by making the boards essentially courts of first resort to hear charges rather than administrative agencies which investigate and attempt to obtain voluntary settlements. Prevention of violations became matters of private right rather than of public interest to be protected by an administrative agency. Michigan and Minnesota relied upon the courts for the prevention of unfair labor practices, the former by making violations misdemeanors, and the latter by providing injunctive relief. Representation procedures were included, except in Michigan, with the employer having the right to petition for an election, and craft units mandatory if a majority of the craft so desired.

The protection of labor against unfair labor practices by employers in these states was somewhat diluted. Thus Wisconsin eliminated the word "interference" from its list of banned activities by employers. Wisconsin and Minnesota denied the benefits of their acts to anyone violating their provisions, and Pennsylvania provided that unfair labor practices by the opposing party should be a complete defense to a complaint against one of them. Wisconsin and Minnesota specified what was always implicit—the right to refrain from concerted activities.

The limitations placed upon labor activities under the name of unfair labor practices were rather extensive. With differences among the states, they included such prohibitions as that of coercion or intimidation of workers in connection with their right to join or refuse to join a union; coercion of an employer to violate the law, as by a strike against a certified union; picketing or boycotting except when a strike had been called by a majority of the employees concerned, or after following the required procedures set up in Minnesota and Michigan; mass picketing; sit-down strikes; secondary boycotts; and, in Wisconsin, strikes in violation of an agreement. Wisconsin also limited closed-shop agreements by requiring a three-fourths vote of the employees in the unit. Thus in two industrial states the little Wagner Acts had been modified and "equalized," while two others had enacted measures which likewise provided only a somewhat diluted version of protection of the "right" of workers to organize when they so desired. All these measures were designed to protect the "rights" of individual workers, farmers, creameries, employers, and the public quite as much as, if not more than, the right of employees to organize.[11] In addition, Wisconsin and Pennsylvania amended their anti-injunction laws to relax somewhat the previous limitations on injunctions in labor disputes. Only two states, Connecticut and New Mexico, passed new legislation limiting such injunctions.

[11] For more detailed summaries of this legislation, Millis and Montgomery, *op. cit.*, pp. 547–53; Mills and Katz, *op. cit.*, pp. 285–90.

1941 and 1942

The next two years saw only a little industrial relations legislation, but some of it showed which way the wind was blowing. In 1941 Rhode Island adopted a Labor Relations Act of the Wagner type, and New Jersey adopted an anti-injunction law and established a State Mediation Board. North Carolina also established a conciliation service. But Texas passed a very drastic antipicketing law—known as an "antiviolence" law—making it a felony for anyone by force or violence or threat to attempt to prevent any person from engaging in any lawful occupation, or to assemble near a place where a labor dispute existed and attempted to prevent persons from working. California passed its Hot Cargo Act, subject to referendum vote in 1942, prohibiting secondary boycotts or refusal to handle "hot cargo."[12] Maryland prohibited sit-down strikes; Georgia required thirty days' notice to the employer before a strike except in seasonal industries; Minnesota among other amendments added violation of contracts by employee or employer to its list of unfair labor practices. Colorado re-enacted provisions of its 1915 law making strikes in industries affected with a public interest unlawful until after investigation by the Industrial Commission. Arkansas required persons soliciting advertising for labor publications to post a $5,000 bond to assure that they would perform any contracts entered into; this was supposedly for the protection of those who deal with the labor press, but no other group was similarly protected.[13] The political and industrial climate of the southern and southwestern states which adopted most of these new restrictions showed the desire to encourage their expanding industry, including "runaway plants" from the North, by maintaining freedom from unionism so far as possible.

In 1942 only a few legislatures were in session, and the country was preoccupied by war problems. State Labor Relations Acts were amended in New York to permit petitions by employers, as in Wisconsin, Minnesota, and Pennsylvania; and in Rhode Island an amendment permitted court review of certifications as well as of cease-and-desist orders. Mississippi adopted an antipicketing statute similar to that adopted in Texas a year earlier, with its drastic limitations and its provision for punishment of violations as felonies.

1943 and the campaign in the South and Southwest

The year 1943 was more prolific of state labor legislation than any other year to that time. Proposals for union regulation were introduced in nearly all the state legislatures, and twelve states passed new statutes or amended existing ones in this field. By this time the great wartime expansion of industry into the South and Southwest, as well as into the nonindustrial hinterland of other states, and with it the increase in union organization and actual and impending extension of collective bargaining, brought to new activity the latent forces of opposition to the policy of permitting or even protecting union activities. Unreasonable use of the new power of some unions contributed to the basic opposition of those who feared expansion of

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[12] The Act was adopted by referendum, but finally in 1947 the "hot cargo" provision was held unconstitutional by the California Supreme Court. *Ex parte* Blaney, 184 P. 2d 892 (1947).

[13] U.S. Department of Labor, Division of Labor Standards, *Digest of State and Federal Legislation, 1940–41,* Bulletin No. 48.

unionization as a threat to the desirable industrialization of their states or localities or to the power of management. Many unfair labor practice cases filed with the National Labor Relations Board attested to the fact that the expansion of unionism was not accepted without stiff opposition in many quarters. Frequently farmers joined with business in efforts to stop the "menace." The wartime strikes which brought demands for antistrike legislation in Congress increased the pressures in many states for restrictive legislation. And in many areas state, local, and sectional associations participated actively in the drive to put such legislation on the books. Some of those which had been described by the La Follette Committee in its study of California a little earlier were still active, especially in southern California,[14] and there were others with headquarters in the North whose propaganda efforts were far-reaching. While little specific information is available, the evidence suggests the influence of organizations working across state lines and promoting certain types of bills. Thus the Texas laws served as a model for attempted legislation in many other southern states. Registration bills of the Texas type were introduced in at least fifteen states in 1943. Its 1941 model "antiviolence" law, which was adopted in Mississippi in 1942, was enacted in Arkansas and incorporated into the law enacted in Alabama in 1943. This bill, sponsored by the "American Christian Association" with headquarters in Houston, Texas, had been introduced in at least eight other legislatures where it was defeated that year.[15]

It was significant that most of the regulatory legislation of this year came not from the great industrial states of the East and Middle West but from the heretofore nonindustrial areas of the nation. The legislation was only incidentally, if at all, protective of labor's rights. Principally the acts imposed limitations on the right to organize and function through unions and to conduct union affairs without undue outside interference. And in 1943 for the first time extensive regulation of the internal affairs of unions was established in a number of states, along with restrictions upon unions' external activities.[16]

The most comprehensive statute was that of Colorado, modeled largely after the Wisconsin Employment Peace Act. It declared the right of employees to organize or to refrain from so doing. It included both a list of unfair labor practices of employers and a longer list directed against activities of employees. Engaging in a "slow-down" or requiring a "stand-by" not needed by the employer were additions to the proscribed activities of employees. A three-fourths vote was required for an all-union agreement. Failing to give thirty days' notice of a strike if agricultural products were involved, or twenty days' in other cases, also was proscribed. This was of course a continuation

[14] Cf. *supra*, ch. 8, pp. 283–86, esp. nn. 18 and 21

[15] *Monthly Labor Review*, 56 (1943), 941–42; Victor H Bernstein, "The Anti-labor Front," *Antioch Review*, 3 (1943), 328–40. The so-called "Women of the Pacific," organized in 1938 with headquarters in Los Angeles, was mentioned the next year as active in the California drive for anti-closed-shop and other restrictive legislation, along with the Associated Farmers and other organizations. At that time, however, the move was opposed by the State Chamber of Commerce and the San Francisco Employers' Council as one that threatened to cause disunity in wartime. *New York Times*, September 17, 1944; December 27, 1944. The "Women of the Pacific" were still functioning in 1947, when they published a pamphlet, *Workers! Do You Know Your New Rights under the Taft-Hartley Law?*

[16] For summaries of the legislation see U.S. Department of Labor, Division of Labor Standards, *Digest of State and Federal Labor Legislation, 1942–43*, Bulletin No. 63; cf. also E. Merrick Dodd, "Some State Legislatures Go To War—on Labor Unions," *Iowa Law Review*, 29 (1944), 148–74.

of the Colorado system adopted in 1915 of a required waiting period and an investigation and attempt to settle an industrial dispute by the Industrial Commission. In addition, the Act put many requirements on unions: compulsory incorporation with the right to sue or be sued, reasonable dues, annual examination of union books by the Commission, detailed financial reports to members, provision for secret ballot on important matters, majority vote by secret ballot before a strike could be called, and no use of funds for political purposes.[17] Charges of violation were to be heard by the Industrial Commission, as in the Wisconsin and Pennsylvania acts, but violations were also misdemeanors and subject to injunctive relief.

Another sweeping law was that of Kansas. Its list of unfair labor practices of employers was extremely limited, there was no provision for a board to administer the Act, and its list of unfair labor practices by employees was the most extensive of any state; it was therefore primarily a restrictive law directed at labor organizations. As in Colorado, the right to refrain from organization was stated. Union business agents were required to be licensed by the state, and unions were required to file certain documents, including financial reports, with the secretary of state. Violations were punishable as misdemeanors, and the license of any business agent violating the Act could be revoked by the court. A Federal District Court in 1945, however, found unconstitutional the provisions banning jurisdictional strikes and refusal to work on nonunion goods and requiring licensing of business agents.[18]

Minnesota, which in 1939 had pioneered with Wisconsin in regulating union methods, adopted a "Labor Union Democracy Act," regulating union elections and requiring unions to make financial reports to their members. It also amended its 1939 statute by outlawing jurisdictional strikes, such disputes to be settled where necesssary by a referee appointed by the governor, and made any strikes without the required notice or without a secret vote of a majority of the employees voting, or in violation of an agreement, unfair labor practices. It was also made an unfair labor practice to interfere with the production, marketing, or processing of agricultural products. Other states adopting more extensive regulation of union internal affairs were Florida, Texas, and Alabama. Texas required all union organizers, and Florida all business agents, to obtain a card or license from the state. Texas and Alabama required the filing with the state of certain information including financial reports. Texas also regulated union elections, controlled expulsions of union members, and limited union fees; and it banned political contributions by unions. Heavy penalties were provided as well as enforcement by injunctions. Alabama prohibited fees for work permits, political contributions, strikes without majority vote, and refusal to work on nonunion materials.[19] It prohibited also inclusion of executive, supervisory, or professional employees in a union including other employees. Violations were made subject to fine or imprisonment or both. Florida included many of the unfair

[17] The provisions regulating internal affairs of unions were, however, invalidated when the related compulsory incorporation provision was held unconstitutional by the state supreme court. AFL v. Reilly, 155 P. 2d 145 (1944).

[18] Stapleton v. Mitchell, 60 F. Supp. 51 (1945).

[19] It appeared to forbid union-security agreements, also, but a 1947 decision of the Alabama Supreme Court held otherwise. Hotel and Restaurant Employees International Alliance v. Greenwood, 30 So. 2d 696 (Ala., 1947), cert. den., 332 U.S. 847 (1948).

labor practices found in the Kansas statute, but none directed against employers. It banned jurisdictional strikes, strikes without majority vote, secondary boycotts, mass picketing, and picketing beyond the area of the industry in which the dispute arose. Violations were made felonies. An anti-closed-shop amendment to the state constitution was to be submitted to the voters. The drastic "antiviolence" provisions adopted by Alabama and Arkansas, on the Texas model, have been mentioned above. Massachusetts, also, added its first restriction upon unions by prohibiting the requirement of fees for work permits. Pennsylvania banned political contributions by any corporation or unincorporated association.

The constitutionality of much of this body of regulation of union affairs was of course questionable. Courts invalidated the restrictions upon certain union methods in the statutes of California, Colorado, Kansas, and Oregon, in whole or in part.[20] The Supreme Court in 1945 found the Texas "identification card" provision unconstitutional when it was applied to a speech for the solicitation of union members.[21] It found the Florida licensing requirement invalid, also, as in conflict with the National Labor Relations Act.[22] Certain other provisions of the acts in Texas and Alabama were invalidated by state courts.[23]

Fears by agricultural interests in several states brought also the enactment of statutes designed to protect agriculture from interference by unions. Idaho prohibited secondary boycotts where applied to agricultural products, banned picketing of agricultural premises or the entry upon such premises by union agents without the consent of the owner, and required complete financial statements to be filed annually by all unions with the secretary of state. Violation was made a misdemeanor. A similar law was adopted in South Dakota. Both of these were held unconstitutional in whole or in part.[24] Minnesota also added to its laws provisions designed to prevent interference with the transportation of agricultural products, and Michigan adopted a somewhat similar provision affecting both farm and commercial products.

Thus the 1943 state legislation, especially the very drastic regulations and restrictions imposed by six southern and southwestern states, gave a preview of the types of restriction on labor desired by many articulate groups in industry and agriculture. As Professor Dodd has said:

> Many of the new statutory provisions are unmistakable signs of the deep cleavage which exists between labor unionists and other elements in the population with respect to the legitimate functions of labor organizations and the extent to which they should be permitted to operate as self-governing bodies. . . . Many of the provisions . . . will inevitably be regarded by organized labor as a whole and not merely by its leaders as war legislation in a very sinister sense—legislative declaration of war against unions.[25]

The unions were worried but not yet sufficiently to establish a united and effective counteroffensive.[26]

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[20] *Supra*, nn. 12, 17, 18.
[21] Thomas v. Collins, 323 U.S. 516 (1945).
[22] Hill v. Florida, 325 U.S. 538 (1945).
[23] AFL v. Mann, 188 S.W. 2d 276 (1945), in the Court of Civil Appeals of Texas; Alabama State Federation of Labor v. McAdory *et al.*, 18 So. 2d 810 (Ala. Sup. Ct., 1944).
[24] AFL v. Michelson, 9 CCH Lab. Cas. 67,064 (1944); AFL v. Langley, 168 P. 2d 831 (1946).
[25] Dodd, *op. cit.*, p. 174.
[26] Cf. the account of an attempt to set up a "legislative coalition" by the AFL, CIO, and railroad brotherhoods in February, 1943. *New York Times*, February 6, 1943.

The postwar drive: Anti-closed-shop and other restrictions

The last two years of the war saw relatively little further restrictive or regulatory legislation in the states, although the drive for "right-to-work" or anti-closed-shop legislation continued and made some headway in the South and West. Florida and Arkansas banned the closed shop by constitutional amendment in 1944, as did South Dakota by law in 1945 and by constitutional amendment in 1946. In the latter year also Arizona and Nebraska adopted constitutional amendments against the closed shop. "Right-to-work" proposals, banning virtually every type of union-security agreements, were introduced in almost identical form in at least eleven legislatures in 1945. But the major success was not to be achieved until 1947. Minnesota in 1945 amended its labor relations law to prohibit any strike, boycott, or picketing designed to interfere with the right of a certified representative to function during the effective period of the certification. Wisconsin reduced to two-thirds the vote required to authorize an all-union agreement. But Connecticut, contrary to the trend in state legislation, enacted a Labor Relations Act of the Wagner Act type.[27] The New York and New Jersey acts of 1945 forbidding discrimination in employment based on race, creed, or color, and providing for enforcement, should also be mentioned. In 1946 Massachusetts and in 1947 Connecticut also adopted fair employment practice laws with teeth.

In 1946 only eleven states held regular legislative sessions, but restrictive legislation was adopted in several.[28] The "right-to-work" constitutional amendments in three states have already been noted. Resentment at the postwar strikes helped to bring new restrictions in some of the states. Louisiana and Virginia joined the list of southern states with restrictive laws. Louisiana prohibited "wildcat" strikes in violation of collective agreements, sit-downs, and violence, force or threats around a plant in connection with a labor dispute, thus apparently banning mass picketing. It also made unlawful a conspiracy in restraint of trade between management and a union. Violations were made misdemeanors as well as subject to injunctive restraint. Virginia banned mass picketing, "stranger" picketing, the use of force or intimidation, and any interference with the right of another to work. Violations were a misdemeanor. New Jersey added to its Mediation Act the provision that the governor might seize and operate any public utility where one of the parties to a dispute refused to accept the recommendations of a fact-finding panel appointed by the Mediation Board. And in Massachusetts, following a popular referendum,[29] a law was enacted requiring unions to file annual statements showing names and addresses and salaries of all officers, their scale of dues, the dues and other amounts charged members, and receipts and expenditures.

In 1947 came the real flood of state legislation restricting union activities. Postwar conflicts had aroused resentment and set the stage

[27] U.S. Department of Labor, Division of Labor Standards, *Digest of State and Federal Labor Legislation, 1943–44*, Bulletin No. 71; *1944–45*, Bulletin No. 75.

[28] "State Labor Legislation in 1946," *Monthly Labor Review*, 63 (1946), 754–59.

[29] Cf. Commonwealth of Massachusetts, *Report of the Governor's Labor-Management Committee*, House of Representatives, No. 1875, March 18, 1947. The Committee included representatives of labor, management, and the public. Following the referendum it made proposals as to what limited information should be required in the annual statements to be filed. Substantial sections of the report are reprinted in *Industrial and Labor Relations Review* 1 (1947), 110–28.

for the successful drive for legislation.[30] The campaigns of the National Association of Manufacturers and the United States Chamber of Commerce, with their affiliated associations and others in all parts of the country, rose to a climax.[31] And the harvest came in "equalizing" or more often merely restrictive legislation in at least thirty states, as well as in the federal Labor Management Relations Act of 1947.[32]

The most comprehensive enactment was the Delaware Union Regulation Law, including one of the most extensive lists of unfair labor practices of employees; it made closed-shop agreements contrary to public policy and unenforceable, made any interference with "the right to work" unlawful, and made strikes unlawful except after a majority vote; political contributions by unions were banned. In addition, unions were required to register and file annual financial reports and came under regulation as to their fees and elections. Injunctions, damage suits, and penalties of fine or imprisonment were provided for enforcement.

Two of the original states with "Little Wagner Acts" in 1947 added unfair labor practices of employees to their statutes. Massachusetts banned interference by employees with the right of employees to choose or reject representatives for collective bargaining, and strikes or boycotts to induce the commission of an unfair labor practice. It also declared the obligation of a recognized union to bargain collectively. Utah specified several unfair labor practices of employees, including intimidation, sit-down strikes, picketing in the absence of a majority strike vote, and secondary boycotts. Pennsylvania also tightened its prohibition of interference with employees in their choice as to joining or refraining from joining a union or their choice of representative.

Anti-closed-shop legislation was the type occurring most frequently in 1947. Twelve states, four of which already had constitutional amendments, prohibited closed shops, or in most cases any other type of union-security agreement; three others limited them in one or another way, and New Mexico proposed a constitutional amendment to be voted on at the next election. Twelve states imposed further limitations upon picketing or other strike activity; eleven prohibited secondary boycotts; six restricted jurisdictional disputes; eleven states provided for the regulation of disputes in public utilities; seven states banned strikes of public employees. Delaware, New Hampshire, and North Dakota required registration and the filing of financial reports by unions.

It was significant that the major part of this legislation in 1947 still came from the South and Southwest, and from the largely agricultural states of the Midwest and Far West. Restrictions upon strikes by public or public utility employees, however, came in four northern states—New York, New Jersey, Ohio, and Indiana. And greater or less restrictions upon union activities were added in Delaware, Massachusetts, Connecticut, Pennsylvania, and Michigan, as well as in Maine and New Hampshire.

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[30] *Supra*, ch. 8, pp. 311–14.
[31] *Ibid.*, pp. 287–91.
[32] "State Labor Legislation in 1947," *Monthly Labor Review*, 65 (1947), 277–84.

Summary

In summary, by the fall of 1947 state legislation on industrial relations and the rights and obligations of employers or employees, or both, on major points was about as follows.[33] Comprehensive labor relations acts of the Wagner Act type, protecting the right of labor to organize and putting obligations explicitly only upon employers, were to be found in only three states, New York, Rhode Island, and Connecticut. Seven other states had to a greater or less extent included unfair labor practices of employees or unions, in an "equalizing" law; these were Colorado, Massachusetts, Michigan, Minnesota, Pennsylvania, Utah, Wisconsin. Four others—Alabama, Delaware, Florida, and Kansas—had extensive lists of unfair labor practices of labor, the last with some quite limited restrictions also upon employers. Closed shops, and usually all other types of union-security agreements, were banned by constitutional amendment or statute or both in thirteen states,[34] all of them predominantly agrarian, nonindustrialized states with relatively little experience with collective bargaining or union-security provisions. Four others—Colorado, Kansas, New Hampshire, and Wisconsin—permitted such agreements only after vote of the employees; three—Delaware, Louisiana, and Maryland—declared them, as well as nonunion contracts, against public policy and so unenforceable, while Nevada made both types unlawful; and six states provided some measure of protection against unreasonable expulsion or refusal of membership in unions with union-security contracts.[35] Check-off arrangements were controlled by nine states,[36] work permit fees were banned by eleven states.[37]

Although the Supreme Court in cases involving antipicketing statutes and ordinances had held that picketing is protected as a form of free speech,[38] many states continued efforts to restrict picketing and boycotts. Some of these as we have shown above had already been invalidated. While the validity of the entire body of such restrictions continued to be in doubt, the statutes remained on the books as threats and sometimes actual weapons used against union use of economic power. At least eighteen states[39] by 1947 banned intimidation of nonunion workers, ten of them by the drastic antiviolence laws of the South and Southwest. Mass picketing was specifically banned in thirteen states.[40] Five states permitted picketing only if a majority of the employees had voted for a strike,[41] these and seven others[42] made

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[33] The count of major types of legislation follows Millis and Katz, *op. cit.*, with a few additions as checked from other sources, especially Charles C. Killingsworth, *State Labor Relations Acts* (Chicago: University of Chicago Press, 1948), Appendix A, and E. Merrick Dodd, "Trends in State Legislation Relating to Unions," *Proceedings of New York University First Annual Conference on Labor* (Albany: Mathew Bender & Co., 1948), pp. 497–535.

[34] By constitutional amendment in Arizona, Arkansas, Florida, Nebraska, South Dakota; New Mexico also had such an amendment to be voted on at the 1948 election; others by statute, Georgia, Iowa, Maine, North Carolina, North Dakota, Tennessee, Texas, Virginia.

[35] Colorado, Delaware, Massachusetts, New Hampshire, Pennsylvania, Wisconsin.

[36] Arkansas, Colorado, Delaware, Georgia, Iowa, Pennsylvania, Rhode Island, Texas, Wisconsin.

[37] Alabama, Delaware, Georgia, Iowa, Massachusetts, New Hampshire, New York, North Carolina, Tennessee, Texas, and Virginia.

[38] Thornhill v. Alabama, 310 U.S. 88 (1940); Carlson v. California, 310 U.S. 106 (1940).

[39] Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Pennsylvania, South Dakota, Texas, Utah, Virginia, Wisconsin.

[40] Colorado, Delaware, Florida, Georgia, Kansas, Louisiana, Michigan, Minnesota, South Dakota, Texas, Utah, Virginia, Wisconsin.

[41] Colorado Delaware, North Dakota, Utah, Wisconsin.

[42] Alabama, Florida, Kansas, Michigan, Minnesota, Missouri, Oregon.

strikes themselves illegal in the absence of such a vote. Secondary boycotts were banned in more or less sweeping fashion in fourteen states.[43] Strikes, picketing, or boycotts to upset valid certifications and induce violations of the labor relations laws were outlawed in six states—Colorado, Delaware, Massachusetts, Minnesota, Pennsylvania, and Wisconsin. Jurisdictional strikes were banned or subject to greater or less control in thirteen states.[44] Strikes in violation of contracts were either unfair labor practices or unlawful and subject to injunctions or damage suits in eleven states.[45] Strikes of public employees in addition were forbidden by eight states.[46] and in eleven [47] restrictions were imposed upon strikes in public utilities.

Regulation of the internal affairs of unions had gone less far than attempts at control of strikes and picketing and other methods used by labor organizations. Twelve states, however, had adopted requirements for registration and filing of certain information by unions.[48] Union elections were regulated by statutes adopted in Minnesota, Texas, and Delaware. Florida, Texas, and Kansas had required union agents to obtain a license, but each of these laws had been invalidated at least in part. Political contributions had been banned by five states—Alabama, Colorado, Delaware, Pennsylvania, and Texas—but in the first two the provisions had been invalidated.

It is not our purpose here to report on all details or to pass judgment on this body of state legislation regulating and restricting union activities in addition to the specific protection given in a minority of the states to labor's right to organize. Some of it, as in Massachusetts, was rather carefully designed to deal with real abuses and problems. Some of it was highly debatable in purpose, such as the sweeping prohibitions of union-security clauses. Some of it was of the sledgehammer sort meant to beat down effective methods of the use of economic power by unions. Some provisions had already been declared unconstitutional, and more would in all probability be invalidated. Much of it opened the way for an increase in intervention by the courts such as had not been seen since the Norris–La Guardia Act set standards of judicial restraint in labor disputes. Only the test of experience would show the real effect of the legislation upon union strength and collective bargaining and upon political developments. The major significance for our present purposes is in how this history paralleled and influenced the efforts to obtain more or less similar enactments in Congress. At the end the developments in the states, even though the greater part of that experience came from the agricultural and semi-industrial states which were still in the early stages of the establishment of labor organization and collective baragining, strengthened the hands of those who desired a comprehensive revision of federal labor policy.

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[43] Alabama, California, Colorado, Delaware, Idaho, Iowa, Minnesota, Missouri, North Dakota, Oregon, Pennsylvania, Texas, Utah Wisconsin.

[44] California, Colorado, Delaware, Florida, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Oregon, Pennsylvania, Wisconsin.

[45] California, Colorado, Delaware, Louisiana, Minnesota, Missouri, North Dakota, Pennsylvania, South Dakota, Texas, Wisconsin.

[46] Michigan, Missouri, Nebraska, New York, Ohio, Pennsylvania, Texas, Virginia.

[47] Florida, Indiana, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, Pennsylvania, Texas, Virginia, Wisconsin. Minnesota prohibited strikes in any charitable hospital.

[48] Alabama, Colorado, Delaware, Florida, Idaho, Kansas, Massachusetts, New Hampshire, North Dakota, South Dakota, Texas, Utah.

DEVELOPMENTS IN CONGRESS, 1936–46 [49]

Scarcely had the ink dried on the President's signature establishing the National Labor Relations Act as part of our national policy when bills to repeal or amend the Act began pouring into the congressional mill. Despite numerous proposals, only two major pieces of legislation substantially affecting national labor policy passed both houses of Congress between 1935 and the passage of the Labor Management Relations Act in June, 1947. The War Labor Disputes Act [50] became law in 1943 over the veto of President Roosevelt. While from the point of view of the Wagner Act it was restrictive, it did not approach either some of the earlier legislative proposals or the later Case Bill as far as fundamental changes and revisions in national labor policy were concerned. The Case Bill failed of passage over a presidential veto in June, 1946. One other bill of major importance was approved by the House, although it never came to a vote in the Senate. This was the Smith Bill passed by the House in 1940 after the preliminary report of the Smith Committee to investigate the NLRB.[51]

Ten years of legislative proposals

In the ten years covered by this analysis, 169 bills relating to national labor policy were introduced in Congress. If we add those introduced in the Eightieth Congress before the passage of Taft-Hartley, but excluding the original Taft proposal (S. 1126) and the original Hartley Bill (H.R. 3020), we find a total of 230 such bills introduced. If we consider also the more important of the resolutions which if acted upon could have resulted in policy changes, we find that between 1937 and 1947 more than 50 other legislative proposals could be added to this total.[52] It is extremely difficult to assess accurately the meaning of these sheet numbers. Some bills were omnibus measures that would have legislated on labor relations matters from *A* to *Z*.

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[49] This section was written by Seymour Z. Mann.

[50] 57 U.S. Stat. 163 (1943); *Supra*, ch. 8, pp. 298–300; *infra*, pp. 354–56.

[51] *Infra*, pp. 350–54, 360–62. Other bills pertaining to national labor policy which were acted upon in some manner during these years were as follows: an amendment to the Byrnes Anti-strikebreaking Act of 1936, Public Law, 779, 75th Cong., 3d Sess., amending 40 U.S. Stat. 1899; S. 1970, the Oppressive Labor Practices Act, sponsored by Senators La Follette and Thomas (Utah), which passed the Senate, 76th Cong., 3d Sess.; H.R. 4139, reported from the Naval Affairs Committee, and providing for the investigation and mediation of disputes in naval construction, passed by the House, 77th Cong., 1st Sess.; the Lea Act (60 U.S. Stat. 89), April, 1946, banning royalty payments to the union in the making of phonograph records; H.R. 653, the Hobbs Bill, approved by the House, 78th Cong., 1st Sess., later included in the vetoed Case Bill, then separately passed and signed as the Hobbs Act (60 U.S. Stat. 420), July, 1946, removing labor union exemption from the Federal Anti-racketeering Act; and H.R. 6578, 79th Cong., 2d Sess., passed by the House to meet the railroad emergency but not acted on by the Senate.

[52] The information for this section was obtained as follows: The proposals we are concerned with include only those having a major impact on national labor policy. They do not include legislation on wages, hours, social security, etc. Also excluded are riders to appropriation legislation or other measures alluding only indirectly to labor relations matters. The primary sources of information used were the Index and Legislative History volumes of the *Congressional Record* for each session of Congress, the Digest prepared by the Legislative Reference Service of the U.S. Library of Congress, and copies of the bills and resolutions proposed.

The bills considered and the more important resolutions were classified into seven major categories. They dealt with proposals on: (1) NLRB procedure, organization, and jurisdiction; (2) problems of representation; (3) limitations upon the scope and procedures of collective bargaining; (4) unfair and oppressive labor practices; (5) limitation and regulation of self-help activities; (6) employer-union regulation and the imposition of legal obligations and responsibilities; and (7) the settlement of disputes. Anyone familiar with these matters realizes the impossibility of developing hard-and-fast categories for such a classification. There is much overlapping, and some classifications are undoubtedly arbitrary. In each of the bills or resolutions the specific suggestions contained were analyzed and classified. Many miscellaneous proposals were intentionally omitted from the tabular analyses. What follows, then, cannot be presumed to be statistically exact; enough materials were evaluated, however, to establish certain trends and conclusions.

Others might contain only one specific proposal. And a further complication results from duplicate bills being introduced by the same or different congressmen, even during the same session of Congress. Nevertheless, this does constitute a significant number even for a Congress that often works in terms of tens of thousands of bills awaiting or praying for legislative action.

One is impressed in examining these legislative proposals with the fact that the attack upon the principles of the Wagner Act, and in essence this is what the largest portion of these proposals means, was consistently conducted by a small minority continually harping on a few points. This minority was successful finally in winning enough people to their point of view to develop into a successful majority. It is obvious, when these legislative proposals are broken down into their component parts and classified, that all the major proposals put forward during the years were finally acted upon in some way in the revisions and additions to national labor policy contained in the Labor Management Relations Act of 1947.

1. *Problems of NLRB organization, procedure, and jurisdiction.*— A first major group of these proposals related to Board jurisdiction and power, or to the size, organization, and makeup of the Board, or its procedures. It was the Seventy-sixth Congress, in 1939–40, that was most preoccupied with these problems. During 1939 and 1940, also, Congress was concerned with charges of bias and unfairness on the part of the NLRB. Added momentum was given these charges by the raging dispute between the divided camps in the labor movement. The proposals advanced [53] ranged from reducing the jurisdiction of the Board to shearing it of its unfair labor practice duties. A large number of the bills would have excluded agricultural activities and supervisors and other persons from the application of the Wagner Act. Every proposal made on these matters in the Seventy-sixth Congress was repeated in substantially the same form during the three succeeding Congresses. At least fourteen bills introduced would have changed the size or organization of the Board, some going as far as the abolition of the Board and the creation of independent judicial and prosecuting agencies. Eleven would have limited the Board's discretion in the application of remedies. Such proposals appeared in every Congress from the Seventy-sixth through the Seventy-ninth. There were twenty-seven proposals as to unfair labor practice procedures, and thirty-one for revision of representation procedures. Again demonstrating the trend, well over half of both of these occurred during the Seventy-sixth Congress.

While the total number of proposals included here was large, they did not necessarily all differ from one another. Very often the suggestion made in the earliest Congress was sponsored over and over again in substantially the same form by the same congressman or group of congressmen. Four of Representative Hoffman's bills, for example, introduced in each session from 1939 through 1946, were for all practical purposes duplicates of each other. These bills all contained similar provisions limiting the jurisdiction of the Board, requiring certain case procedures, restricting Board uses of personnel, or affecting the remedies to be applied by the Board. This constant repe-

[53] More than 25 such proposals, contained in 18 major bills, were classified. At least 15 of these were advanced in 1939 and 1940.

tition of proposals reflecting charges against the Board is quite typical of the knds of legislation introduced during these ten years.

When we examine this legislative history from the point of view of what was finally enacted into law by Taft-Hartly, it can be seen that the most important of the proposals were ligislated upon, although the most extreme changes suggested over the years did not find place in the congressionally approved 1947 legislation. Among important changes made by Taft-Hartley in this area, which had been proposed many times in the preceding ten years, were the separation of the judicial from the administrative and prosecuting functions, changes in the Act's provisions as to evidence and the scope of judicial review, exclusion of supervisors, and a number of changes in procedure and rules of decision. Proposals as to the position of Trial Examiners were largely handled by the Administrative Procedure Act.

2. *Problems of representation.*[54]—Again it can be said that the Seventy-sixth Congress more than any later one was concerned with these problems. This, too, resulted largely from the AFL–CIO split and the ensuing controversy over the craft-unit question. Almost half of the proposals in this area attempted to amend the Wagner Act to assure craft-unit representation where desired. One of the Burke bills introduced in 1939 would have eliminated completely the majority-rule provisions of the NLRA. Many kinds of bans were advanced on multi-employer or multi-plant units, as well as other requirements as to the representation units allowed. The craft-unit question was acted upon in the Taft-Hartley Act. Perhaps the Communist affidavit requirements of the 1947 Act, also, can be compared to the suggestions occasionally put forward to prohibit subversives from serving as bargaining representatives.

3. *Limitations upon the scope and procedures of collective bargaining.*[55]—Almost all the proposals analyzed here restricted collective bargaining in some manner. Some matters, the closed shop and others, were to be completely removed as proper subjects of collective bargaining. Other proposals removed the "bargaining" from collective bargaining by legally requiring the inclusion of certain provisions, such as specified procedures for the settlement of disputes, or adjustment boards for grievance controversies. Many of these restrictions placed union under the antitrust laws by preventing their entering into contracts, conspiracies, or combinations having as their object some of the items banned, and making such actions subject to injunction.

The Seventy-ninth Congress, of 1945–46, led with the most specific proposals in this area. This was accounted for in part at least by the growing belief that inequality between unions and employers was then stacked in favor of the former. The large number of major disputes occurring in the postwar period added to the argument that something had to be done to curb union power. Such limitations could be accomplished in part through legislation affecting the scope of the collective bargaining process.

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[54] We exclude here any proposals already noted under procedural questions in representation matters. Eighteen major proposals are included here.

[55] Such proposals were sponsored at least 40 times, in 28 major bills. This grouping is not all inclusive of collective bargaining matters since many issues relating to this topic were classified under union-employer regulations, or under limitations upon self-help activities.

In the Taft-Hartley Act we find sections limiting collective bargaining in ways similar to those previously suggested. Among them were limitations on the closed shop and union shop, on the check-off, on royalty payments and welfare funds, the prohibition of featherbedding practices, and the sixty-day-notice requirement for terminating or modifying a contract.

4. *Unfair and oppressive labor practices.*—Here again many matters that could fall into this area have been classified elsewhere. An attempt has been made to distinguish between propositions referring to "unfair" labor practices and those referring to "unlawful" labor practices. The latter are in most cases treated under limitations on self-help activities. The Oppressive Labor Practices Bill introduced in every session of Congress since the early La Follette Committee made its report is placed here because of the similarity to activities designated as employers' unfair labor practices, although some of these practices would have been declared unlawful. Unfair labor practice proposals, found in twenty-one major bills, ran the whole gamut from the complete exclusion of unfair labor practices as subjects of national legislation to redefining small parts of them to benefit special groups. Most of the proposals attempted in some way to bring unions and employees under their purview. This was accomplished by making persons other than employers subject to the prohibitions against certain unfair labor practices under the Wagner Act; by adding special prohibitions to apply to union and employee conduct; or by the creation of altogether new unfair labor practices to apply to unions, employers, and employees alike. Here too the greatest concern with proposals of this kind was in 1945 and 1946, reflecting the argument over union-employer equality which gained in momentum until the adoption of the Taft-Hartley Act. For the 1947 law legislated quite extensively in this area. Its list of unfair labor practices to apply particularly to labor organizations and their agents was typical of the bans suggested often during the preceding ten years.

Brief mention must be made of the Oppressive Labor Practices Act, first proposed in the Senate by La Follette and Thomas in the Seventy-sixth Congress, in 1939. It would have banned the use of strikebreakers, strikebreaking agencies, labor spies, the use of private guards armed with dangerous weapons, the use of industrial munitions during strikes, and the like. This was the result of one of the most intensive and extensive investigations ever conducted by any governmental agency, the La Follette Committee investigation on violations of free speech and the rights of labor, instituted pursuant to a resolution in the Seventy-fourth Congress and extended through 1943.[56] Aside from the original passage by the Senate in 1940, this bill never received further action other than being placed in the legislative hopper in both the Senate and the House. The treatment of such proposals demonstrates the changing attitudes prevalent in Congress after 1935. Occasionally bills in the spirit of the Wagner Act originated from the Senate. If they received favorable action there, they were usually not considered by the House. Bills contrary to the spirit of the Wagner Act occasionally received House approval or con-

[56] Senate Committee on Education and Labor, Subcommittee on Senate Resolution 266, Robert M. La Follette, Jr., Chairman. Measures referring to strike-breaking activities were included in the Byrnes Act and its later revisions. See *supra*, n. 51.

sideration. These were never able to get favorable, if any, attention by the Senate committee dealing with labor matters. The strongly supported bills for an Oppressive Labor Practices Act were consistently ignored, although a growing number of congressmen were ready to consider "restrictive" legislation with only superficial investigation.[57]

5. *Limitation and regulation of self-help activities.*—As would be expected, most of the changes sought here [58] were limitations upon the concerted activities of labor groups. They ranged from flatly prohibiting strikes, as in one Hoffman measure,[59] to some minor procedural requirements that strikers had to meet before striking, as in several bills. In between there were proposals that dealt with every phase of every kind of concerted activities that unions or unorganized employees might undertake. A large number of these restrictions stemmed from bills dealing with procedures for the settlement of disputes, which included various kinds of cooling-off periods, strike ballots, notice requirements, and a host of other miscellaneous provisions. The defense and war period naturally brought forth many of them. Some of these were written into the law when the Smith-Connally War Labor Disputes Act received legislative sanction.[60] The total number of proposals was swelled also by demands for making strike participation treason.[61] Many restrictive measures meant to deal specifically with defense and war industrial activities were later introduced in practically their identical form, merely dropping all war or defense phraseology. The Smith Bill, H.R. 4875, introduced in the Seventy-ninth Congress, was a chief example. It had been introduced twice previously as a measure applying to the special defense and war situation.[62]

Among the more important proposals seeking to limit concerted activities was the oft-repeated attempt to revise the Norris-La Guardia Act and the Wagner Act by defining "labor dispute" so as to include only those who stood in proximate relationship of employee and employer. Such a limitation was included in at least seven of the bills examined. Outright repeal of the Norris-La Guardia Act was suggested by Senator Moore during the Seventy-ninth Congress.

These limitations and regulations on concerted activities fell mainly into two classes. There were first those that prohibited certain activities at the risk of losing rights and status under the NLRB as amended. Certain of these proposals would have prevented violators from receiving such federal benefits as social security or unemployment compensation. Second, there was a very large number of proposals restricting strikes, boycotts, picketing, and other activities by declaring them unlawful. In most cases jurisdiction over violation was given to the district courts, and the bulk of these activities previously protected by the Norris-La Guardia Act were to be opened to the injunction remedy. There were also many proposals relating to union security and to coercive activities, proposals regulating the use of

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[57] For discussion of the Smith Committee investigations, *cf. infra*, pp. 350–52; *supra*, ch. 2, pp. 49–50. Its methods were the subject of considerable criticism and controversy.

[58] One hundred and seven important proposals contained in 62 major bills or resolutions were classified.

[59] H.R. 1407, Seventy-seventh Congress.

[60] See *infra*, pp. 354–56.

[61] As in H.R. 4223, 5929, and 6057 in the Seventy-seventh Congress.

[62] H.R. 6149, 77th Cong., 1st Sess., and H.R. 2124, 78th Cong., 1st Sess. Much of the latter measure of course was included as part of the War Labor Disputes Act.

property in self-help activities, and others. Self-help activities would also have been severely limited by numerous suggestions to make unions liable and suable for damages resulting from concerted activities or contract violations.[63]

Great preoccupation with these matters of limiting and regulating self-help activities is found in the Seventy-seventh and Seventy-ninth Congresses. This is probably explainable for the former, since such matters were assuming more importance as the defense period gained momentum. Moreover, 1941 was a record strike year. The attention given such matters in the Seventy-ninth Congress can be attributed to the postwar strikes and to the growing pressure to curb labor union power as the months of 1945 and 1946 progressed.

Many of the self-help limitations and regulations put into the legislative mill during this ten-year period were included in one form or another in the 1947 law. Organizational, jurisdictional, and sympathetic strikes, boycotts, picketing, contract violations, featherbedding, coercive, violent and destructive activities, Norris-La Guardia Act limitations, and others all received Taft-Hartley attention.

6. *Regulation of employers and unions; imposition of legal obligations and responsibilities.*—It was quite apparent that most of these legislative proposals were directed at unions. Only a few suggestions dealt with regulation of employees in regard to labor matters. Of course, much of the legislation was predicated on the idea that employers and businesses were already sufficiently controlled and circumscribed by adequate legal regulations and responsibilities. The argument most often advanced in favor of the type of union regulatory legislation here considered was based on the notion that unions and their activities were similar enough to ordinary business activities to bring them under the same kinds of legal requirements as those imposed on business and industry. Over one-fourth of these proposals[64] would have required union incorporation or registration of one kind or another. More than two-fifths of them attempted in some manner to regulate internal union affairs. Many of these called for specific kinds of election procedures within unions; some would have regulated details of dues and assessments; many would have specified who could serve as union officers; some would even have legislated concerning the internal decision-making processes of labor organizations. Many would have made unions liable and suable at civil law for damages resulting from concerted activities or contract violations. A number included prohibitions on political contributions and activities.

Pressure for such legislation mounted from 1937 to 1942. With the Seventy-eighth Congress is subsided considerably, probably because of our entrance into the war and the passage of the War Labor Disputes Act in 1943, which naturally acted to cut off further legislative proposals for a short while. But, as the postwar situation developed during the Seventy-ninth Congress, these matters received increasing attention. Such pressure passed over into the Eightieth Congress and came to a head with the inclusion in law of much of the essence of the proposals made over these ten years. The 1947 labor law included extensive requirements for registration and filing of certain docu-

[63] These are classified in our next group. Such proposals were contained in 12 major bills.
[64] More than 85 proposals were advanced in 50 significant bills or resolutions.

ments by unions before they could use the facilities of the NLRB and imposed extensive legal obligations and responsibilities in the way of suability and liability for a variety of causes. A ban on political contributions and expenditures was included, as well as clauses removing in some ways protections unions had previously enjoyed against application of the antitrust laws.

7. *The settlement of disputes.*—Methods for the settlement of labor disputes were not within the province of any of the basic federal labor laws other than the Railway Labor Act. Although for many years the Department of Labor maintained its Conciliation Service, there was no legislation on mediation and conciliation procedures. There were many proposals, however, to limit strikes in some manner or to provide for their prompt settlement. Especially was this true for public utility disputes, or disputes in industries where stoppages could have serious repercussions on the health, safety, or vital interests of the nation. Most of the thirty-five important bills containing suggestions in this group provided for boards, panels, or tribunals for the settlement of various kinds of disputes in a variety of industries. They ranged from the suggestions offered as far back as the Seventy-fifth Congress to give mediation and conciliation functions to the NLRB to the setting-up of procedures similar to those of the Railway Labor Act for maritime labor. Steps to be used in the settling of disputes ranged from mere legislative urging that mediation and conciliation facilities be first used to procedures to be followed in case strikes continued in plants or mines that had been seized by the government in order to prevent or end a work stoppage. In between such extremes were cooling-off or status quo provisions, conciliation and mediation, adjustment boards for disputes arising over contract interpretations, fact-finding, arbitration, and government operation. Under many of these proposals violators might have lost status under the NLRA, had their violations enjoined or restrained by the courts, or have been subjected to criminal penalties.

Understandably the greatest activity over measures of this kind occurred during 1945 and 1946. In the light of the peculiar postwar conditions,[65] the major work stoppages then occurring, the attitudes of business and the public, and the congressional political realignments, such concern in Congress is easily explained. While none of the extremes of these proposals were adopted, the most important of them are contained in Title II of the Taft-Hartley Act.

This ten-year survey shows the range and character of the legislative proposals that preceded the Taft-Hartley Act. Merely from a review of the subjects covered one can discern the pressures for amendatory legislation that were mounting during this period. An examination of other elements in the legislative background of the 1947 Act will give added meaning to these growing pressures.

Persons, parties, and regions [66]

Personalities, parties, and regions are of interest in relation to this mass of labor legislation proposed from 1937 to April, 1947. For the

[65] *Supra*, ch. 8.

[66] The ten-year legislative period for this chapter has covered the period from the opening of the Seventy-fifth Congress in 1937 to the opening of the Eightieth Congress in 1947. For this section we have extended the period to include the first four months of the Eightieth Congress so that measures proposed in the House before the introduction of the Hartley Bill and measures proposed in the Senate before the introduction of the Taft Bill could also be examined.

200-odd bills and resolutions analyzed there were some 100 senators and representatives who had assumed the responsibility for sponsoring such measures. This was not a one-man-one-bill affair. Some 66 representatives were responsible for the 161 major House measures introduced. Many bills were, of course, plurally sponsored, but credit was given for a bill or resolution to each man sponsoring the proposal. The variation between the number of sponsors and the number of bills offered is accounted for primarily by the activity of a few men. Representative Hoffman in the House with thirty-four bills to his credit is the extreme example. Smith of Virginia follows with nine. A few representatives had five or six bills to their credit. More than a score sponsored from two to four bills. It must be remembered, of course, that many of these were merely reintroductions of similar measures not acted upon earlier. Even some bills introduced in the same session by the same person were, for certain strategic reasons, duplicates of each other, or were parts of omnibus bills put into the hopper earlier during the session—if not on the same day. Yet the actual numbers of these proposals introduced serve as an index to the activity and concern exhibited over labor policy at any given session. Such raw numbers alone, also, give important clues to the intentions and motivations of the sponsoring congressmen, for it was not unusual to find very restrictive proposals, less restrictive proposals, and occassionally even nonrestrictive proposals offered by the same man at a single congressional session. What can one assume when one notes a bill which proposes to repeal the Wagner Act, offering no amended version or substitute version of a national labor law, accompanied or followed by various proposals to amend the Act in one fashion or another? Is it unfair to suppose that repeal would have been preferred to amendment had such repeal been possible?

Taking first all the legislation offered in the House, without any reference as to whether its over-all effect or intent were restrictive or nonrestrictive, well advised or ill advised from the point of view of policy expressed in the Wagner Act, the breakdown by party of proposed legislation was as follows: 40 Democratic representatives, 25 Republicans, and one Progressive participated in the sponsorship of these measures. Until the Eightieth Congress there was a Democratic majority in the Hosue. When Republicans became the majority in the Eightieth Congress, there was a noticeable upturn in the number of Republicans participating in these proposals for labor legislation. When we exclude legislation, however, which could be considered as favorable to labor, or in the spirit of the NLRA, or bills for settlement of disputes with few regulatory or restrictive provisions, or those bills introduced at the behest of the President (especially during the Seventy-ninth Congress), we can exclude at least 11 Democrats from the original 40 participating. Of the 29 remaining Democratic representatives, at least 15 who can be termed southern Democrats were responsible for a large amount of the restrictive type of proposals. Turning to the 25 Republican representatives, over half had made no previous labor legislation proposals before 1945. Of this half only 2 had been in Congress at the time of the passage of the Wagner Act, while 4 other Republicans who had made such proposals had served continuously since 1935. More than one-half of the 25 did not enter Congress until 1943.

During the Seventy-ninth Congress in 1945 and 1946 and in the first four months of the Eightieth Congress in 1947 there were 73 bills related to labor policy introduced in the House. Republicans whose first legislative proposals on such matters came in 1945 or later were responsible for more than two-fifths of the 73 proposals. These measures, sponsored for the most part by delegates from northeastern states, could be classified as restrictive in nature. Some nine Democrats who had not previously sponsored any labor legislation put into the hopper during this period bills that were in some manner restrictive. These Democratic restrictive proposals represented less than one-fifth of the total of 73 bills, and most of these were introduced by southern representatives. Of all restrictive measures, then, introduced in the House during the Seventy-ninth Congress and the first months of the Eightieth Congress, more than three-fourths were introduced by Republican members; most of the remaining measures were sponsored by southern Democrats.

These figures corroborate general observation. The pressure for restrictive legislation in the House as it mounted came from the traditionally conservative regions and representatives: from the South, always Democratic and usually conservative on labor questions, and during this period vexed by the growth and challenge of unionism in the South stemming from the war and postwar period; and, second, from significant numbers of eastern and midwestern Republican representatives. Even without detailed analysis, when debate and committee work are considered as well as the activity of other members who did not directly sponsor legislation, these trends become even more patent.

Taking the over-all picture in the Senate, we find that for the 68 major proposals in the Senate in the ten years there were 33 senators involved. Democrats accounted for 17 of this total, Republicans for 15, and there was 1 Progressive. As in the House, there were also in the Senate plural sponsorships, repeated proposals, and inconsistent proposals. Fewer men, however, had large numbers of proposals to their credit, although Senator O'Daniel (D.) of Texas with 19 legislative proposals and Senator Ball (R.) of Minnesota with 8 stand out somewhat, considering that the total number of proposals in the Senate was of course less than in the House. The Senate accounted for only one-third of the total bills and resolutions. Excluding the nonrestrictive bills in the same way as in our discussion for the House, we can exclude at least 9 Democrats, 2 of who were southern Democrats. There were a total then of 5 southerners among the 8 Democratic sponsors, of whom O'Daniel and Byrd loom large as supporters of restrictive labor measures. Members from the Republican side of the Senate, on the other hand, sponsored 38 measures here considered, all restrictive in one way or another, out of the total of 68.

The increased concern of the Senate on these matters in the Seventy-ninth and Eightieth Congresses is very evident. Until 1943 there were only 25 measures introduced in the Senate, and a good number of these were not restrictive in any sense of the term. From January, 1946, until April of the following year 45 measures, almost twice the number of the previous eight years, were introduced in the Senate. The absence of large amounts of amendatory legislation in the earlier Congresses reflects the usual prolabor attitude exhibited in the Senate

until the Seventy-ninth Congress. The increase commencing with 1945 reflects the growing number of Republicans entering the Senate who felt disposed to take an active part in the shaping of national labor policy; of the 15 Republican senators included in this activity, over half did not enter the Senate until 1942. Of these Republicans, only Senator Vandenberg was a member of Congress at the time the Wagner Act became law.

The same general trends as to attitudes, pressures, and proposals found in the lower chamber of Congress were also indicated by the activity in the upper chamber.[67] The Senate, however, until the Seventy-ninth Congress was much less disposed to extreme restrictive action, or any action at all for that matter, than was the House. Southern Democrats were active in the Senate as in the House, although there are proportionately fewer names involved, and there are some notable exceptions of men who stood against the traditions of the region they represented. The importance of Republican representation from the eastern and midwestern states is significant in the Senate. There was perhaps greater participation by western state representatives on these matters in the House. Lastly, we note the profound impact of newer Republican members in the Senate such as Ives of New York, Morse of Oregon, Ball of Minnesota, Ferguson of Michigan, and McCarthy of Wisconsin.

State trends and national trends

Significant relationships are to be noted between the development of labor legislation in the states during this ten-year period and activity in the national legislature at the same time. In 1935 Congress led with the Wagner Act, and those states which were to adopt its principles in legislation of their own followed only after the NLRA had become law. After that time, however, it was the states which first adopted or attempted to adopt various kinds of amendments or changes in labor policy. Legislation coming to the House and Senate for consideration, or pressing for consideration there, very often had been previously suggested in state legislatures in various parts of the country; or it may even have been adopted and put into practice in one or several of the states.

By 1947 more than thirty-five states had legislation which was to some degree restrictive of labor or union activities and practices.[68] It is true that a number of these states had basic legislation of the Wagner Act type and that certain restrictions were additions or amendments to their basic protective-type acts. On the other hand, a goodly number of these states had no previous experience with labor legislation of this kind, and their original activity in industrial relations statutes was all restrictive or regulatory in content. These states represented to a large extent the southern and southwestern states experiencing new problems as war and defense industries spread to

[67] It should be noted that quite often attempts were made on the part of congressmen interested in restrictive labor legislation to get their bills referred to other committees than the House and Senate Labor committees. Many bills whose passage would have been of major importance for labor activities were referred to the military committees, judiciary committees, or others. Outstanding, of course, are the examples of the 1940 Smith Bill gaining consideration through Rules Committee action. The Smith-Connally Act in 1943 emanated from the House Military Affairs Committee largely, and the Case Bill in 1946 was a substitute measure written by Representative Case and allowed as a substitution by the Rules Committee of which he was an important member.

[68] *Supra*, pp. 329–32.

their regions, and along with such industrialization labor unrest and labor organization of a magnitude they had not before known. Such states, for example, as Alabama, Arizona, Arkansas, Georgia, and Texas could be so classified. As the pressure for revision of policy at the national level increased, the activities of congressmen from these same states are very noteworthy. O'Daniel of Texas and many of his colleagues in the Senate and the House give good examples of attempts of state representatives to get action at the national level along the lines of patterns adopted in their own states. Other significant examples are not wanting.

When proposals and their sponsors are analyzed in detail by states, one finds that on at least forty occasions legislation on national labor policy was introduced into the House or Senate by representatives or senators immediately following activity on labor policy legislation in their own states. In many cases the suggested legislation followed quite closely that adopted by the state legislatures.

The extraordinary amounts of restrictive and regulatory legislation adopted in the states in 1945 and 1946 accompanied the very strong pressures evident in Congress during this time, and they preceded, of course, the adoption of any legislation at the national level, although both houses of Congress approved the Case Bill in June, 1946. That there is some relationship between the trends in the states and the pressures at the national level seems obvious from the number of states active during the years of the Seventy-ninth and Eightieth Congresses who had representatives in Congress active on the same or similar kinds of proposals there.[69]

Three crucial periods in Taft-Hartley background

Three particular phases of legislative activity in Congress deserve special mention in any account of the ten years of developments which preceded the approval by the Eightieth Congress of the new labor act. The first concerns the attempts to amend the Wagner Act during 1939 and 1940; they came to a temporarily unsuccessful climax when the Senate failed to approve the Smith Bill, upon which the House had acted favorably. The next important phase centered about the adoption of the Smith-Connally War Labor Disputes Act in 1943 over the veto of President Roosevelt. Finally, there was the activity during the Seventy-ninth Congress, climaxed by the House and Senate acceptance in June, 1946, of the Case Bill. During each of these significant sessions bills were proposed, hearings were held, debate occurred, and the measures were accepted in part and rejected in part by one or both of the houses. While there was not the detailed investigation of many of the phases of the 1947 Act which numerous citizens would have preferred, the action taken by Congress in the spring of 1947 in large part echoed and re-echoed attempted and successful legislative action in these three significant preceding periods.

The treatment of these developments which follows seeks to describe systematically some of the more important pieces of legis-

[69] We may cite such states and representatives as Indiana with Landis and Jenner; Maine with Hale and Smith; Massachusetts with Herter and Hesselton; Michigan with Dondero, Ferguson, Woodruff, and Hoffman; Minnesota with Ball; Missouri with Bennett and Slaughter; Nebraska with Miller and Wherry; New Jersey with Hartley, Auchinschloss, Case, and Smith; Pennsylvania with Muhlenberg; South Dakota with Case; Texas with O'Daniel; and Virginia with Byrd, Smith, and Randolph. The list of states and congressmen is only partial, and additions are certainly possible.

lative history which give meaning to the acceptance of Taft-Hartley by the Eightieth Congress. An over-all legislative survey has already been made. The basic reasons for these recurring campaigns to change our labor policy have been shown in chapter 8; and, what is more, the materials dealing with the specific charges hurled at the Board and the Act it administered have formed the basic subject matter in the first seven chapters.

1. *1939–40—the Seventy-sixth Congress.*—While the first major attempts to amend the Wagner Act came in the sessions of the Seventy-sixth Congress, indications of pressures to be felt by Congress appeared in the latter half of 1938.[70] The AFL at meetings early in that year and from time to time through President Green, John P. Frey, and AFL legal counsel had begun to talk and prepare resolutions along the lines of the Walsh Bill, soon to be introduced; but it was in October, 1938, at its Fifty-eighth Annual Convention that the AFL adopted its important proposals for amendments[71] that were to set the stage for a good portion of the legislative history to ensue during the following twenty-four months. These proposals were, of course, largely designed as an attack against the Board itself in retaliation for alleged bias and unfairness in matters of collective bargaining units and the invalidation of contracts, which the AFL had been consistently claiming since the split with the CIO had occurred.[72] They aimed toward gaining an advantage for the AFL in its interunion quarrels with the CIO. This division in the labor movement was a most important factor behind the drives for amendment to the Act and the defenses of the Act made during this period. The CIO during this pre-Congress period, as well as during the 1939 session, opposed amendments of all kinds and vowed to support the opposition with all its resources.

Industry was active, too, in this drive for legislation. Senator Burke had delivered an address at the annual meeting of the Chamber of Commerce of the United States in March, 1938, which portended all the proposals he was to embody in the bills introduced in the Senate during the Seventy-sixth Congress. These proposals were, short of repeal, all those for which the major business and industry associations and spokesmen had begun to work. Their demands for amendments were to increase as the months rolled on toward the opening of the new Congress. Both the NAM and the Chamber of Commerce, as well as other important groups, continued this barrage of proposals and pressures during the whole of the Seventy-sixth Congress.[73] With minor modifications, and in some quarters with greater belligerency and daring, it was the same program that the major employer groups followed in pressing for legislation in 1946 and 1947.

Of some twenty significant bills introduced during the Seventy-sixth Congress, we stress eleven whose impact was very strong in

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[70] Much help in ideas and background material for this section came from Millis and Montgomery, *op. cit.*, pp. 534–47, and the news items and documentary materials in the *Labor Relations Reporter*, Vols. 2 through 7, as well as the original analysis by the writer.

[71] They included amendments to favor craft units, to curtail the power of the Board to invalidate contracts, set specific qualifications for trial examiners. . . . "Some are wholly incompetent and unfit to serve in that capacity . . ." liberalize rules as to subpoenas, end secrecy of the Board's files, permit intervention by interested parties as a matter of right, set time limits for the holding of elections and the making of decisions. American Federation of Labor, *Report of the Proceedings of the Fifty-eighth Annual Convention*, October, 1938, pp. 344–45.

[72] Cf. *supra*, ch. 5, pp. 143–44; ch. 6, pp. 204–7.

[73] Cf. *supra*, ch. 8, pp. 283–85.

1939 and 1940 and which for the most part retained their significance for the next eight or nine years.[74]

These proposals fall into three broad groups. First are those of the Lea and Logan types broadly redefining agricultural labor so as to exclude from the application of the Act certain workers otherwise covered. A second group somewhat modified Board procedure and jurisdiction but not the form or spirit of the Act itself. Into this group fall most of the AFL proposals which sought to strengthen its position against the CIO. The Walsh, Barden, Hartley, and Norton bills, and to an extent the Smith Bill as passed, are the prime examples. The third group would have radically modified Board procedures and structure as well as other important aspects of the Wagner Act. These were the bills receiving the strong support of the various business and industry groups. The Burke, Hoffman, Anderson, and Holman proposals and the Smith Bill as introduced are outstanding here.

The details of each proposal are not of great significance at a post-Taft-Hartley date. We can summairze, however, the major aspects of these three kinds of bills. The first group are self-explained. They are important because of their number, because of the continued strong sentiment behind such bills all the way through the Seventy-ninth Congress, and because of the intent shown to remove jurisdiction in as man areas as possible from the Board. The remaining two groups in large measure set the general framework for most of the significant proposals that were to follow until the adoption of Taft-Hartley.

The second group of bills, that would have made less than major modifications of national labor policy but contained the changes desired by the AFL, generally included some or all of the following most significant modifications:

1. Limited the discretion and the jurisdiction of the Board by removing its authority in jurisdictional disputes or in designating multi-plant or multi-employer units and by requiring craft units whenever desired by a majority of the craft employees.
2. Changed the concept of employer neutrality under the NLRA by allowing the employer to interfere in employee choice of unions but not to "restrain or coerce" employees; by giving employers the right to freedom of expression when not accompanied by acts or threats of discrimination; by not holding employers responsible for acts of supervisors not vested with the right to hire or fire.
3. Created a new five-man board or enlarged the Board from three to five members.
4. Required notice to all parties who might be adversely affected and provided for labor organization intervention in complaint cases where a showing of interest could be made.
5. Set new rules in representation cases, by permitting employers to petition for elections; giving district courts power to order the Board to act in conformity with hearing or elections; requiring the Boad to hold hearings on representation questions; requiring elections when requested by a labor organization; establishing a one-year rule for new elections or certifications.

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[74] All except two of these were introduced during the first session. Two, the House Labor Committee Norton Bill and the Smith Bill resulting from the Special Committee Investigating the NLRB, came during the third session. In the Senate we are interested in the Burke, Holman, Walsh, and Logan bills, and in the House in the Barden, Hartley, Hoffman, Lea, Anderson, Norton, and Smith proposals. The Barden and Hartley bills were duplicates of each other; the Logan and Lea bills were substantially similar and represented a host of proposals of the same nature also introduced. Respectively S. 1264, S. 1392, S. 1000, S. 1550, H.R. 4749, H.R. 5231, H.R. 4990, H.R. 4400, H.R. 2761, H.R. 9195, and H.R. 8813.

6. Required independent, fair, and impartial trial examiners for complaint and representation questions and provided for disqualification for bias on a charge by one of the parties.

7. Prohibited the Board from impairing agreements between employers and representatives of employees except under specified conditions; redefined requirements as to evidence.

Bills of the third kind, supported by business groups and containing primary changes in national labor policies, were for the most part restrictive and regulatory of labor union activities. They included more or less of the following:

1. Defined collective bargaining to make it mean less than under the NLRA; specified that employers or unions were not required to make counterproposals or reach collective bargaining agreements.

2. Changed the concept of employer neutrality by permitting employers to "counsel and advice" in matters of organization (this not qualified by prohibition of restraint and coercion of employees).

3. Changed or modified the Board in makeup, organization, and function or abolished it completely and created new agencies in its place; all would have separated the judicial and prosecuting functions of the Board in some manner.

4. "Equalized" the NLRA by proscribing unfair labor practices of unions and employees; provided that the commission of an unfair labor practice on the part of an employee was a complete defense for the commission of same by employers.

5. Prohibiting filing complaints more than thirty days from the time the act was committed; required thirty-day notice to employees or employers of complaints to be filed; provided for the removal to the proper district courts of complaint cases within twenty days.

6. Permitted employer petition for elections in case of dispute between unions; required determination of representation issues at the request of an employer; eliminated the majority rule provisions of the NLRA.

7. Prohibited the appointment of aliens to any position.

8. Defined disputes as current only until normal production was resumed; provided penalties for striking without written demands and without allowing time for demands to be answered, and for striking in violation of agreements or participating in sit-down strikes; required registration of unions; provided that union officers or employee representatives could not be subversives.

Extensive hearings were conducted by the labor committees of both houses, starting in April and May, 1939, and running until late July or August. As the hearings commenced, the Board itself, in a lengthy memorandum submitted to the Senate committee, came out strongly against amendments. On four points already under discussion, however, it declared itself open-minded: on permitting employer petitions under proper safeguards; on statutory guidance as to the determination of bargaining units; on additional safeguards for contracts, although the power to invalidate contracts should not be removed from the Board; and on a time limit for the opening of hearings after issuance of complaints. When the House committee was in its twelfth week of hearings, the House voted 254 to 134 [75] to approve the resolution presented by Howard Smith of Virginia for a special committee to investigate the NLRB. While the resolution was opposed by most of the members of the House committee, it was supported by the AFL. The growing temper of the House was clearly

[75] *Cong. Rec.*, 84 :9592.

shown in the debate, the action taken, and the character of the committee appointed.[76]

Shortly after the completion of the hearings of the regular committees of both houses the CIO also announced itself as critical of the NLRB, contrary to its expressions during the weeks of hearings.[77] The CIO claimed that the Board was attempting to meet criticisms and to placate the AFL, by decisions permitting the carving-out of craft units and the breaking-up of company-wide units by separate plant elections despite successful organization and collective bargaining on a board basis.[78] Before the 1940 session of Congress convened the CIO declared in favor of certain amendments to the Wagner Act. Two of these would have added further penalties for violations of the Act by employers, but the third was designed to check the tendency to permit carving-up of established CIO industrial units.

The AFL continued its stand for amendments, although with some uncertainty since internal opposition developed at the 1939 convention. Business groups continued their ever strengthening line of attack. Meantime the Special Committee for the Investigation of the National Labor Relations Board carried on its extensive hearings and investigations.[79] In March, 1940, before completion of the hearings and before any report from the House Labor Committee after its protracted hearings of the first session, the majority of the Smith Committee issued an Intermediate Report [80] and introduced H.R. 8813, the Smith Bill. The Intermediate Report and bill were strongly opposed by the Healey and Murdock minority.[81] The AFL declared in favor of those proposals meeting its earlier suggestions for amendment but opposed others which it felt "invaded the basic principles of the Act." [82] The CIO vigorously opposed the bill. As was to be

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[76] Mrs. Mary T. Norton, chairman of the House Labor Committee, urged that the Labor Committee be permitted to finish the job it had started, and asserted: "He [Mr. Smith] is the last man in the world to pass on labor legislation. * * * I have yet to find a single labor bill for the benefit of the workers of the country that he has ever voted for." *Cong. Rec.*, 84:9583. Mr. Smith disclosed that he had voted against the Wagner Act on the ground that it was unconstitutional. "But time has changed the Supreme Court and the Supreme Court has changed the Constitution," he said. *Ibid.*, 84:9582. Representative Cox, stating that the AFL supported the resolution, said, "If we are to wait here until the Committee on Labor takes action to restrain the Labor Board in its maladministration of the law, then we will be here until Gabriel blows his horn." *Ibid.*, 84:9591. At a later point in the debate Representative Smith answered Mrs. Norton's charge by citing bills beneficial to the workers for which he had voted. *Ibid.*, 84:10235–10236. The members appointed to the Committee were Smith (D., Va.), chairman; Healey (D., Mass.), Murdock (D., Utah), Halleck (R., Ind.), and Routzohn (R., Ohio). Two members had been previously committed to amendment, two appeared favorable to labor, according to their past action in the House, and one had been a former general counsel for an AFL union. Chairman Smith was a member of the Rules Committee and not of the Labor Committee.

[77] A summary of the testimony before the two regular committees showed the following. Of 160 witnesses before the Senate Committee in its seventeen weeks of hearings, 108 favored amendment to the NLRA. The CIO's 15 witnesses opposed any change. Among those supporting amendments were 52 employers' representatives, most of them favoring the Burke amendments; 11 of the 15 AFL speakers, indorsing the Walsh bill; 15 farm representatives indorsing the Logan Bill; 23 of 27 representatives of independent unions. Of 55 witnesses before the House Committee in its thirteen weeks of hearings, 25 favored amendments and 30 opposed. Six CIO representatives opposed; of 10 AFL representatives, 7 supported amendments. Others favoring amendment included 8 employers and 2 independent unions. *Labor Relations Reporter*, 4 (August 7, 1939), 873.

[78] *Ibid.*, p. 949. For discussion of some of the controversial decisions of this period, cf. *supra*, ch. 5 pp. 138–44, 148–49, 151–52.

[79] For comments on its work, cf. *supra*, ch. 2, pp. 49–50. Its proceedings were published in thirty volumes, covering hearings from December, 1939, to December, 1940.

[80] U.S. House of Representatives, Special Committee To Investigate the National Labor Relations Board, *Intermediate Report*, Report No. 1902, 76th Cong., 3d Sess., Pt. 1, March 29, 1940.

[81] *Ibid.*, Pt. 2, April 11, 1940.

[82] American Federation of Labor, *Report of the Executive Council to the Sixtieth Annual Convention*, November, 1940, pp. 75–76.

expected, the Chamber of Commerce and the NAM approved but called for further amendments.

The House Labor Committee finally in April presented the Norton Bill, including only four amendments, even these opposed by seven members of the Committee. It would have added two members to the Board, required craft-unit designation by the Board when such a desire was indicated by a majority of the employees of a particular craft, permitted employer petitions where competing unions were involved, and protected certifications of representatives for one year. The NAM called this a red herring and pressed for the Smith amendments; the AFL gave full approval, and the CIO offered vigorous opposition. As had been threatened by the Rules Committee, the Norton Bill was quickly sidetracked when it came up for consideration in June, by a rule which permitted the substitution of the Smith Bill intact. A letter from President Green giving AFL approval to the latter if certain modifications were made was read into the record, and the bill was shortly passed with these changes.[83]

In the Senate Committee very little was done with the Smith Bill. Senator Thomas pleaded the long study necessary and procedural complications because of the passage of the Walter-Logan Bill with its code of procedure embodying some of the suggested NLRA amendments for all administrative agencies.[84] Besides it was reported that despite his letter President Green did not support the bill; the letter was claimed to have been a tactical move to get the bill passed and on to the Senate where objectionable portions could be eliminated. By November it was clear that there would be no action in the Senate and consequently no change in national labor policy during 1940.

These 1939–40 attempts at amendment set the pattern for the continuing efforts almost until Taft-Hartley.[85] The passage of the Smith-Connally Act was the first success. The postwar crises brought new opportunity. When a Republican majority began to assume control in 1946 and 1947, their proposals pushed so vigorously followed the pattern of the bills introduced in 1939–40.

The employer associations and business groups whose appetites for change had been whetted continued their support of the basic and far-reaching amendments, adding new ideas as circumstances indicated or allowed. Only the AFL had had its fingers burned in attempting to get the kind of amendments it wanted. It soon joined the CIO in the safer strategy of opposing most legislation that would tamper with the Wagner Act. If we are to see the same ideas pressing for consideration through the years, we also see many of the same faces pressing for the original ideas they had presented during this period, or other ideas of the same amendatory and restrictive spirit.

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[83] The four changes made eliminated the following: a change in the statement of national labor policy to omit reference to encouraging collective bargaining; a definition of collective bargaining to relieve the employer of the duty to make counterproposals; a clause barring certifications where competing unions failed to agree on the unit; and a limitation of back pay for discharged employees to six months (a twelve-month limitation was accepted). The Act as passed included most of the points listed in our analysis of the second group of bills, *supra*, p. 349.

[84] Senator Taft for the minority stated flatly that no action was taken because the majority simply refused. He thought a committee vote should have been taken.

[85] Ex-Chairman Hartley of the House Labor Committee of the Eightieth Congress in his book expressed this Committee's indebtedness to the important contributions of Howard Smith personally and of the Smith Committee. Fred A. Hartley, Jr., *Our New National Labor Policy* (New York: Funk & Wagnalls Co., 1948), pp. 14–15.

We need but mention the names of Barden, Hartley, Hoffman, and Smith to realize the import of Senator Wagner's remark, made during this time: "Based on more than thirty years' experience as a legislator, I am willing to set down as a first principle that, while all great social legislation needs to be perfected over the years, no great social legislation has ever been genuinely perfected except by its true friends." [86]

2. *The Smith-Connally Act.*—The next critical period occurred in the midst of the war during the 1943 session of the Seventy-eighth Congress. For the first time since the passage of the Wagner Act both houses of Congress approved a bill contrary to the spirit of that Act. The War Labor Disputes Act became law on June 25, 1943, when very substantial majorities voted to override the veto of President Roosevelt. All the provisions of the Smith-Connally Act had previously been suggested in one form or another in the years 1941 and 1942. Some of the proposals were contained in the bills in the Seventy-sixth Congress just discussed. Representative Smith had introduced a bill immediately after Pearl Harbor which included all and more than the adopted legislation contained. Difficulties had arisen and emotions had run high as a result of the crises in the bituminous coal industry. The concurrence of the Senate in this Smith-Connally type of legislation in 1943 so shortly after the vigorous stand the same majority in the Senate had taken on the various proposals offered in the Seventy-sixth Congress, and despite the very good record labor as a whole was making on its no-strike pledge, attests to the emotion and public disfavor aroused by the increased number of strikes during this period. We need not repeat our discussion of the merits or demerits of the Smith-Connally Act, or its record in preventing or engendering strikes during the years it remained on the statute-books.[87] Its significance here is in the extent to which it gives added prespective to the actions of the Eightieth Congress.

The original Connally Plant Seizure Bill (S. 796) was passed by the Senate early in May. It provided for presidential seizure of plants, strong prohibitions against any attempts to interfere with production in a seized plant, subpoena power for the War Labor Board, rules of procedure for the WLB, and court review of WLB decisions in relation to matters of law.

More important for our purposes are the amendments offered to the bill during its consideration but not adopted. These included allowing the federal courts to enjoin violations, thus extensively modifying the Norris-La Guardia Act. Such proposals had begun to appear in the two years previous. In these proposals we find evidence of a growing sentiment which reached a climax in the proposed Ball-Taft amendment during the Senate's discussion of S. 1126 in the Eightieth Congress; this would have again opened the injunction remedy to private parties. Some modifications of Norris–La Guardia were of course included in Taft-Hartley as adopted. A cooling-off period suggested by Taft in the Senate in 1943 was also defeated.

When the bill reached the House, a much more drastic measure based for the most part on the Smith proposals of the current and past Congresses was adopted. Its final form as passed by the House

[86] *Cong. Rec.*, 86 :2775 (March 13, 1940).
[87] Cf. *supra*, ch. 8, pp. 298–300.

included the following provisions; statutory authority and subpoena power for the WLB; government seizure, with strong penalties for interference with production in such seized plants; a thirty-day cooling-off period and a prohibition of strikes after that period without a favorable secret ballot; registration requirements for unions; and prohibition of union political contributions.

Here, too, the clauses which were omitted after debate, although recommended by the committee, are significant. For the first time the whole House actually considered measures that would have forbidden jurisdictional strikes and violent picketing and would have authorized the Attorney-General to seek antistrike injunctions in the federal courts. Other provisions considered by the committee, but not reported to the whole Hose, uwould have banned sympathy strikes and boycotts. These also are significant in portending the future and indicating the pressures being exerted in regard to national labor policy.

The final version agreed upon by Senate and House conferees contained four major provisions; (1) requirement of a thirty-day strike notice in private plants, the NLRB to conduct a secret ballot on the thirtieth day after notice; (2) provision of statutory authority for the WLB; (3) prohibition of strikes in government-held plants or mines; and (4) prohibition of political contributions by unions in federal elections. Criminal penalties were provided for interference with government operation, and there was liability for damages resulting from strikes in violation of the provisions for notice and cooling-off period. The strike-notice requirement and the cooling-off provisions were of course to appear in almost all the bills for settlement of disputes that poured in on Congress in the postwar period of 1945 and 1946. The ban on political contributions was written into the Taft-Hartley Act despite the protests made when this was first introduced in the War Labor Disputes Act and the little discussion given to it in the Eightieth Congress.

Though it was a special situation that precipitated the War Labor Disputes Act, and though the warnings of the President concerning its probable effects went unheeded, it remained law even through a part of the postwar period. In its various forms it foreshadowed the Case Bill to follow three years later and, through it, the Labor Management Relations Act of 1947.

3. *1945–46—the Seventy-nineth Congress.*—Changing attitudes of the public, the continuing demands of the labor and business groups and their tactics, and the labor unrest and work stoppages during the postwar period formed the background for the activities of the Seventy-ninth Congress.[88] It remains here to summarize the legislative history of the 1945–46 period. Attention will be paid chiefly to several major bills representative of the more than fifty which this Congress had before it on the matter of national labor policy. We do not aim to discuss the vital issues these proposals raised. This is the task of the chapters analyzing Taft-Hartley itself, for by the time of its consideration the issues were essentially the same. Almost all these proposals offered in the Seventy-ninth Congress were pointed to, and colored by, the very difficult industrial relations situation during these years.

[88] Discussed *supra*, ch. 8.

In June 1945, the Ball-Burton-Hatch Bill was introduced into the Senate. The introduction of this bill which had been preceded by a considerable amount of fanfare elicited strong responses both negative and affirmative from various elements in the country. The legislative proposals which followed it were indeed written in the shadow of Ball-Burton-Hatch. For purposes of organization it will be discussed not in chronological order but in conjunction with the modified version introduced as the Ball-Hatch Bill. The next major bill was introduced by Senator McMahon on September 20, 1945. Shortly after this the Labor-Management Conference, called at the invitation of the President, met for almost four weeks and ended in agreement on some matters but great disagreement on others.[89] Immediately after the close of this conference the President requested emergency fact-finding legislation. His suggestions were incorporated in the Ellender-Norton proposal.

At this juncture, another measure was introduced by Congressman Smith on December 3. This was a very different measure, akin to the Smith Bill of 1939 and also those of 1941 and 1943 passed by the House but not acted upon as such by the Senate. It had been incorporated in a limited manner in the Smith-Connally Act. The Ball-Hatch Bill was introduced on December 10 as a substitute for the Ellender-Norton proposal. A fifth measure was the Case Bill, which was introduced in the House as a substitute measure and, after revisions, passed on February 7. After considerable revision in the Senate, the bill was accepted by the House. This amended bill was vetoed by the President in June, 1946, and the veto was narrowly sustained.[90] With this over-all review of the important occurrences we can examine these major proposals individually.

The McMahon Bill.[91]—This was a measure not objectionable to labor because of any compulsion, or cooling-off period, or strike limitations, for all these were carefully guarded against. Nor would it have amended federal labor law. In a sense, it was a rival of the labor-opposed Ball-Burton-Hatch Bill, which had been introduced the preceding June. It provided for conciliation functions such as had been performed by the Conciliation Service, but now to be under a Conciliation and Mediation Division headed by an administrator and located in the Department of Labor. There was also provision for the appointment of boards of inquiry to investigate disputes and to report to the public the position of each party, but to refrain from making any recommendations. In addition, a United States Board of Arbitrartion was to be established as an independent agency, to aid in setting up voluntary arbitration.[92]

The Ellender Bill.[93]—On December 3, 1945, upon the close of the Labor-Management Conference, the President in a message to Congress proposed legislation to cope with the then pressing problem of labor disputes. This statement of the President's marks a turning point in the history of labor legislation, for this was the first time since the

[89] Cf. *ibid.*, pp. 306–11, for a discussion of the Conference.
[90] The House majority vote to override the veto fell five votes short of the necessary number.
[91] S. 1419, also sponsored by Senators Hayden, Tunnel, and Thomas (Utah).
[92] The McMahon Bill, as well as others to be summarized, authorized the Bureau of Labor Statistics to maintain a file of copies of agreements resulting from conciliation or arbitration, etc.
[93] S. 1661, similar to the Norton proposal, H.R. 4908, in the House.

Wagner Act that a chief executive had favored, or called for the passage of, legislation that would affect the law of labor in this country. This marks the Seventy-ninth Congress as different from the four that had preceded it, and it undoubtedly had its effect on the pattern of proposals and counterproposals which stands out as a feature of this period. The proposals he made at that time were embodied in the Ellender Bill providing for fact-finding panels to be appointed by the President when a dispute in progress, or a threatened dispute, seriously affected the national interest or interstate or foreign commerce. These panels were to have power to make recommendations as well as the responsibility of making the facts in a dispute available to the public. A mandatory cooling-off period was provided. There were no specific penalties for violations of the status quo requirements, but injunctions could be obtained to prohibit such actions. The recommendations of the panel were purely advisory, and neither of the disputants was bound to accept the recommendations.

Ball Hatch.—Some background is needed in order to make clear the peculiar origin of the Ball-Hatch Bill through the original Ball-Burton-Hatch proposals. In the spring of 1943 a group of men met in Philadelphia to consider needed federal legislation relating to industrial relations. Others were recruited and in February, 1944, the group took the name of "Committee To Promote Industrial Peace." Though among them were some very able and liberal businessmen, such as Mr. Samuel S. Fels and Mr. Arthur N. Whiteside, and several lawyers, neither business, management, nor labor as such were represented. In other words, the Committee regarded itself as representative of the public, not of the different interested groups, although it was said that outside contacts were made in order to draw upon experience in industry and to test out ideas. The chairman, Donald R. Richberg, played a leading role.[94] In the course of time, the Committee drafted a legislative proposal, which was submitted to an additional group with invitations to join in sponsorship. Following this, conferences were held with certain members of the Senate Committee on Education and Labor. These conferences led to substantial revisions in the draft which were mutually agreeable to the committee and to the three able and active senators, Hatch of New Mexico, Burton of Ohio (later an Associate Justice of the Supreme Court), and Ball of Minnesota, who became sponsors of the revised draft. This draft was introduced in the Senate in June 1945, as S. 1171, and referred to the Committee on Education and Labor, which held no public hearings on it. Reduced to pamphlet form, it was widely circulated and was made known to the public through speeches and radio.[95]

The Ball-Burton-Hatch Bill was an extremely complex and broad measure. It was largely based on the Railway Labor Act with its con-

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[94] Richberg had at one time served as counsel for the railroad brotherhoods and in NRA days had served closely with General Hugh Johnson, head of that organization. After his service in the government he again practiced law, with offices in Washington. For his account of the origins and work of the committee, with the names of the original members and of those who accepted and did not accept the invitation to sponsor the measure (there were finally twelve signers, seven of them lawyers), see Donald R. Richberg, "The Proposed Federal Industrial Relations Act." *Political Science Quarterly*, 61 (1946), 189–204.

[95] The bill was received with bitter criticism by labor groups both for what was contained in it and for the manner in which it was prepared. See, for example, the editorial, "Proposed Federal Industrial Relations Act," in the *Pattern Makers Journal*, July, 1945. For a critical analysis of the bill see Herbert R. Northrup, "A Critique of Pending Labor Legislation," *Political Science Quarterly*, 61 (1946), 205–16.

cept of the obligation to bargain collectively, but contained also provisions drawn from other sources such as the Minnesota Labor Relations Act of 1939.[96] All the possible devices to prevent or allay industrial disputes were included: cooling-off periods, adjustment boards for the handling of grievances, conciliation, mediation, voluntary arbitration, and fact-finding boards with power to recommend settlements. And in stoppages that would work severe hardship on the public the fact-finding boards could be vested with special powers for compulsory arbitration at the discretion of the Federal Labor Relations Board created by the Act. Violation of such arbitration awards could be enjoined by the courts, when action was instituted by this Board; and provision was made for access to the courts for recovery of damages by parties injured as a result of violations.

Controversies were divided into four classes or groups: (1) those over representation for the purposes of collective bargaining; (2) those over the making of agreements; (3) those arising out of grievances; and (4) other labor controversies. All these were within the jurisdiction of the Federal Labor Relations Board which was to replace the National Labor Relations Board and to which also were to be transferred the functions of the United States Conciliation Service. A separate semijudicial agency, the Unfair Labor Practices Tribunal, was to be set up to handle charges of unfair labor practices. Thus representation questions were to be handled in connection with disputes over the substance of agreements, rather than by the agency handling the often closely related unfair labor practice issues. Orders in connection with representation questions, however, were to be reviewable by the courts.

In addition, the Ball-Burton-Hatch Bill would have amended the federal law of labor by "equalizing" changes in the unfair labor practice provisions. These would have been applied to employees and unions as well as to employers and, by extensive additions, would have imposed substantial restraints upon concerted activities of labor.

The Ball-Hatch Bill, introduced on December 10, 1945, as a substitute for the Ellender Bill, eliminated the more drastic of these changes. The Wagner Act as such was to be left untouched. The substitute provided for a Federal Industrial Relations Board, concerned only with mediation, voluntary arbitration, and fact-finding with a thirty-day waiting period in public interest cases. It was empowered to seek injunctions in the federal courts without the limitations of the Norris-La Guardia Act.

The Smith Bill of 1945.—This bill (H.R. 4875), introduced on December 3, 1945, was also very different from the Ellender Bill both in scope and in concrete proposals. Not only did it concern itself with the mediation, conciliation, and voluntary arbitration of industrial disputes, of course with cooling-off periods, but it also contained provisions relating to the organization of unions, their internal operations, annual reporting, and the like, as well as far-reaching restrictions on strikes, picketing, and boycotting. Such proposals and procedures have been summarized in discussing the earlier Smith bills. The settlement procedures except in detail were similar to earlier proposals.

[96] *Supra*, pp. 319–21.

The Case proposals.—On these four important measures (including Ball-Hatch as part of the larger Ball-Burton-Hatch proposals) were built the three discernible forms in which the Case Bill appeared in the Seventy-ninth Congress. These four measures, of course, were in themselves not new but represented the accumulation of almost ten years of suggestions at the national level and a considerable amount of actual achievement along these lines in state legislation.

It has been charged that the original Case Bill presented to the House as a substitute measure for the President's proposals embodied in the Ellender-Norton bills was carefully prepared by certain members of the Committee on Rules.[97] There were conferences, or something resembling such, outside of the Committee. The substitution was made on January 30 at a time when hearings on fact-finding had been temporarily suspended. This measure with amendments made on the floor became the House version of the Case Bill.

This version was referred to the Senate Labor Committee, then passed on February 7. The Senate committee majority reported out a very much watered-down bill early in March, which removed all the House provisions for penalties imposed on unions for violations of the would-be Act and all clauses which would have actually amended the Wagner Act. This was the second version of the bill. The minority in the committee, spearheaded by Ball and Taft, who were to become the major figures of the new committee majority when the Eightieth Congress opened, offered amendments which would have retained these provisions, clarifying them somewhat and making them less drastic than the House had conceived them. The procedures for settlement of disputes advocated by the minority would also have involved basic changes in the law of labor not included in Senator Murray's majority proposals.

The third and final version of the Case measure is the bill as it was finally passed by the Senate and accepted by the House.[98] The reflection of the earlier measures is clearly seen in the main points of this bill:

1. Creation of a Federal Mediation Board to encourage the making and maintenance of agreements and to aid the parties in settling disputes.
2. Provision for a sixty-day cooling-off period.
3. Provisions for enforcement of the cooling-off period by administrative remedies against employers and deprivations of Wagner Act right for employees.
4. Provision for fact-finding commissions in major labor disputes involving public utilities, to make recommendations, and with extension of the cooling-off period until five days after the report of the commission.
5. Imposition of stringent penalties against "whoever" interferes by violence or extortion, or conspiracy to do so, with the movement of goods in interstate commerce.
6. Proscription of employer contributions to welfare funds administered exclusively by unions.
7. Exclusion of "supervisors" from the Wagner Act's definition of "employee" but not prohibiting union membership to them.
8. Provision for damage suits against unions for violation of contract.

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[97] See, for example, Philip Murray's letter, urging President Truman to veto the Case Bill, *New York Times*, June 3, 1946.

[98] It was in the midst of the consideration of the Case Bill by the Senate that the President asked Congress for emergency legislation to deal with the existing railway emergency. See *supra*, ch. 8, p. 313. After the House acceptance and the Senate rejection of this legislation, on the same day both houses passed the Case measure with minor amendments, on May 25, 1946, 1946. On June 11 the President's veto of this final form of the Case measure was sustained.

9. Provision for action against "wildcat" and rival union violations of collective bargaining contracts by deprivation of Wagner Act rights for employees involved.
10. Outlawing of secondary boycotts by making them unlawful under the anti-trust laws, and removing the limitations of the Norris-La Guardia Act on the use of injunctions in labor disputes in such cases.[99]

The relationship is clear between the contents of this bill and its legislative history and what was to follow in 1947 when the Labor Management Relations Act was passed, based on the extreme Hartley Bill in the House and the less restrictive, though definitely amendatory, Taft Bill of the Senate.

Conclusions

On the basis of this analysis several observations can be made: first, there were few major provisions in Taft-Hartley which did not find counterparts in legislation previously introduced; second, a relatively small number of points in the NLRA and its administration were severely and consistently criticized by a minority of representatives and senators during the ten-year period; third, important members of this minority were the same members who consistently proposed restrictive amendments that would have changed the basic law of labor; fourth, it was the views of this minority, substantially unchanged, which became the predominantly accepted view of the Congress as a new Republican majority joined hands with diehard southern Democrats; and, lastly, despite the lengthly hearings of the Senate and House labor committees at two widely separated times, and the investigation by the highly controversial Smith Committee in 1939–40, there was never any systematic, nonpolitical study or investigation authorized or undertaken by Congress before it acted on many complex and technical matters about which it had relatively little accurate information.

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[99] Cf. *Labor Relations Reporter*, 18 (June 3, 1946), Analysis 17. Point No. 5 of the Case Bill was later adopted as the Hobbs Act. The President's veto message on June 11, 1946, included many arguments which crop up later in the criticism of the Taft-Hartley Bill by the President and the Democratic minority. The major points may be summarized: The bill would not have prevented or shortened the great postwar strikes; the cooling-off period was inequitable in its penalties and might provoke strikes and hamper mediation; fact-finding was inexplicably limited to public utility disputes; the Mediation Board would deprive the Secretary of Labor of many of his responsibilities, without being fully responsible either to him or to the President; welfare fund questions should not be removed from the scope of collective bargaining; the bill did not fairly handle the questions of supervisors; the boycott provisions might eliminate certain evils but would make remedies available against recognized legitimate activities of labor; the labor injunction should not be permitted as a weapon of the private employer except with the careful restrictions of Norris-La Guardia; there was need for careful study preparatory to long-range legislation. *Cong. Rec.*, 92:6674–78 (June 11, 1948).

Chapter 10

TAFT-HARTLEY AND THE EIGHTIETH CONGRESS

On the day that the Eightieth Congress convened no less than seventeen bills dealing with labor policy were dropped into the hopper of the House of Representatives.[1] This showed that the tremendous pressure demonstrated in the preceding Congress had gained even greater momentum when the congressional elections of 1946 made clear that the "mandate of the people" was to be carried out by a Republican majority in Congress. As bills to change national labor policy continued to appear in the early weeks of the session and as President Truman himself requested labor leigslation in his January State of the Union Message, it was obvious that this Congress would place the passage of some labor legislation high on its agenda. This problem was probably *the* major concern of Congress until Taft-Hartley became law in June. For the first six months of 1947 the formulation of this labor legislation and the course of the legislative strategy which led to its ultimate embodiment in the law of the land occupied a large share of the time of the chief majority and minority members in the new Congress.

CHRONOLOGY OF THE LEGISLATIVE HISTORY

It is difficult to establish the precise moment when the legislative history of this Act begins. The drive for revision of our national labor policy which met success in 1947 actually was begun immediately after the passage of the Wagner Act in 1935. Despite the numerous bills which the labor committees in both houses of Congress had before them when they opened their hearings in the early months of 1947, it can be said wtih little reservation that there was not much in these suggestions that had not been presented in the national legislature previously. They were all variations on old and well-worn tunes that a small minority had been playing constantly.

Perhaps the real legislative history in the Eightieth Congress itself commenced with the President's State of the Union Message on January 6. Mr. Truman asked for action to prevent jurisdictional disputes, to prohibit secondary boycotts with "unjustifiable objectives," to provide for machinery to help solve disputes arising under existing collective bargaining agreements, and to create a temporary joint commission to investigate the whole field of labor-management relations and to report their recommendations by March 15. The President's proposals were embodied in bills sponsored in both houses. Needless to say, his proposals were very much weaker than congressional inclinations on these matters, but they did, in a way, set the

[1] This chapter was written by Seymour Z. Mann.
For a rather detailed survey of the legislative proposals before the Eightieth Congress see John A. Fitch, "New Congress and the Unions," *Survey Graphic,* 36 (1947), 235.

stage for the legislative history to follow. With even the President suggesting legislation it was a foregone conclusion that this new Republican Congress would act on labor policy.

On January 23 the Senate Committee on Labor and Public Welfare opened hearings on these problems. These lasted until March 8. On February 5 the Hose Commuittee on Labor and Education opened its hearings which continued some six weeks until March 15. It was obvious when these hearings opened that there would be no action on the bills and resolutions to establish the oft-suggested temporary joint commission for thorough study of labor-management relations before any general legislation. By the time committee hearings opened the chairmen of the Hosue and Senate labor committees had both signified that their committees were going ahead to prepare bills, and at these early dates they had indicated the major outlines of their proposals. The Republican Policy Committee in the Congress early had announced that a new version of the Case Bill would be introduced in the House.

Before April 11, when H.R. 3020 was favorably reported from the House Committee, and before April 17, when S. 1126 was likewise reported to the Senate by its Labor Committee Chairman, Mr. Taft, these committees had over sixty major bills to consider. Although the House hearings ended somewhat later than the Senate hearings, the House committee was ready to present its bill for action first. Four days after the Hartley Bill was reported in the lower chamber it was decided overwhelmingly to limit general debate on the bill to but six hours. This was on April 15, and two days later, almost at the same time that Mr. Taft was reporting S. 1126 to the Senate, the House passed and sent to thte Senate H.R. 3020. The Senate, on the other hand, had the Taft measure under the scrutiny of debate almost continuously from the time the minority report of the Labor Committee was introduced on April 22 to its passage as amended on May 13. This contrast to the six hours given in the Hosue on what was a much more difficult and complicated piece of legislation seems significant despite the customary limitation on debate in the lower chamber.

Since the House disagreed with the amendments to its H.R. 3020 as passed by the Senate, a Conference Committee was appointed which met from May 15 through May 29. On June 3 the Conference Report was introduced in the House, and the following day, after a one-hour general debate, it was accepted by the lower chamber. In the Senate the same report was submitted on June 5 and debated that day and the next before passage.

The President's veto message was received by Congress on June 20. In the House, without any debate and discussion, the successful vote to override was taken immediately after the reading of the message. In the Senate the vote to override occurred on June 23 after two days of debate.

The character of the committees and their hearings, the course of the general debates, the Conference Committee and the debates which followed its report, and lastly the presidential veto and the action of Congress thereupon remain to be described and analyzed.

The service records of the members of the House labor committees since 1935 are significant. In the Eightieth Congress there were twenty-five members of the House Committee on Education and Labor.[2] Fifteen of them were Republicans and ten were from the Democratic side of the House. Of the fifteen Republicans, ten had not served on the Labor Committee prior to the Eightieth Congress. Excluding any service before 1935, the five experienced members of the committee had a total of twenty years' service. Only one member, the Chairman, Mr. Hartley, had ten or more years of experience on the committee.[3] Of the ten Democrats, only four were without previous service on the Labor Committee. The six remaining members accounted for thirty years of experience since 1935, with one, Mr. Lesinski, having been in continuous service since the Seventy-fifth Congress. Of the ten Democratic committee members, four did not join with their fellow party members in supporting the minority report of the committee submitted to Congress.[4]

Open hearings before the House committee were held for six weeks. During this period five volumes of testimony were accumulated, totaling some 3,873 pages. While this mass of material is included in the printed record of the hearings, not all of it was heard at the hearings themselves. Much of the testimony consists of formal statements, letters to the committee or its various members, and exhibits of one kind or another given to the committee for inclusion in the completed record. These materials, not made public at the hearings themselves, were always on file in the committee offices for inspection of the various members. It is impossible to know the quantity or quality of the evaluation these records were accorded by committee members. There were allegations on the floor of the House that many members were unaware of much that was in the testimony. Certainly many representatives rightly proclaimed that the mass of testimony was so complicated and so great that there was little time between the conclusion of the hearings and the vote on the committee bill to give adequate attention to this record.

More than a hundred and thirty witnesses were heard or had testimony inserted in the record in the six weeks of hearings. Fifty-five of these represented employers or employer associations, while twenty-

[2] The members of the House Committee on Education and Labor were: Fred A. Hartley, Jr., New Jersey, *chairman;* Gerald W. Landis, Indiana; Clare E. Hoffman, Michigan; Edward O. McCowen, Ohio; Max Schwabe, Missouri; Samuel K. McConnell, Jr., Pennsylvania; Ralph W. Gwinn, New York.; Ellsworth B. Buck, New York; Walter E. Brehm, Ohio; Wint Smith, Kansas; Charles J. Kersten, Wisconsin; George MacKinnon, Minnesota; Thomas L. Owens, Illinois; John Lesinski, Michigan; Graham A. Barden, North Carolina; Augustine B. Kelley, Pennsylvania; O. C. Fisher, Texas; Adam C. Powell, Jr., New York; John S. Wood, Georgia; Ray J. Madden, Indiana; Arthur G. Klein, New York; John F. Kennedy, Massachusetts; Wingate H. Lucas, Texas; Caroll D. Kearns, Pennsylvania; and Richard M. Nixon, California; with W. Manly Sheppard, *clerk.*

[3] Mrs. Norton, former chairman of the House Committee on Education and Labor, gave as her reason for resigning from the committee the following: "* * * I regret to say I have no respect for the present chairman of the Labor Committee. And I could not serve with a chairman for whom I hold no respect. My reason for that is that during the 10 years I was chairman of the Labor Committee, the gentleman from New Jersey, who is now the chairman of the Labor Committee, and who comes here before you and talks about labor as if he knew something about it, attended exactly six meetings in 10 years. That was my reason for leaving the Committee on Labor." *Daily Cong. Rec.*, 93:3542 (April 15, 1947). Mr. Hartley, in a book published in the fall of 1948, mentions Mrs. Norton's charge but does not specifically refute it. Fred A. Hartley, Jr., *Our New National Labor Policy: The Taft-Hartley Act and the Next Steps* (New York: Funk & Wagnalls Co., 1948), p. 26.

[4] These were Messrs. Barden (North Carolina), Fisher (Texas), Wood (Georgia), and Lucas (Texas). Three of these representatives voted for passage of H.R. 3020, while one (Wood) did not vote. As the debates testify, this left an effective minority of six members.

seven represented labor or labor organizations. Twelve congressmen were heard, mostly testifying on bills they had proposed. Public officials, including Secretary of Labor Schwellenbach and Paul M. Herzog, Chairman of the NLRB, accounted for five witnesses. Representing themselves, the public, or public institutions were some fourteen witnesses. Four of these testified as experts, including two representatives of the Brookings Institution. Of two listed as professors, only the testimony of Professor Slichter of Harvard seemed important. Six of these witnesses were lawyers appearing independently. Among the witnesses who supposedly represented a public or expert point of view were some large corporation lawyers. Included among the lawyer witnesses was Theodore Iserman, who was later said to have done much of the writing of the committee bill.[5] Among other institutions or organizations represented were the Committee for Economic Development, the Federal Farm Bureau, the Committee for Constitutional Government,[6] engineering societies, the Institute of Architects, and others.

Only a minute analysis of these hearings would indicate whether a satisfactory representation of public and private viewpoints was made. It is even more difficult to know whether important persons who wished to testify or should have testified remained uninvited. Despite bitter and caustic personal comments against committee members from both sides of the House, both majority and minority statements during debate attested that the hearing aspect of the committee's work was conducted ably and fairly.[7]

One outstanding criticism can be made. From the many employers, representatives of employer associations, and the corporation labor lawyers, as well as from some of the supposedly neutral experts on the matter, there were constant and often bitter criticisms of the NLRB and its work in the administration and interpretation of the Wagner Act. Certainly over half the witnesses voiced serious dissatisfaction with Board practices or the Act the NLRB was administering. Certainly more than half of the total hours of testimony were along this line. To answer such charges publicly, to correct many errors that appeared in the record, and generally to explain or defend their actions in the administration of the Act they knew so well, representatives of the Board were given relatively little time in contrast to other witnesses who had equal or even more time.

Chairman Herzog's testimony came toward the end of a long day of committee hearings, most of which had been given over to the examination of Secretary Schwellenbach. Late in the afternoon when Mr. Herzog was called to the stand, the committee chairman announced that, since many committee members had previous evening engagements, there would be insufficient time for cross-examination of the witness, but that an hour might be spared the next morning. After some discussion it was agreed that members would as far as possible refrain from questioning in view of the shortness of time and that

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[5] Cf. *infra*, p. 370.

[6] This committee sponsored the anti-collective bargaining *Labor Monopolies—or Freedom* (New York, 1946), written by John W. Scoville, formerly with the Chrysler Corporation, and charged on the House floor with influencing strongly the committee bill.

[7] Representative Klein of New York, a member of the Committee, however, stated in a speech delivered before a meeting of labor unions in New York that a great majority of the management witnesses who appeared before the House committee were employers who had been cited by the NLRB and the courts for unfair labor practices. *New York Times*, March 5, 1947.

some opportunity would be given in the morning for further cross-examination. Chairman Herzog then indicated that the whole Board had to appear at 10:00 a.m. the next day before the deficiency committee of the Appropriations Committee. It was made clear that there would be no other time available for further Board testimony after that morning but that the committee would release Mr. Herzog by 10 a.m. Chairman Herzog's time before the committee did not total more than three hours.

This lack of time was an obvious handicap to the witness, despite his statements of appreciation for the extreme courtesy of the committee. There were many gaps that had to be left in his prepared testimony, questions could not be answered fully, and much important testimony had to be inserted in the record without comment but with a hope for later reading. Particularly in the case of the Board's testimony these forced omissions from the direct presentation were unfair and dangerous. This procedure was unfair, since a large portion, which was directed as rebuttal to previous testimony, was not heard directly by the committee and was not subject to as good press coverage as otherwise.[8] Such a procedure prevents direct questions and answers which might bring out important information, and which would have allowed the witness to defend his statements. Any charges made later against the Board or its testimony by committee members who read the unheard portions of testimony could only be answered by letter or further insertions in the record. In contrast it can be noted that Mr. Iserman, a bitter foe of the Board, was heard for more than four hours, he was not rushed, and most of his testimony was given fully and directly without the necessity of merely inserting much of it in the record.

As to the writing of the committee bill itself charges of a serious nature were leveled at the majority of the committee. The signers of the House Minority Report said that H.R. 3020 was not a committee bill, since no general meetings of the committee were held to consider the bill. Some support for the charge is available merely from the chronology. Committee hearings were concluded on March 15. It was said that no meetings were called for two weeks, but the bill was introduced in the House by Representative Hartley on April 10. The following day it was reported favorably by the majority of the committee.[9] The minority members were handed their copies of the bill on April 10, the day the bill was introduced, with a request to have any minority report prepared by the twelfth.[10]

Further allegations were made during the course of the debate that the bill was written before termination of the committee hearings. Representative Klein charged this openly on the floor and even maintained that its writing began before the hearings opened.[11] The charge seems to receive some support from a statement made by

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[8] For example, the *New York Times* of March 12, 1947, carried only a brief paragraph on the Herzog testimony, at the end of its report on the Schwellenbach testimony.

[9] U.S. House of Representatives, Committee on Education and Labor, *Labor-Management Relations Act*, 1947, Report No. 245, 80th Congress, 1st Sess., April 11, 1947, cited as *Hartley Report*. The *Minority Report* is in the same document, pp. 64–112.

[10] *Ibid.*, p. 64.

[11] *Daily Cong. Rec.*, 93 : 3530. Cf. also Representative Powell's statement, *ibid.*, 93 : 3584. A convenient source for the congressional committee reports and debates in connection with the formulation and adoption of Taft-Hartley is the *Legislative History of the Labor Management Relations Act, 1947*, published by the National Labor Relations Board (Washington, 1948), Vols. 1 and 2. We cite the committee reports individually, and the debates by reference to *Daily Congressional Record*, which was used in the *Legislative History*, and the paging of which differs from that of the bound volumes of the *Record*.

Chairman Hartley himself. As early as January 29, before committee hearings opened, he was reported as saying that the committee would propose an omnibus labor reform bill which would be ready for consideration not later than March 15. All the issues which he then stated the committee would consider appeared in the bill introduced on April 10.[12]

Also appearing frequently was the charge that H.R. 3020 as reported was written with the help of prominent employer and industry spokesmen. Such allegations were made from the first days of the debate and continued even after the final conference measure was passed over the President's veto. This charge was made most specifically by Representative Klein, and it was echoed and re-echoed in the House.[13] It was said also that, no matter what one could say about who wrote it, comparison of the bill with the 1946 legislative proposals of the NAM showed amazing similarities. A point-by-point comparison was introduced into the debate by Representative Blatnik on April 17.[14]

The tone and pattern which the House debates were to follow were set by the statements of the majority and minority to their reports on the Hartley Bill. Before analyzing their positions, the chronology of the debate should be noted.

While the general debate did not actually commence until after the adoption of the six-hour rule for debate, there was discussion of the bill on the day previous, and an important debate about the bill on April 15 when the rule to govern debate was being considered in the House. This rule allowed six hours for general debate on the measure and a very restricted time, under a five-minute rule, for the proposing and consideration of amendments. In any event there were not more

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[12] *New York Times*, January 30, 1947. Describing his legislative strategy and defending the actions of his committee at a later date, Hartley admitted that the measure was worked out "behind closed doors" but defended it by saying: "Nevertheless, a certain measure of secrecy was essential. There were many differences of opinion within the Committee on particular legal phraseology, and on the best method of tackling individual problems. Had these differences of opinion become known to the labor leaders here in Washington the well-organized propaganda forces at their disposal would have exploited such differences to defeat the purposes of the legislation, and to make our task even more difficult." Hartley, *op. cit.*, p. 50. Hartley indicated that a measure acceptable to majority committee members was worked out first. This was considered by the full committee. The legislation was then taken to the Republican caucus of the House where further changes were adopted, and finally back to the full committee where it was further amended. *Ibid.*

As to the charges of aid by industry in the writing of the bill, he reviewed the legislative background of the Hartley Bill especially in relation to the old Smith Committee proposals and the Case Bill of the former Congress, and concluded that "it would appear ridiculous for the labor bosses and their spokesmen in Congress to attack the legislation as hastily conceived or worked out behind closed doors by representatives of business organizations." *Ibid.*, p. 60.

[13] Klein's statement is quoted: "The new House labor bill was not written with the help of the Democratic members of the committee. In fact, they were not consulted and no full committee meetings were held to discuss it. The bill was actually written with the help of several industry representatives and some lawyers from the National Association of Manufacturers and the United States Chamber of Commerce. [He named William Ingles, T. R. Iserman, and Jerry Morgan, with their industrial connections.] This group of high-priced lawyers quietly worked up the most vicious bill yet produced. The Democratic members were ignored. For 2 weeks no committee meeting was called." *Daily Cong. Rec.* 93 :3530.

See also the remarks of Mr. Powell, *ibid.*, p. 3584. "The tragic thing about it is that we, the Representatives of the people, meaning the gentlemen on both sides of the aisle, did not write this bill. Not only did we not write it but we did not even see it, and right now not one-half of the Members, both Republican and Democrat, of this Congress have read the bill. This bill was written on the fifth floor of the Old House Office Building, written by over a score of corporation lawyers, paid not by the Government of the United States, not by even small business, but paid by big business, monopoly business."

[14] *Ibid.*, pp. 3732–33. The CIO and AFL made the same charges. See *New York Times*, April 17, 1947. The NAM thought enough of these charges to later make a specific denial in a mimeographed statement made available to the public, *Who Wrote the Taft-Hartley Bill?*, January 13, 1948. One gets the impression from some remarks of Congressman Blatnik that each representative had received a leather-bound copy of the NAM booklet, *Now Let's Build America*, with his name inscribed in gold on the cover. This booklet contained the NAM legislative proposals formulated at the Fifty-first Annual Congress of American Industry, *Daily Cong. Rec.*, 93 :8600.

offered which would have softened the bill somewhat but were overthan three sittings of the House given over to debate on the measure, for the bill was passed on April 17. Nine major amendments were whelmingly rejected. Three slight alterations accepted in the final stages of debate would have strengthened existing restrictions on labor activity or added new ones. The final vote for passage of the measure, after a motion to recommit was soundly beaten, was 308 to 107. Only 22 Republicans voted against the bill, while 93 Democrats stood with the 215 Republicans voting in the affirmative.

The bill presented to the House for debate was long and complicated. It covered some sixty-six pages of text with many sections that could not be understood without constant reference to other sections. The majority presented this bill as a "labor bill of rights." In his opening remarks in the report Chairman Hartley listed twenty major points that the bill would accomplish. Each of these would-be accomplishments was stressed as a boon to labor, as an aid to smooth labor-management relations, and as giving privileges and protections to individual workers that most working people desired and had not been able to achieve under the Wagner Act. It was contended also that the then present period of industrial strife and unrest was a result of abuses within the "House of Labor" that would be cured by the suggested bill and that the result would be industrial peace. The proponents of this bill, and especially the majority members of the committee, were called the real friends of labor, the real champions of the public, for they had considered all the interests involved and not only industry's or labor's alone. This strategy was followed by the majority throughout the debates. The opening gun, a speech by Mr. Smith of Ohio on the day before the bill was called up for debate, reiterated the theme that the Wagner Act "does not bestow upon wage-earners the benefits claimed."[15] That the NLRA was not the Magna Carta of labor, but that H.R. 3020 was a fair bill and would protect the rights of workers, was woven into the web of the majority argument in every major defense made of the bill; the Hartley Bill was not harsh; it was not restrictive; it was, on the contrary, as fair and as unbiased as the Wagner Act had not been in its intent, its interpretation, and its administration. These remarks must be borne in mind for contrast with what was said during and after the Senate and House conference.[16] Another tune played in many ways and at all times was that Congress by the return of Republicans to a majority in that body had received a "mandate from the people" to enact reform labor legislation.

The minority in their report on H.R. 3020 attacked these premises vigorously and made the essential points that were to set the pattern for the opposition on the floor of the House. The Hartley Bill, they argued, was not truly representative of public interests. The bill was one-sided, giving all to the interests of business and industry; furthermore, the wishes of employers expressed during the hearings had been

[15] *Daily Cong. Rec.*, 93:3471–75.
[16] Cf. *infra*, pp. 384–87.

given full satisfaction while labor appeals were ignored.[17] They bitterly condemned the majority favoring the bill for covering themselves with the cloak of ostensible friendliness to labor. They argued that some of the most bitter foes of labor organization in this country were leaders in the formulation and fight for this bill. In addition, they contended that the majority was ignoring the basic economic and social issues of the day—such matters as inflation, housing shortages, and the lack of congressional action on minimum wages and the extension of social security. Placing the onus on labor abuses was merely a political device for covering up failures on the most significant problems of the day. They denied the "mandate of the people" refrain by insisting that the election results were really indicative of aroused public feeling over these more basic matters; furthermore, the Republicans in their 1944 platform and in the major pronouncements of party leaders did not campaign on the kind of national labor policy now proposed.

The opposition protested too that the President's suggestions were given no heed. It was asserted that at least the proposal for joint study should have been accepted, since many of the matters included in the bill were areas of ignorance for the congressmen as well as for the country at large. The majority was attacked in particular for forcing a measure of great complexity to a vote before it could be given adequate study by individual representatives and the House as a whole. It was argued that House members were swayed by their emotions and prejudices to such an extent that they were prepared to act on a momentous piece of legislation although most of them had not even read the bill in its entirety and certainly did not understand its full meaning and impact. There was severe criticism of the undue haste with which the measure was being considered.[18] Finally, it was said that the Republican policy-makers had decided that labor legislation of this nature must be passed; no matter what the members of the Labor Committee did or did not believe, they were forced by the Republican organization to report the kind of a bill that did emerge.

While the House debates at times became very caustic, personal, and bitter, on the whole they seemed dispirited. The majority was confident of victory from the time the measure was introduced, and charges were never seriously or fully answered. At the same time, the opposition through such stalwarts as Lesinski and Sabath admitted in the opening discussions and continued to lament throughout that there was nothing they could do to stem the tide in the House, and it was almost useless trying. Some matters received no attention or very scant attention, although they represented new departures in labor policy. Among these were the provisions relating to the reorganization

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[17] The minority had some difficulty with this argument, for the failure of labor representatives to propose any suggested legislation of their own, or admit that there were perhaps some abuses which could stand legislative treatment, was an outstanding factor in the committee hearings and deliberations. Mr. Murray and Mr. Green both finally agreed that jurisdictional strikes were morally unjustifiable, although they both indicated they could be solved without legislation. Mr. Green for the AFL thought that perhaps employers could be guaranteed extended free-speech rights. Nor did labor in general, and the CIO in particular, endear itself to Congress by direct and indirect assertions that Congress was incapable and not prepared to act on labor legislation. Cf. testimony Jan A. Bittner, U.S. House of Representatives, Committee on Education and Labor, *Hearings, Amendments to the National Labor Relations Act,* 80th Congress, 1st Sess., 1947, pp. 2361–2465, cited as House Committee on Education and Labor, *Hearings, 1947.* Mr. Hartley writing at a later date stresses this point and is insistent that labor's nonco-operative attitude during the course of the hearings had some effect on the final provisions included in the bill. Hartley, *op. cit.*, p. 48.

[18] Congressman Sabath spoke of the "indecent rush" to pass the Hartley Bill. *Daily Cong. Rec.,* 93 :6545.

of the NLRB, to craft units, to prehearing elections, to the use of temporary injunctions, to suits for breach of contract, to the banning of political contributions, and to the prohibition of strikes by government employees. This is only a partial list, but for some of these crucial items there are not even passing references recorded in the journal of the debates.

We are forced to conclude that the House proceedings did not do credit to that body in terms of adequate and relevant analysis of the important issues presented. Whether because of the shortness of time, the lack of information on the part of many members, or the sense of defeat harbored by the opposition, relatively few persons participated, and their contributions were on the whole neither brilliant nor penetrating.

COMMITTEES, HEARINGS, AND DEBATES—THE SENATE

The membership of the House Committee on Education and Labor as a whole was relatively inexperienced in so far as congressional service was concerned. The same cannot be said for the Senate Committee on Labor and Public Welfare. Of the thirteen members on this committee, eight were Republicans and five were Democrats.[19] Two of the eight Republicans had not previously served on the committee. Of the remaining six Republicans, the chairman, Mr. Taft, had served seven years, two others had served six each, and the three others had each served two years. All five Democratic members had seen previous service on the Labor Committee. Four had accumulated two or more years of service, and the other was a member for nine years previously. The six Republicans, then, had a total of twenty-five years' accumulated service, while the five Democrats had among them served more than forty-nine years. Two Republican Senators, Morse and Ives, also, had long experience in labor relations prior to their entry into the Senate.

In the Senate, as in the House, the members of the minority party did not act as a unit in the reporting and consideration of the committee bill. Senators Ellender and Hill did not join with their colleagues in the minority report. In the vote on S. 1126, the Taft Bill, Ellender was recorded for passage, while Hill voted against the measure. In the Senate committee, however, unlike the House, there was sharp and serious disagreement between some Republican members. Senators Morse and Ives stood out as opposed to important restrictions that their colleagues favored. Senators Taft, Ball, Donnell, Jenner, and Smith all signed supplemental reports supporting in whole or in part amendments that would have made the final bill more restrictive. Only Morse, however, voted against his colleagues when the Senate bill was passed. There was what might be termed a "conservative-liberal" split in the committee majority. The bill as finally accepted by the Senate included most of the provisions desired by Senator Taft, who represented the conservative views on the committee.

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[19] The members of the Senate Committee on Labor and Public Welfare were: Robert A. Taft, *chairman*; George D. Aiken, Vermont; Joseph H. Ball, Minnesota; H. Alexander Smith, New Jersey; Wayne Morse, Oregon; Forest C. Donnell, Missouri; William E. Jenner, Indiana; Irving M. Ives, New York; Elbert D. Thomas, Utah; James E. Murray, Montana; Claude Pepper, Florida; Allen J. Ellender, Louisiana; and Lister Hill, Alabama, with Philip R. Rodgers, *clerk*.

According to a statement of Taft in the majority report, the committee heard some 83 witnesses. Our own count in the hearings of all testimony available to the committee included some 97 witnesses. Labor and labor organizations were represented by 31 witnesses, while employers and employer associations had 41 spokesmen. Three congressmen were heard on their proposed bills, and 5 public officials, including former Governor Stassen of Minnesota, presented testimony. Nine miscellaneous witnesses recorded their views, including one individual, Cecil B. DeMille, who also testified before the House, representatives of engineering societies, architectural associations, the Foreman's Association of America, the Farm Bureau, the American Nurses' Association, and the NAACP. The professors testifying as experts, Wolman of Columbia and Slichter of Harvard, were not an altogether representative cross-section of the expert views available. Among the lawyers, prominent corporation labor lawyers were in a majority.

The Senate hearings proceeded much more slowly than did those in the House, having begun on January 29 and ending two days earlier than the House hearings on March 13. The printed record includes four volumes, totaling 2,424 pages. There were almost daily sessions during this time, and these were followed by four weeks of executive sessions held almost daily in which all members of the committee, according to their own word, participated. On the day that the House passed the Hartley Bill, April 17, Senator Taft introduced S. 1126 in the Senate. The contrast seems obvious.

The committee bill was as lengthy as the House measure, covering some 68 pages of text. It was, however, much better organized than H.R. 3020. This is not to say that it was not complicated. The final bill which became law was based on the Taft Bill, and, as the analysis in the succeeding chapters will demonstrate, its complicated structure, its maze of technicalities, and its difficult language often couched in negative terms, did not make it a model of clarity, conciseness, and simplicity. Both sides of the Senate realized this, and while the supporters of the measure blamed it on the difficulty and technicality of the subject matter the legislation treated, it was used as ammunition by the opposition. The bill was, nevertheless, a better-designed measure technically and structurally than was the Hatrley Bill of the other body.

The criticism leveled at the House committee as to the conduct of the hearings and the writing of the bill could not be leveled at the Senate committee. Perhaps general criticism could be made of the method of the hearings and the committee procedure in general, but this is true for many of the congressional committees. All members of the committee stated publicly that the bill that resulted, even with the minority report, represented a genuine committee effort. It was repored out by an eleven-to-two vote.[20] All members agreed that, while very conflicting viewpoints were represented on the committee, these were ameliorated and mitigated to the extent that "a fair and conscionable compromise"—the mark of a true legislative product— resulted. Contrary to the feeling of some members of the House, the Senate felt that on the whole the committee conduct of the hearings did make possible a true sample of views that should have been

[20] Senator Thomas voted to report out the bill, although he also signed the minority report. He felt it was a committee measure and ought to be considered by the Senate.

heard.[21] In a way this was demonstrated by the fact that both majority and minority members in the reports of the committee and in the debates were able to turn to the hearings for evidence to support their various points of view. The minority, of course, insisted that while the hearings were perhaps long enough and thorough enough, an even better result would have been obtained if the President's proposal for an impartial and more nonpoltical body to make a prelegislation survey had been followed.

Veiled or open assertions that bitter enemies of labor wrote the Senate bill in its entirety were never vigorously made in the Senate as in the House. Largely it was not necessary, since most of the help the committee received was an open and acknowledged fact. Gerard D. Reilly, a former member of the NLRB who had aided Senator Ball in the formulation of some of his measures, was employed by the majority of the committee to help in the writing of their bill. Mr. Reilly, of course, was known as a proponent of Wagner Act revision, not only from past statements and activities and the views which he shared with Senator Ball; he had clearly make known his opinion when he appeared as witness before the committee on the last day of its public hearings. It is reported that his engagement as a consultant by the committee was by a divided vote.[22] Similar complaints of possible bias and partiality against Thomas E. Shroyer, who was selected as staff adviser on labor relations to the committee, were also heard. The appointment of Shroyer, who had been an NLRB regional attorney in Cleveland, was announced by Taft shortly after the public hearings opened.[23] No matter what grounds these charges had or what the influence of Reilly and Shroyer on the outcome of the measure may have been, the issue did not assume the importance either in the debates or the labor press that alleged committee help in the House did.

As in the House the various reports of the committee set the tone and the framework for the discussions that followed in the eleven days of major floor debate preceding the passage of S. 1126 on May 13.[24] The majority report said: "The Committee bill is predicated on our belief that a fair and equitable labor policy can best be achieved by equalizing existing laws in a manner which will encourage free collective bargaining."[25] This was the keystone of the majority strategy, and it was voiced over and over again at every critical point in the proceedings. Senator Taft commenced the hearings with that idea stated publicly, and he reiterated it at the conclusion of the conference that produced Taft-Hartley and even after the bill had be-

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[21] See as a good example of this attitude the remarks of Senator Morse, made on March 10 after the hearings were concluded and on April 17 when the Taft Bill was introduced. *Daily Cong. Rec.*, 93:1884, 3786. Chairman Herzog of the NLRB in his testimony for the Board did intimate that too many of the employer witnesses did not have good bargaining relations with their employees. U.S. Senate, Committee on Labor and Public Welfare, *Hearings, Labor Relations Program*, 80th Cong., 1st Sess., 1947, Pt. 4, p. 1852, cited as Senate Committee on Labor and Public Welfare, *Hearings, 1947*.

[22] *Daily Labor Report*, No. 49:AA–1, March 11, 1947. President Murray of the CIO in a letter to Taft demanded the removal of Reilly, stating among other things that he was widely denounced by "the entire labor movement as biased and partisan." *CIO News*, March 24, 1947, p. 16.

[23] *Daily Labor Report*, No. 21:A–15, January 30, 1947.

[24] U.S. Senate, Committee on Labor and Public Welfare, *Federal Labor Relations Act of 1947*, Report No. 105, 80th Cong., 1st Sess., April 17, 1947, cited as *Taft Report*. Part 2, *Minority Views*, is dated April 22, 1947. Also included in Part 1 were a separate report by Senator Thomas, supplemental views containing the suggested amendments of Senators Taft, Ball, Donnell, and Jenner which they were to offer to the committee bill, and the views of Senator Smith, who was concurring with reservations to the supplemental views of the four other majority members.

[25] *Ibid.*, Pt. 1, p. 2.

come law. Unlike the House, however, not so little was made of the Wagner Act. Rather, stress was placed on the fact that the Wagner Act and the Norris-La Guardia Act were experimental in nature, and that the experiment, though not entirely unsuccessful, showed that changes were necessary; moreover, the Supreme Court in its interpretation of the Anti-injunction Act and the Clayton Act placed those who were protected by the NLRA beyond the reach of federal antitrust law; and, furthermore, a poor and biased administration of the Wagner Act, in part stemming from the one-sided character of the Act, had played such havoc with the Act and permitted so many abuses to develop that only additional legislation could rectify the situation. The majority in the Senate did not stress as strongly the claim that they were carrying out the "mandate of the people" as had been done in the House. They did, of course, insist that this was a fair bill and not harsh or restrictive. It was in the Senate that Republican colleagues of the House majority called the other body's bill vicious and harsh. The argument was stressed that the equitableness of the Senate proposals would have to be accepted in order to meet the threat of a presidential veto. Naturally, as in the House, every exposition or defense of the bill insisted that the measure provided exactly the formula needed to solve the kinds of strikes occurring at the time; the bill would bring industrial peace.

These same arguments were used by the right wing of the committee to support their four major amendments: (1) making it an unfair labor practice for employees or unions to interfere with or coerce employees in the exercise of their rights to join or refrain from joining a union or engaging in organizational activities; (2) placing important restrictions on industry-wide bargaining; (3) placing important restrictions on welfare funds; and (4) allowing direct action against secondary boycotts and jurisdictional strikes by declaring them unlawful, permitting injunctions on petition of private parties, and providing that injured parties could sue directly in the courts.

The opening paragraph of the minority views read as follows:[26] It can be seen that this was substantially similar to the opposition arguments in the lower chamber. Even more in the Senate did the minority fall back on the original proposals of the President in his State of the Union Message and score the majority for giving these no heed. They attacked the Republican majority's attempt to slough off all blame for postwar industrial unrest on labor abuses instead of attempting to find solutions for the basic social and economic issues of the day. With the help of Senator Ives, they continually contended that the forcing of an omnibus measure on the Senate was unjust; that this, as well as other things, showed that the Republicans were ordered to follow this procedure by their policymakers, although many Republican senators felt that on many things included there was no need for legislation at all.

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[26] *Ibid.*, Pt. 2, pl. 1.

This bill is designed to weaken the effective program of labor legislation which has been, with great pains, built up over the years. It would be destructive of much that is valuable in the prevention of labor-management conflicts. It contains many barriers, traps, and pitfalls that can only make more difficult the settlement of disputes. Its principal results would be to create misunderstanding and conflict, and to aggravate the imbalance between wages, prices, and profits which already endangers our prosperity.

That the area of disagreement between the majority and the minority in the Senate was less than in the House is shown by the number of proposals in the committee bill which the minority members and other opposition members on the floor stated they would agree with if the bill went no further. Such an area of agreement was obviously absent from the more vituperative statements and discussions in the House.[27]

On April 23 the general debate on the Taft Bill in the Senate commenced. While only nine actual days were given over to major debate on the bill, it was not until May 13 that the final vote was taken. Many more major amendments were suggested and discussed than in the House. And, at the same time, amendments adopted by the Senate as a whole were much more significant than the relatively minor changes instituted by the lower chamber on their bill. Among the more important of the changes accepted by action of the whole body were included: (1) making coercion of employees by unions an unfair labor practice; (2) the Ball amendment relating to restrictions on payment to employee representatives; (3) part of the Taft amendment making unlawful the boycotts, jurisdictional strikes, and sympathy strikes which were already made unfair labor practices, and providing for direct suits in the courts by any injured party for injunctions or damage suits; (4) an amendment prohibiting certification of unions whose officers were members of the Communist party; and (5) the McLellan amendment providing for "free speech" for employers and employees. Important amendments offered but rejected included the following: (1) an amendment that would have restricted industry-wide bargaining; (2) that part of the Ball and Taft amendments on unlawful activities that would have opened up the use of the injunction remedy to private parties; (3) the Ball-Byrd amendment to outlaw the union shop; and (4) the O'Daniel amendment to restrict drastically the application of union-security provisions. These rejected amendments stand out as a mark of a Senate attitude in contrast to the feeling in the house, which had already included the more important of the rejected proposals in their H.R. 3020.

The question of individual measures for special problems in place of the proposed omnibus measure reached the floor of the Senate for a vote when Senator Morse proposed that S. 1126 be recommitted to the Labor Committee in order that the various titles could be reported out as separate measures. A vote was taken on this proposal on May 7 during the fifth day of debate and narrowly missed being adopted; the vote was 44 to 43. In contrast to the House a substitute measure embodying the principal views of the minority was presented to the Senate. This measure, introduced by Senator Murray on May 9, received some discussion. On May 13, the next legislative day on which the Senate again considered the Taft Bill, it was defeated by a vote of 73 to 19. On the same day the Taft Bill as amended passed the Senate with 68 yeas and 24 nays. Twenty-one Democrats joined with the forty-seven Republicans on the affirmative side as contrasted to the three Republicans (Morse, Langer, and Malone) who voted with the remaining Democrats opposing the measure.

Absent almost entirely from the general Senate debate were the caustic and bitter interchanges of a highly personal nature that marked much of the discussion in the House. This difference seeming-

[27] *Ibid.*, pp. 40 and 41.

ly resulted from the different way in which the two committees went about their work of conducting the hearings and writing the bills. This is not to infer that the Senate body was beyond criticism for its methods of work, but its methods were very different from those of the House committee, if only a part of the allegations made by the minority members in the lower chamber are believed. Also absent from the Senate debate until the conference report was the defeatist attitude of the minority. While relatively few members of the minority party in the Senate took an active part in the debate, they were certainly not "lying down on the job" in attempting to show fallacies in the approach of the majority party and their proposed legislation.

The very serious omission of topics from discussion that we noticed in many instances in the House debates did not occur to such a great extent in the Senate. Again, it must be remembered that the Senate had more time, and there were fewer members to be heard in the time available; nevertheless, some important problems that it would seem deserved the full consideration of the Senate received little time. Often during the debate over these matters, even where time was given to them, the remarks consisted of explaining again and again what this or that provision would or would not do; but at the same time there was an absence of discussion dealing with the essential questions of whether the proposal made was the best possible or the best designed to meet a particular problem. And often when such statements or answers were sought by opposition members from supporters of the Taft Bill they were given in return a further explanation of the mechanics of the questioned proposal and what it was intended to accomplish. Among important issues which received this kind of "debate" or meager treatment were the following: craft units, prehearing elections, union-shop elections, the precedence of state anti-closed-shop laws, the changes proposed for the mediation service, the handling of disputes involving national emergencies, provisions on breach of contract, bans on political contributions and expenditures, strikes by government employees, and the provisions creating the joint committee for further study. Many of these matters which received inadequate treatment during the debates were the subject of much controversy in the early administration of the Taft-Hartley Act.

The whole Senate debate, despite this criticism, was on a much higher plane than the discussion in the House. There was much more of an attempt to get questions answered and to discuss real issues clearly. This procedure was not always successful, for while the answers of Senator Taft and his colleagues on particular issues were much more reasoned and full than the meager answers of their counterparts in the other body, there was still much to be desired. The controversy arising within the first year of the Act as to what some of the legislative history meant in the interpretation of the Act bears out this point. The Senate with its ninety-six members, and operating under a much less restrictive time limit than the House, naturally produced a much fuller debate. Speeches and colloquies were longer and contained much more of the philosophy and the reasoning and attitudes behind the arguments of the various participants. The Senate debate was open and full and compares favorably with similar debates on other important issues of national policy. Yet one has the feeling that it still did not match the difficulty of the subject or the needs of the times.

THE CONFERENCE, THE CONFERENCE REPORT, AND CONGRESSIONAL APPROVAL OF TAFT-HARTLEY

Almost a month after the House had passed its bill, that measure and the Senate proposal went to a conference of House and Senate appointed managers, who were to work out a compromise acceptable to both chambers. Both the House and the Senate bills passed their respective bodies with more than the two-thirds vote necessary to override a presidential veto. This veto factor had been much in the minds of senators as their work on their own bill had progressed. There was a strong feeling that a bill such as the House measure, often called "tough" and "harsh" on the Senate floor even by majority members, would not be accepted by the President. Ives, Morse, and Aiken at times had opposed the strengthening of the Taft Bill as it came from committee, often on the ground that amendments of the Ball-Taft variety would not be countenanced by the President. There was division of opinion as to the political wisdom of getting a bill passed in the first session of the Eightieth Congress by making it a "safe" one, or whether the better strategy would not have been to design a bill the President could not sign, so that the Republicans could make political hay of the issue in 1948 and serve notice what the 1948 Republican intentions would be labor-wise. Important in the background of the conference was the veto possibility, coupled with speculation that perhaps a veto might be upheld in the Senate, where it was expected that some of the twenty-one Democrats who had supported the Taft measure might, in the event of a veto, switch to the support of their own party.

Appointed as managers from the House were Chairman Hartley and Representatives Landis, Hoffman, Lesinski, and Barden. The latter two were minority members, although Barden had generally supported the majority of the committee, and his advocacy of change in basic labor policy was old and well known. From the Senate side the managers were Chairman Taft and Senators Ball, Ives, Murray, and Ellender. The latter two represented the minority party. Murray was of course opposed to the Taft Bill as passed and naturally even more strongly opposed to the House version. Senator Ellender, on the other hand, had not joined with his Democratic colleagues in the minority report on the Senate committee bill. He had, in fact, introduced some legislation of his own that had gone far beyond the suggestions of his party leader, the President.

By the time the conference managers began their work on May 15 the House bill had generally become known through constant press reference as a "tough" or "harsh" measure. The Senate bill, on the other hand, was considered "soft" and "mild"—at least in comparison to what the House had accepted in the Hartley Bill. A brief summary of the essential differences and similarities in the two bills is necessary in order that the task of the Conference Committee can better be understood. Significant similarities in the two bills, though not all particulars were identical, were:

1. Certain unfair labor practices of unions, including union coercion of workers, were prohibited.
2. Employer "free-speech" rights were extended.
3. The closed shop was outlawed, but the union shop under certain restrictions permitted.

4. Involuntary check-offs were prohibited.
5. Supervisors were removed from coverage of the law.
6. Bargaining right were denied to unions with Communist officers.
7. Government injunctions were provided in "national emergency" disputes.
8. An independent agency for mediation and conciliation was set up outside of the Department of Labor.
9. Federal district courts were opened for suits for damages for unlawful concerted activities and violation of collective bargaining agreements.

The most essential differences were these:

1. The House bill abolished the NLRB and created a board for hearing cases and an agency for prosecuting cases under an administrator. The Senate bill provided only for minor alterations in the organization of the Board.
2. The House bill had a long and detailed list of unlawful concerted activities by unions and brought unions under the antitrust acts. The Senate bill had a shorter section making boycots and certain jurisdictional and other strikes unlawful.
3. Injunctions against unions on petition of *employers* were permitted by the House for unlawful concerted activities. The Senate bill provided for injunctions on petition of the *Board* in unfair labor practice cases, such injunctions being mandatory in certain types of cases against unions.
4. Economic strikes were permitted by the House bill only after a vote of approval of employees concerned and after notice and cooling-off periods. Such procedural limitations on strikes in the Senate bill were restricted to "national emergency" disputes.
5. Mass picketing was made unlawful in the House bill.
6. The House bill outlawed entirely employer payments to any union or joint health and welfare funds. The Senate regulated them only.
7. Industry-wide bargaining was greatly limited by the House.
8. Detailed regulation of internal union activity was provided for by the House bill. The Senate bill provided little regulation.
9. The House bill banned strikes by government employees.
10. The House bill banned political contributions or expenditures by unions in national elections or primaries.
11. The Senate bill called for a joint committee to study labor-management relations.

The importance of the omnipresent possibility of a presidential veto that might be sustained was indicated in the early reports concerning the conference. The attitude of the majority of the conferees from both the House and the Senate showed this as the conference opened. While some of the House conferees were more moderately inclined than the tone of their whole bill, they had, nevertheless, supported the general strategy of calling the Hartley Bill fair and just. Their first major concession was the admission early in negotiations that something similar to the Taft measure would have to be achieved to meet the veto possibility. As the conference progressed, they became more and more conscious, at least for public purposes, of the concessions they were making to the Senate. Taft in reporting to the press the daily accomplishments of the conference had early listed each day the concessions made by the House. These seemed more numerous than Senate concessions to the House. These outlines of the give and take were later soft-pedaled after Mr. Hartley made several statements that he was "catching it" in the House. A complete news ban was finally placed on the activities of the conference, and a *New York Times* story intimated that the censorship was imposed at the request of the House conferees.[28] The House conferees generally answered their critics in the House by asserting that the Senate bill as passed was more restrictive than it would otherwise have been if the early House measure had not set an example; and, second, that if it had not

[28] *New York Times*, May 26, 1947. Our account of the conference depends a great deal on the news stories and by-line articles in the *Times*.

been for the early and firm decision of the House leaders to push through an omnibus bill, the final legislation sent to the President would have been in piecemeal form and subject to piece-by-piece destruction by the veto.[29]

Certain remarks of Mr. Hartley made at the conclusion of the conference seem to indicate that the House leaders were not sincere in their original defense of their measure or that they had changed their minds somewhat in the intervening month between the passage of the Hartley Bill and the Senate acceptance of the Taft Bill. He said: "Confession being good for the soul, I can say now that we deliberately put everything we could into the House bill so we would have something to concede and still get an adequate bill in the end."[30] Thus on May 29 the "compromise" measure was ready to be returned to the respective chambers.

On June 3 the conference report on H.R. 3020 was given to the House.[31] The following day the conference measure was agreed to by the House after a one-hour general debate. The vote was 320 to 79, a total of 217 Republicans and 103 Democrats affirming the bill. Opposing it were 66 Democrats, 12 Republicans, and 1 American Laborite.

Most members of the House did not have access to the conference report until the morning of June 4. Despite this fact the report almost missed being read in its entirety to the House. Mr. Hartley himself thought this was not necessary. In his opening remarks defending the bill Hartley tried to minimize the concessions the House had made to the Senate and at the same time to intimate that the bill was still a strong measure.

> Just what really basic concessions did the House conferees make? We conceded on the ban of our bill [o]n industry-wide bargaining. We conceded on the ban in our bill on welfare funds. We conceded on the question of injunctions to be obtained by private employers and on the provisions making labor organizations subject to the antitrust laws.

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[29] *Ibid.*, May 27, 1947. This statement of the "early example" intent of the House seems contrary to Hartley's statements as early as February 12 when he indicated the intention of House leaders to wait with their bill until the Senate acted first. This was based on previous congressional history when the House had on occasion produced restrictive labor measures only to see them refused or emasculated by the Senate. At that time Hartley was reported as anxious to re-establish the prestige of the House labor committee. *Ibid.*, February 13, 1947.

Hartley indicates in his book that he was at first in agreement with the idea of waiting for developments in the Senate before the House prepared its bill, because of the likelihood that the Republican senators would get out an acceptable measure, and the fact that the Senate was organized before the House and had already begun hearings. "As time passed, however, it became more and more apparent that once again the House would have to take the initiative." Hartley, *op. cit.*, p. 34.

As to the early plan of passing an omnibus measure Hartley said: ". . . It was my decision to wrap all the provisions that appeared desirable into a single package and to put the entire weight of the Republican Party and the southern Democrats behind it.

"In this decision we ran afoul of a different plan of operation developing in the Senate. Over in the other body, the leaders had proposed a series of different bills. In forcing the Senate to take the omnibus labor bill we sent them, the House of Representatives made its greatest single contribution to the rapidly developing labor legislation." *Ibid.*, p. 35.

[30] *New York Times*, May 30, 1947. Hartley suggests in his book that the technique of deliberately and consciously making the House bill appear stiff and harsh at many points was part of the design for the over-all legislative strategy. He said: ". . . We did include among its original provisions several that could easily have been omitted without sacrificing any of the basic philosophy of the original bill.

"Our method was simple but not easily understood. We merely provided several different remedies for the same offense." Hartley, *op. cit.*, p. 67.

[31] U.S. House of Representatives, *Conference Report, Labor-Management Relations Act, 1947*, Report No. 510, 80th Cong., 1st Sess., June 3, 1947. The same report was the official report in the Senate.

I call your attention to what is left in this bill, because I think you are going to find there is more in this bill than may meet the eye and may have been heretofore presented to you.[32]

The general line of argument for the measure was that a good bill accomplishing the original intentions of the House had been achieved, and yet it was a measure of the type that the President could not morally veto. Some Republicans in the House thought that the bill was not strong enough. The spokesman voicing such sentiments was Hoffman, who maintained the bill was a gift to the labor leaders of the country. The House, he claimed, had given way completely to the Senate in conference; furthermore, he made point of the fact, as did the minority, that things happened so fast in the conference that no one knew rightly what was taking place at any particular moment. Early in the debate, on a point of order, he attempted to have the conference report thrown out because it contained language and treated matters not in either of the original bills.

The opposition argued that this bill was a grace matter, yet most of the representatives were acting without knowing or understanding the bill. They pleaded with the House to consider its action. They naturally took as an argument in their favor contentions of the majority conferees that House concessions had not made the bill less restrictive or harsh than it had originally been. According to Lesinski, strong evidence indicated that the House measure had been purposely touted as harsh and the Senate measure as soft in order to confuse the final outcome, although most of the severer points of the Hartley measure were really included in the conference bill.[33]

The Senate began its consideration of the conference measure on June 5. It concluded its debate on the following day and passed the measure by a vote of 54 to 17. Favoring the bill were 37 Republicans and 17 Democrats. Against it were 15 Democrats and Republicans Morse and Langer. Of the absentees whose views were announced, 15 would have been in the affirmative and 7 would have been opposed. Here as in the House more than the two-thirds necessary to override a veto had been attained.

Senator Taft opened the debate in the Senate with a defense of the conference report and a statement that the conference bill represented a victory for the Senate, since it was substantially the same as the version of S. 1126 sent to the conference:[34]

* * * I think that as a general proposition I can say that the Senate conferees did not yield on any matter which was the subject of controversy in the Senate; certainly not on any important matter. The bill represents substantially the

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[32] *Daily Cong. Rec.*, 93:6540. Speaking of the conference strategy, Hartley said: "Our strategy at that time was so simple as to be almost transparent.

"We had to retain as much of the House measure as we could without jeopardizing the final two-thirds majority in the Senate.

"As the situation developed the conference became a battle of nerves and, more than that, a battle of public relations.

"We had to create the general impression that most of the original Hartley bill had been discarded by the conferees in favor of the so-called milder provisions of Taft's bill." Hartley, *op. cit.*, p. 75. And at an earlier point he wrote: "We knew what was known to few persons outside of Washington at that time . . . the discrepancies between the Taft bill and the Hartley bill were more fancied than real." *Ibid.*, p. 73.

One item in Senator Taft's Foreword to Hartley's book seems to intimate that the strategy noted here was perhaps what Hartley thought it was, and not necessarily what Taft thought it was. He says: "There is a suggestion in Mr. Hartley's book that various desirable changes were omitted from the Senate bill simply to get enough votes to pass the bill over the President's veto. Of course, this was a consideration, but fundamentally the difference[s] with the House were brought about by differences of principle." *Ibid.*, p. xi.

[33] This was spelled out more in detail in a speech delivered to the House on the day previous to the President's veto message. *Daily Cong. Rec.*, 93:7493. The CIO made a similar charge. See *New York Times*, June 5, 1947.

[34] *Daily Cong. Rec.*, 93:6559.

Senate bill. Concessions as to language were made here and there. We made concessions on some matters which were not perhaps dealt with in the Senate bill at all. The only major additions to the bill, as I see them, deal with matters which the Senate has approved in other measures.

The two major concessions the Senator referred to were the bans on political contributions and expenditures and on strikes of government employees. He listed a third possible major change, the featherbedding provisions taken over in part from the House. Among minor concessions made Taft included the acceptance of portions of the House bill on "free speech." The summary and analysis that Mr. Taft later offered for the record, however, of the differences between the House measure and the Senate measure and the inclusions of each in the conference bill showed many other important changes and concessions. This was not read or discussed by him in the Senate.[35] On this general position of Senator Taft was based the whole of the majority defense of the conference bill. Summed up, it said that this bill was still fair and just and represented workable solutions to the pressing labor relations problems of the day, since it was for all practical purposes the same bill which the Senate had originally agreed to and which had been based on these premises of equitableness and workability.

The stand of the minority was similar to that taken in the House but much more detailed and thoroughly presented. Here too the Senate majority was assailed for retreating from the stand it had taken on its own legislation before the conference. The opposition said that none of the concessions were minor; they were all major changes that made the bill restrictive, vicious, and unfair. The strategy of the minority seemed to be that of attacking the bill at every major point and pointing out the difficulties and problems that would arise from its acceptance. They hit very hard, of course, the previous stand of the bill's supporters in the Senate that the Wagner Act was only being amended while its essential principles and ideas were being retained. The opposition contention was that the conference "compromise" measure effectively repealed the whole of the NLRA.

Perhaps the opposition arguments were best stated and summed up, although in a more moderate form than some of the extreme statements, by Republican Senator Morse in his long speech against the bill on June 5. Two pertinent quotations follow:

I shall vote against this bill that has been reported by the conference committee because, after careful study, I am completely convinced that the amendments added in conference make it an impracticable and unadministrable law. Virtually every amendment which has been made threatens the legitimate rights of the American workingman; the net effect is to discourage and stifle collective bargaining and to impede, if not make impossible, effective enforcement of the National Labor Relations Act.

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Mr. President, this conference report is far cry even from the Senate bill. It is unfair, it is destructive of legitimate labor rights, and administratively it is unworkable. I think it will cause, rather than prevent, labor disputes. It must, and I believe it will, be opposed by the working people of America. I think it makes a disastrous contribution to the Nation's economic health and well-being.[36]

[35] *Ibid.*, *pp.* 6598–6603.
[36] *Ibid.*, pp. 6608, 6614.

THE VETO AND FINAL PASSAGE

On June 20 the Congress received the President's veto. President Truman had been subjected to very strong pressure to veto in the interim between the Senate and House passage of the bill and his return of the measure as unacceptable. Labor delegates poured into Washington, the White House mail in favor of a veto was very heavy, and all over the country gigantic rallies were staged by the labor organizations. In New York the bill even stimulated AFL–CIO cooperation to the point that the CIO used the same banners the AFL had used at their rally in Madison Square Garden a week previous. Both organizations promised strong political programs to defeat the supporters of this "slave labor" measure. Needless to say, the prominent employer associations and the leaders in the House and Senate declared again and again during this interlude that the bill should be approved, as it represented a fair and workable solution to the labor-management relations problems facing the Nation.

The President had about fifteen days to consider the measure finally approved by the Congress after the conference. Early during this period the Cabinet was reported as split over the matter of a veto. Some of the department heads felt that it would be a useless gesture in view of the almost certain overriding a veto would get in both houses. Others felt that perhaps a veto would have been proper had the nation not been faced with the threat of another coal walkout on July 1.[37] Likewise the inner-circle White House advisers were reported as divided. Of the former group, the views of Secretary Schwellenbach were definitely known as favoring a veto. Of the latter group, Clark Clifford, one of the chief Truman advisers, also supported a veto. During most of the time between his veto message and the passage of the conference measure the President was away from the White House. Before his departure he had left instructions for the kind of analysis he wanted with his aide John Steelman, and during his absence a large staff worked on the preparation of the analysis of the bill for the President. It was reported that no bill in the President's career had received the minute analysis given the Taft-Hartley Act. Cabell Phillips in the article here referred to maintained that the veto came only after the advice of Truman's closest advisers and the final unanimous agreement of the Cabinet.[38]

From the point of view of organization and articulateness the President's message was a good one. It covered the whole bill systematically, and yet for a message so momentous it was not lengthy or overburdening. The President first stated his conviction that there were abuses that could have been met by legislation. Had Congress followed his original January proposals concerning those abuses, and delayed further legislation until study by the proposed joint commission, he could have gone along with them. He subjected the bill to four general tests: (1) would it result in more or less intervention

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[37] *New York Times*, June 8, 1948.

[38] *Ibid.*, June 22, 1947. This article described the following procedure used for analyzing the bill: Secretary Schwellenbach had the major job of over-all analysis; the legal aspects were examined by the Attorney-General, who assessed the possibilities for litigation under the Act; the Secretary of Commerce gave his views on the industrial implications; Secretary Krug of the Interior Department (the then custodian of the coal mines) gave his views of the bill's effects on the coal situation; Chairman Herzog, of the NLRB, studied the administrative problems; presidential counsel Clark Clifford generally guided the conferences and particularly studied the legislative history of the bill and the many committee reports. The message itself was written by the President with the help of Clifford and Press Secretary Ross.

by the government in economic life; (2) would it improve human relations between employers and employees; (3) was it a workable bill; (4) was it a fair bill? On all four tests Mr. Truman found the bill wanting. He listed and discussed in detail nine major objections which covered practically all the sections of the bill. In almost every portion of the bill the President found objectionable items that made it unacceptable. These nine general objections were as follows:

1. The bill would substantially increase strikes.
2. The area of collective bargaining is restricted by deciding against the workers issues which were normally the subject of collective bargaining.
3. The bill would expose employers to numerous hazards by which they could be annoyed or hampered.
4. The bill would deprive workers of vital protection which they then had under the law.
5. The bill abounds in provisions which would be unduly burdensome or actually unworkable.
6. The bill would establish an ineffective and discriminatory emergency procedure for dealing with major strikes affecting the public health and safety.
7. The bill would discriminate against employees.
8. Unanimous convictions of the Labor-Management conference were ignored or upset.
9. The bill raises serious issues of public policy which transcend labor-management difficulties.

Mr. Truman at the end of the detailed analysis then stated the very general and fundamental objections which caused him to return the measure unsigned: [39]

The most fundamental test which I have applied to this bill is whether it would strengthen or weaken American democracy in the present critical hour. This bill is perhaps the most serious economic and social legislation of the past decade. Its effects—for good or ill—would be felt for decades to come.

I have concluded that the bill is a clear threat to the successful working of of our democratic society.

Without debate or discussion the House immediately after hearing the veto message voted to override, by a total of 331 to 83. This was 55 more votes than the two-thirds needed to override the veto. The Senate did not proceed immediately to vote. Debate followed that evening. Senator Taylor of Idaho gained the floor about 10:00 P.M. and commenced a "talkfest" with the objective of delaying the vote until the following Monday in order that the sentiment of the country over the President's message might reach the Congress. He was joined by Senators Morse, Pepper, and Murray, and, despite majority assertions to the contrary, it would seem that their objectives were achieved when the Senate agreed to postpone the final vote until 3:00 P.M. of June 23.

The majority arguments against the veto followed the pattern of Senator Taft's radio address to the nation immediately following the address of the President on June 20.[40] Taft attacked the President for misrepresenting the bill to the nation and finding no good in it whatsoever. He remonstrated with him for being able to examine the whole bill and find nothing in it that met with his approval and for not giving due credit to the time and study that was put into the bill. And, lastly, the Senator indicated that the President had not really given adequate time to the study of a measure many months in the process of completion, since most of the time the bill was available to

[39] *Daily Cong. Rec.*, 93:7503. This same message though in more general form was carried to the nation in a radio broadcast by the President on the same evening.
[40] For a text of this address see *ibid.*, p. A3232.

him he was not even in the White House. These criticisms were, of course, repeated on the floor of the Senate by Taft and others. It was even insinuated that the President's message followed a CIO memorandum prepared by Lee Pressman, the CIO's general counsel. The insinuation was acidly retorted to and denied by Pepper. The main line of arguments used by the majority and indicated previously was followed to the very end of the debate. Perhaps, however, there was more tendency after the veto to admit that the bill was not perfect though it would be workable with a good administration and that it could be amended if necessary.

The minority and opposition arguments on the floor followed quite closely the President's message. The veto message itself was substantially similar to the pattern of the attack the minority had conducted after the conference. Perhaps such a strategy had been worked out beforehand. Pepper led the attack, and while the debate on the veto was ably conducted, the bipartisan support of the bill in the Senate simply overwhelmed him and his followers. At the last moment an urgent message from the ailing Senator Wagner, the father of the NLRA, was read urging the sustaining of the veto. As a final element, the minority leader, Senator Barkley, read a letter from the President addressed to himself which commended those who fought against the measure and urged the others to sustain the veto. Such procedures were to no avail. Senator Aiken, the first senator on the roll call and one of the doubtful Republicans, cast the first vote on the roll call and measure and everyone then knew the veto would be overridden. It was, by a final Senate vote of 68 to 25. Thus, the Labor Management Relations Act of 1947 became law.

A final word is necessary concerning the strategy of the minority in the final days preceding the overriding of the President. One of the bitterest foes of the measure and a key figure in the Senate, Senator Thomas of Utah, was not present at the last vote. Many felt that he should have been there to bolster the minority. There is some indication that he was willing to fly from Switzerland, where he was on official business, to be present at the final vote. Indecisiveness and misunderstanding some place in the Democratic hierarchy prevented his coming. It was later said that it would have been a useless gesture, since it would not have affected the outcome. Thomas himself told this to Phil Murray via transatlantic phone. There is some question as to whether or not the President did his utmost to influence doubtful congressmen to uphold his veto. It was not until the day of the veto that he called some thirteen senators, all except one of whom had voted for the measure, to a luncheon at the White House to explain his views. As party leader perhaps the President should have done more in this respect.

The veto message itself, despite its general worth, could perhaps be criticized. Possibly the President should have been somewhat more conciliatory toward a Congress which had exhibited such majorities in favor of the vetoed bill. Perhaps he could have achieved the better legislation he ostensibly sought by recognizing and complimenting the work Congress did on the measure and by pointing out the good or better aspects of the bill and indicating that such legislation, despite his specific January proposals, he would have accepted. There

was much rumor around Washington at the time to the effect that this would have been a more desirable and successful procedure. There are, of course, many political connotations difficult to assess accurately.

This is a legislative history which preceded the final adoption of the Taft-Hartley Act—a dramatic and important history, which illuminates many details of this complex legislation.

21. (Source: Robert A. Taft, "Foreword" to Fred A. Hartley, Jr.'s *Our New National Labor Policy*, New York, Funk and Wagnalls Company [1948])

FOREWORD

When Mr. Hartley asked me to write a foreword for his new book on labor policy and the Taft-Hartley Act, I was delighted to do so for several reasons. I have come to have the highest regard for Mr. Hartley's ability, his knowledge of labor problems, and his intense sincerity in trying to solve those problems in public interest. I was glad to have the opportunity of stating a few general principles which I believe should guide the Federal government in dealing with labor-management relations.

Mr. Hartley discusses the reasons for, and the history of the passage of, the Taft-Hartley Act, as well as the general principles in which he believes. The reader will find both sections of his book interesting and provocative. The subject has been involved in such bitter controversy that few have sat down to consider the very serious problems we face in reconciling American principles of liberty and justice with the situation existing in a modern industrial state, particularly when large units develop employing hundreds of thousands of men who cannot retain any personal relationship with those who manage the business.

Mr. Hartley approaches the problem from the point of view of the House of Representatives and its Committee, which prior to the Eightieth Congress had done more work than had the Senate, where every effort to amend the labor law was promptly suppressed as long as the Democrats retained control of the old Committee on Education and Labor. The new Senate Committee on Labor and Public Welfare, however, went promptly to work entirely independently of the House Committee and developed its own bill which supplied the framework of the final Act. There was certainly no anti-labor bias in the Senate Committee. Under rules of seniority and custom, it would have been impossible for Republican leaders in the Senate to create an anti-labor committee if they had wished to do so, and there was no such wish.

As Mr. Hartley points out, the problem of strikes was one of the issues of the 1946 election, and revision of the labor laws was undertaken because of the Republican promises to correct fundamental injustices and oppressions, and because of the public demand that strikes be curbed together with the arbitrary power of labor leaders. The Case bill had been passed for these purposes by the Seventy-Ninth Congress, and failed to become a law only because of the veto of President Truman. The Republicans promised the enactment of some law similar to that already passed. If they had not acted, they would have had no basis to appeal for the further confidence of the people in 1948.

In the Senate Committee, I think every member of the Committee introduced his own bill dealing with those phases of the labor problem in which he was most interested. We started out to deal particularly with the subjects covered in the Case bill of the previous year, but we discovered that a fundamental revision of the Wagner law was also essential. We conducted hearings for six weeks, with an opportunity for all to testify.

We employed two very able attorneys, Mr. Gerald D. Reilly, a former member of the National Labor Relations Board, and Mr. Tom Shroyer, a former general counsel for the Board in Ohio. Mr. Reilly had also been solicitor for the Department of Labor for a number of years and certainly could not be accused of an anti-labor bias. These gentlemen had expert knowledge of the inner workings of the Board and of the Wagner Act. They knew its faults and its merits. When the hearings were over, we directed them to prepare a bill covering the matters dealt with in the Case bill, and including also a correction of the various kinds of abuses shown in the testimony. After the first draft was prepared, the Committee went over it section by section and made many changes, a number of which I did not personally approve. The Committee finally approved the bill by a vote of eleven to two, and I introduced it in the Senate in behalf of the Committee. It was no more my bill than that of any member. It represented an expert job done by skilled attorneys and the Committee itself, many of whose thirteen members also had wide knowledge of labor relations.

In many respectse the bill was similar to the House bill, because the Case bill provided a common guide, and studies of the Smith Committee were used by both House and Senate. Certain abuses had become obvious to all. While we worked with the House to some extent, the connection was rather a loose one, and the job of putting the two bills together in conference was extremely difficult, but made easier by Mr. Hartley's willingness to sacrifice any personal advantage and any partiality for his own phraseology.

There is a suggestion in Mr. Hartley's book that various desirable changes were omitted from the Senate bill simply to get enough votes to pass the bill over the President's veto. Of course, this was a consideration, but fundamentally the difference with the House were brought about by differences of principle.

Originally the employer had had all of the advantages over his employees. He could deal with them one at a time and refuse to recognize the union. He could stand a strike in most cases better than they could. The courts would freely grant injunctions against any effective action by the unions. This unfair situation resulted in the enactment of the Clayton Act, the Norris-LaGuardia Act, and the Wagner Act. These laws, together with the consistently pro-labor attitude of the Executive, pro-labor interpretations, and pro-labor administration, more than redressed the balance, so that by 1946 employers, except for the largest concerns, were practically at the mercy of labor unions. As a practical matter, no legal remedy remained to the employer, the public, or even to the individual labor union member, against the acts of labor union leaders no matter how violent or arbitrary they might be.

The Taft-Hartley Law was an attempt to restore some equality between employer and employee so that there might be free collective

bargaining. There can be no such bargaining if one party feels that the government and the courts will back up whatever unreasonable demand he may make. But it was equally important not to swing the pendulum back so far as to give the employer again an undue advantage. The laws in effect were infinitely complicated, and nearly all their provisions were intended to give labor an advantage. There were literally hundreds of proposals for amendments.

The Senate Committee felt that our job was one of correcting inequalities in existing law, and that unless there was clearly a serious abuse to be remedied we had better not go too far into experimental fields. Undoubtedly, for instance, there is a serious problem of labor monopoly, but we felt that the monopoly problem had not been satisfactorily solved with relation to industry, and that it required more study of both industrial and labor monopoly before satisfactory legislation could be adopted. We further felt that if an equal balance of power between employer and employee was restored, free collective bargaining itself might be so successful as to make further government interference unnecessary.

In two other respects the philosophy of the Senate was somewhat different from that of the House. Many of us had been fighting against the attempt of government to extend its regulation of business, commerce, industry, and agriculture. We were opposed to the Federal government taking over state functions. Therefore, in principle we were opposed to provisions of the House bill which attempted to regulate the internal affairs of labor unions. We did not wish to go beyond the requirement that full information regarding financial statements and other union matters be furnished to the members, as in the case of stockholders of corporations.

Again, in the matter of mass picketing and violence, these were clearly matters within the jurisdiction of the state and local governments. We hoped that the change in Federal policy providing for equality between unions and employers would encourage the states to do their jobs better than they have done them in the past. Furthermore, there is always a difficulty in bringing the Federal government into the police field when there is no Federal police force. Our past experience with deputy marshals sworn in to deal with strikes has not been encouraging.

So also, the attempt to prohibit featherbedding requires an elaborate Federal investigation of conditions in each industry and the exercise by the government of an expert opinion of the number of men required to do each job. The extreme case of paying men for doing nothing, made an unfair labor practice by the new law, can be more easily dealt with, but there are literally thousands of borderline cases different in every industry which would require a vast extension of government regulation of labor and industry.

In general, however, the two houses proceeded on the same basic theories and had no great difficulty in reaching an agreement. We agreed that labor-management relations should be based on free collective bargaining. Such bargaining cannot be free unless it is reasonably equal, and unless the parties have the right to strike or close down the plant in case agreement cannot be reached.

There is a public demand for compulsory arbitration and a complete prohibition of strikes. The people do not realize that this would mean in the last analysis a government fixing of wages which would

undoubtedly lead to government price fixing, rationing, and detailed control of industry. We all felt that a free economy with free competition was the basic cause of American success in the past, and of the great production which has made possible a high standard of living and success in two wars. We did not believe that this system had to be abandoned for a regimented economy and the dead hand of government. It may be that in time the world will become so complicated that a free economy can no longer be maintained, but certainly it is the hope of Republicans that that time will never come.

In the second place, we accepted the basic principle of the Wagner Act, namely that the employer must deal with his men as one unit recognizing the representative chosen by a majority of those men without the influence or coercion of the employer. Without the requirement of union recognition the employer has a great advantage in the present complex industrial world. On the other hand, to make this requirement effective there must be a serious limitation on the rights of the individual workman. He can no longer be free to deal directly with his employer.

As long as the employer is required to deal with the union, the labor leaders need have no real fear that they will lose their power. In our union shop provisions, we tried to give each individual as much independence as possible consistent with the exclusive rights of the union to bargain. I think we reached a fair compromise, giving freedom to the individual without any substantial danger that the power of labor leaders can be broken down through an insistence on individual rights. Labor leaders will always be powerful, and should be, but their power should not be arbitrary and should be accompanied by responsibility for their acts commensurate with the power they enjoy.

Apparently, from one year's experience, we have been reasonably successful in restoring a balance of equality between union and employer. If that balance is right, we do not need much more legislation. Undoubtedly, there is a question whether the local unions in an industry should be permitted to join together and close down an entire industry which may be essential to national existence. I feel strongly that the employees of each employer should have the right to deal separately with that employer without having some outside party, such as the international union or its officers, designated by the Board as the union's exclusive bargaining agent. I do feel that no international union should have the right to prohibit the union representing the employees of one employer from closing a contract if it wishes to do so. This was the effect of the amendment which I sponsored in the Senate, and which was beaten by one vote.

I believe, however, that it will require considerably more study before we undertake to prohibit unions from joining together to deal with the employers of an entire industry, or part of an industry. The Sherman Act has not been satisfactory in limiting combinations between employers, and as far as I know there is no limit on employers consulting together as to the wages they will pay. The whole problem of monopoly should be further studied before action is taken.

In the last analysis, it is difficult indeed to prohibit by law a nation-wide strike if all the men in the industry really want to strike. The leaders can be restrained. The strike can be discouraged. But no democracy can put a million men in jail or put them to work at the point

of a gun. President Truman's proposal of drafting strikers into the Army is contrary to every principle of liberal government.

A nation-wide strike, or a general strike, we hope can be avoided by reason and persuasion. It always has been in the past, because in the end it defeats its own purpose. When such a strike threatens the health or safety of the nation, it takes on the aspects of a revolutionary movement. It should be dealt with by an emergency law giving the government power to step in, call for volunteers, seize the necessary facilities for government operation, seize the union offices and funds, and conduct the operation until reason returns to those responsible for the disaster. Such a law should be passed for the emergency only, and should not be part of any permanent system of labor-management relations. We hope it may never be necessary.

For the present, therefore, I think we had better get all the experience possible under the present law, and continue an impartial study of the problems which will gradually develop under that law. Such a study is being made by the joint committee, and will no doubt be continued in the next Congress. In that study, this book of Mr. Hartley's and the great work which he did during his years in Congress will always be of the greatest assistance and furnish sound guidance.

ROBERT A. TAFT.

22. (Source: Fred A. Hartley, chs. II, V, VI, VII, and XIII of *Our New National Labor Policy,* New York, Funk & Wagnalls Company [1948])

II. THE NEED FOR CHANGE

The Wagner Act, which we now recognize as the basic cause of most labor-management controversy, was enacted as a measure to reduce industrial strife. Many of its provisions, particularly NLRB administrative procedures, were taken bodily from similar regulatory statutes. Although it was opposed vigorously by practically all employer groups, there was no doubt that a majority of the American electorate had accepted the basic principles of the right of labor to organize and bargain collectively.

That this bill would be so administered as to exceed the evil effects predicted by its severest critics came, I think, as a considerable surprise to most of us in Congress.

When I entered Congress in 1929, no member then serving could have predicted what the next twenty years were to bring forth in the field of labor-management relations. The nation was still enjoying a period of seemingly sound prosperity; the long depression of the '30's was still six months away.

The cause of labor was being advanced by what I have always regarded as the sound organizing principles of the American Federation of Labor. These principles, to refresh our memory, were based on the banding together of men engaged in closely allied activities requiring relatively similar skills. Some of these AFL craft unions are still typical of what are right and proper activities for labor.

Labor union abuse, with which we are all too familiar today, was still in the future. Literally no one had suggested that the authority and influence of the central Federal government should be, or ever would be, employed for the purpose of furthering the rights of workers over the rights of employers and the public.

This development also lay in the future.

Not that labor did not have certain legislative aims. To the contrary, leaders of organized labor had for many years been advocating legislation that was finally enacted in the Norris-LaGuardia Act of 1932. This law had two principal provisions, insofar as our current problems were concerned.

I want to examine those provisions. They were typical of the legislative approach of those days, an approach we must follow again if we are to restore labor-management problems to their proper place in government.

Organized labor wanted to be exempt from:

1. the issuance of injunctions by Federal courts at the request of an employer involved in a labor dispute;

2. financial liability for union activities during strikes.

To do this, legislation was written limiting the jurisdiction of the Federal courts. In effect, a Federal judge was told that he was not to entertain a motion for an injunction to be used in breaking strikes. Similarly, the judge was prohibited from levying a judgment for liability against individual members of a union, even though the union as a whole were found guilty of an illegal act.

It should be noted that neither of these provisions added a single additional government employee to the Federal payroll. Yet in many respects they were of far more value to labor than the great bulk of admittedly partisan legislation that was to be written during the next few years.

When the historians come to this period, the most noteworthy development during fourteen years of Democratic rule is the theory that a law is insufficient if it is not backed up by droves of government officials and executives and clerks and stenographers and publicity agents.

The American people have always believed in the law. Far too often, in my judgment, we have been inclined to pass legislation as a remedy for situations that required totally different treatment.

The eminent politicians running the Democratic party during the 1930's were well aware of the American fondness for "there ought to be a law". They were the first, however, to realize the potentialities of a giant federal bureaucracy. At no time during the era of the "rubber stamp" Congress was any legislation passed that did not at the same time create an agency for its enforcement. We have only to look at the labor legislation of the 1930's to prove this.

We had the Social Security Act creating the Social Security Board.

We had the Public Contracts Act which created the Public Contracts Division of the Department of Labor.

We had the Fair Labor Standards Act which created the Wage and Hour Administration.

We had the Employment Service Act which reorganized and expanded the United States Employment Service.

We had the National Labor Relations Act which created the National Labor Relations Board.

These laws constitute only a few of the more important pieces of legislation affecting the individual working men and women of the nation. Each of these agencies has employed and will continue to employ thousands of government workers at taxpayers' expense to enforce government policies for the benefit of labor.

How much simpler and less costly it would have been to have left such social problems to lesser government bodies.

The Federal government should never have commenced the administration of such tremendous projects, regardless of how desirable or worthwhile they may have appeared at the time.

The time will come when one or the other of the major parties will reverse this trend. Many of the "social" objectives of the New Deal could have been accomplished as easily through the passage of legislation establishing public policy in a given area, thereby throwing the weight of public opinion on the side of the less fortunate without creating vast federal establishments to administer such policies.

I regret that my party has not been able during its brief period in power to have returned the government to the people; to have taken the government away from the federal bureaucracy.

This must be done.

The American people will be quick to appreciate and quick to reward the political party which says to them, and to itself: these things we can no longer sanction; these responsibilities belong to you, the people, as individuals and not to a government which has become your master.

The National Labor Relations Board was but one of the scores of Federal agencies that mushroomed during the late '30's.

It was an agency that was born in the midst of controversy, which cut its teeth on the criticism of employers and labor unions and grew to a lusty manhood, spoiled by an over-indulgent guardian in the White House. It was severely chastised at regular intervals by its creator, the Congress.

It was an agency that was to embark the Federal government on hitherto uncharted seas and to involve labor-management relations in political and economic arguments of an intensity we had never before experienced.

It was an agency that was to take the struggling labor movement and raise it beyond even the status of the industrial giants of a bygone era.

It was an agency that in the final analysis was to overreach itself and cause the public revulsion against labor from which the labor movement still suffers.

The National Labor Relations Board had its genesis in the National Industrial Recovery Act of 1933.

This created the NRA and provided for a general regulation of all industry by voluntary codes or by government licenses. Among other things, NRA codes fixed wages and hours and limited child labor. Section 7(a) of the NLRA guaranteed to workers the right to organize and bargain collectively.

In carrying out the labor relations provisions of NIRA the President requested authority to establish labor relations boards for individual industries. Under the Act there was no over-all national board to insure uniform application of particular regulations throughout all industry. Each industry worked out its own code of labor relations, to be enforced by what amounted to voluntary compliance.

The invalidation of NIRA by the Supreme Court did not catch labor unprepared.

The Wagner Act had already passed the Senate when the NRA decision was handed down. Its passage by the House was never in serious doubt.

The Wagner Act went far beyond the enforcement of the twin rights of organization and collective bargaining. While I do not intend to discuss the Wagner Act in detail at this point, it was apparent even in 1935 that the list of unfair practices by employers, and the enforcement powers granted the then new NLRB would completely revolutionize labor-management relations in this country.

I would like to comment on the general thinking in Congress when the Wagner Act was passed.

At we all know, its enactment was made possible only through the support of a good many southern Democrats who were later to regret their action. Proponents of the legislation, including Senator Wagner, met almost every attempt to amend its provisions with the assurance that the bill's sponsors would be among the first to insist on clarifica-

tion and amendments should the administration of the act work a hardship on any group.

Some of the most significant labor principles that were later enunciated by the NLRB were not in the Wagner Act. As a matter of fact, its author assured the Senate that the closed shop was not encouraged by the passage of his bill, nor could the law be used to force an employer to reach an agreement against his will.

For my own part, I am certain that the sponsors of the Wagner Act did not themselves anticipate the extent of industrial strife that was to result from that Act.

Congressional opposition in 1935 was weak. A small handful in both Houses tried to stem the tide. I attempted to write into the law the provision that an employee should not be subjected to coercion by anyone, be he employer or labor organizer. This provision was soundly defeated in the House.

It took me another twelve years to get this particular clause into the nation's labor statutes but now, at the end of that twelve years, protection from coercion from any source is part of the law of the land.

In trying to get this particular provision in the law in 1935, I ended up with the distinction of being the only member of the House on record as opposing the Wagner Act.

It happened this way: The rule under which the Wagner Act was brought before the House permitted one motion to recommit. As second ranking member of the House Labor Committee, I had gotten permission to make that motion. To do so, however, under the rules, I had to announce my opposition to the measure.

The motion to recommit was defeated by voice, and the bill passed the House, also by voice vote. No other member was given an opportunity to go on record against the measure, since no member had an opportunity to vote either for or against the bill.

For a period of almost two years employers and unions awaited court tests on various provisions of the 1935 act. Many persons were convinced that the act was unconstitutional. We have evidence that the NLRB itself had difficulty in securing and retaining employees during this period since many were doubtful on the constitutionality issue.

I have no intention of discussing individual personalities on the first National Labor Relations Board. It will be sufficient for me to say that the biased administration which characterized the first ten years of the Board's existence stemmed from the Board members and their immediate subordinates.

The public generally was not too concerned over the first few years of administration under the Wagner Act. A few of us in Congress were aware of the lack of judicial temperament on the part of the Board members and of the activities they encouraged.

It was not until 1939 that the Congress took any official notice of the situation.

Early in the session the labor committees of both Houses were induced, mainly by pressure from the AFL, to conduct public hearings on possible amendments to the Wagner Act.

I was the first member of Congress to appear publicly before a congressional committee of the House in support of these amendments.

The amendments I wanted at that time had been written, in large part, by representatives of the American Federation of Labor. This

union had been the principal target of the pro-CIO influences that controlled NLRB policies during the earlier years of its existence.

The AFL amendments to the Wagner Act would have discharged the 1939 Board, and created a new, five-man Board, with new appointees; protected the craft unit type of labor organization; prohibited the Board from invalidating labor-management contracts already in existence; and made certain changes regarding the admission of evidence before NLRB trial examiners.

I was proud to have been able to fight for the AFL amendments in 1939, just as I have always been proud to fight for any change in existing law which appears necessary.

The labor committees of 1939 made no progress.

Senator Wagner took the occasion to outline what was to become the battle cry of organized labor: Change not the Wagner Act! Accept no amendments! This law is perfect, and must stand for all time!

That this philosophy was, in time, to serve labor badly, was evident even then to friends of labor.

No group, however large, or powerful, or wealthy, can defend the status quo in this nation.

No group can, year after year, maintain successfully that laws cannot and must not be changed to meet changing conditions and forces.

No group can, and labor didn't!

Most significant result of these early attempts to amend the Wagner Act was the creation of a special committee to investigate the NLRB in July of 1939.

This committee was composed of Representative Howard W. Smith of Virginia (Chairman) and Representatives Arthur D. Healey of Massachusetts, Abe Murdock of Utah, Charles A. Halleck of Indiana, and Harry N. Routzohn of Ohio.

Under the chairmanship of Judge Smith this committee conducted a most intensive investigation into the policies and procedures of the NLRB. The material unearthed by this committee formed the basis for many provisions that were later to become a part of the Taft-Hartley law.

Because of this connection I want to comment briefly on the more important recommendations of this special committee. Some twenty-one amendments to the original Wagner Act were recommended by this committee. The House adopted seventeen of these amendments and sent them to the Senate. There they were effectively pigeonholed by the liberal majority in the other body.

It was this committee that first proposed the rewording of the preamble of the Wagner Act so as to remove that portion which constituted a general indictment of industry. Those familiar with labor law will recall that the Wagner Act began: "The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife." This preamble encouraged strife itself and should have been eliminated.

The 1940 report of the special investigating committee contained the first proposal to separate judicial and prosecuting functions of the National Labor Relations Board.

It was this committee that first suggested a change in definition for "collective bargaining."

It was this committee, also, that first pointed out the need for the restoration of "freedom of speech" for the employer.

It was this committee that first advocated procedures whereby an employer could request an election for the purpose of determining labor representatives.

This committee also wished to protect the craft unions against the overwhelming numerical superiority of the horizontal or industrial union.

It was this committee that first proposed fundamental changes in the rules of evidence to protect the civil rights of persons called before the NLRB.

The Smith amendments to the Wagner Act again passed the House of Representatives in December of 1941 by a vote of almost two to one. The Senate Committee on Education and Labor again made no sincere effort to get the legislation to the floor of the Senate.

One hundred and thirty-six House Members voted against the Smith amendments. Of this number, fifty were defeated in the 1942 elections.

The House had further opportunities to act against labor union abuse as the years passed.

In the spring of 1943 John L. Lewis seized the nation's throat. At a period when the fortunes of war appeared to run against us, a single labor leader once again struck at the foundation of the war production effort.

On this occasion both Houses of Congress were determined to limit the tremendous power that the Wagner Act had conferred on labor leaders.

The first steps were taken, to the surprise of most of us, by the Senate. In that body, Senator Connally had succeeded in getting approval for a measure authorizing the President to seize and operate any war production plant or facility that was hampered by strikes.

The final legislation took months to develop.

The House offered and added many amendments including the more important of the old Smith amendments.

Labor offered its usual argument that legislation which would in any way curb a labor leader would lead to the extermination of organized labor. These protests were beginning to fall on ears less sensitive to the demands of labor and more sensitive to the demands of all the people than at any time in recent years.

As finally passed, over a stinging presidential veto, the Smith-Connally Act (the War Labor Disputes Act of 1943) contained the framework for a governmentally operated system of compulsory arbitration. The Federal government now had the power of seizure to enforce the War Labor Board decisions. More significant, there had been written into the measure a provision requiring a prestrike vote of approval from the majority of the union membership before the labor leader could call any strike against a war-contractor.

These two provisions deserve further comment.

In writing the Taft-Hartley bill we were faced with a sizable block of House members sincerely convinced that some form of compulsory arbitration was essential. Furthermore, many felt that the strike vote procedure would so restrict the power and authority of the labor leader that its adoption alone would contribute greatly to labor peace.

Both the plant seizure provisions, and the prestrike voting requirements failed in their purpose.

Since they did fail, we were able to profit from that failure in writing the new labor law last year.

Compulsory arbitration will never become a right and proper means of settling a labor dispute. This is true for many reasons. Should a government agency be charged with the settlement of a strike by compulsory arbitration, organized labor can be expected to take full advantage of the political sensitivity of all government officials, and thereby secure unfair advantage for union members. While the average business man is forced by public opinion to accept the decision of a government tribunal, regardless of its effect on his business, labor will accept only those awards that operate to labor's economic advantage. Furthermore, labor can be expected to try to bring other issues into the arbitration court. UAW's Walter Reuther, for example, wants nothing more than a voice in determining General Motors prices.

From another point of view, proponents of compulsory arbitration insist also that the government set wage scales and rates, hours of work, and conditions of employment in those cases that come before the arbitrator. Such decisions can competently be made only by individuals intimately acquainted with the industry and company concerned, never by an arbitrator whose experience is necessarily limited and who must rely on interested parties for facts.

The whole principle of arbitration all too often fails for one reason: too many arbitration awards attempt to strike an average between the demands of both parties. Justice is never an average; judicial decisions cannot be determined so simply. An arbitration award that is unjust to either party settles nothing but carries within it seeds for later disputes.

The strike vote procedure required by the Smith-Connally Act was quickly turned by the labor leader to his own advantage. Instead of slowing down the labor boss, the strike vote became a vote of confidence in his leadership.

There is a reason for this. Union members, under the 1943 statute, had to vote for or against a strike without knowing what demands their leader had in mind. No union member could, or would, vote to restrain the labor leader without knowing what the strike issues were going to be. Hence, almost without exception, such men as John L. Lewis went to the bargaining table with a favorable strike vote in their pockets.

Experience under these two provisions had its effect on the development of permanent labor legislation.

After passing the Smith-Connally Act the Congress went on to other matters.

It was not until 1945 that the Congress turned once again to the subject of labor legislation.

After the end of the war, President Truman saw fit to encourage labor's demands for substantial wage increases. And, going even further, the President outlined his philosophy that wage increases need not require corresponding price increases.

This encouragement was all the labor leaders needed to map out the unprecedented wave of strikes that were to almost overwhelm the nation during the winter of 1945 and the first half of 1946. It was against this background that President Truman bowed to the public demand that something be done, by requesting legislative authority

for the establishment of fact-finding machinery to be used in major labor disputes.

Once again, the old House Committee on Labor sat in rapt attention while the labor leaders protested that they could do no wrong. Once again, the final measure that the House Committee approved went down the line for organized labor.

In the early months of 1946 the House leadership took the milk-and-water measure sent in by its Labor Committee but permitted an entirely different measure to be substituted on the floor.

This new measure, written by Representative Case, of South Dakota, was to provide the framework for the 1946 attempt at curbing the power of organized labor.

The Case bill proposals and the ensuing struggle over their adoption were to set the stage for the 1946 congressional elections, and in great measure were to produce the favorable atmosphere for the Taft and Hartley bills a year later.

Briefly, the original Case bill provided a Labor-Management Mediation Board to assist in the settlement of labor disputes; provided a "cooling-off" period; made collective bargaining agreements enforceable in courts; prohibited the use of force and violence in labor disputes; excluded supervisory employees from collective bargaining units; and restricted the use of the secondary boycott.

The Case bill passed the House speedily, then went to the Senate.

Months passed.

In the spring of 1946, strikes in essential industries were the rule rather than the exception.

The Senate Committee on Education and Labor took the Case bill and removed all provisions of any consequence. More time passed as Senate leaders prevented the measure from reaching the floor.

But John L. Lewis came to the rescue.

His negotiations with the coal operators reached an impasse and the lack of coal closed down industry after industry, while across the nation cities and towns dug up wartime "brownout" regulations to conserve power.

With this assistance from Lewis the majority of the Senate finally went to work on its own proposals to curb labor's powers. As finally enacted, the Senate measure closely paralled the House bill and went to the White House with the following provisions in addition to those contained in the original Case bill: establishment of fact-finding commissions for public utility strikes, prohibitions against employer contributions to union welfare funds, loss of bargaining rights for any worker striking in violation of the law, and a stronger ban against the secondary boycott.

The reception accorded the Case bill at the White House is now history. So, too, the press of the day has already recorded the failure of the House to override that veto.

But the fight over the Case bill was not futile.

The events that brought about its passage were still vivid in the minds of all of us as we went home to prepare for the 1946 elections. Many of us were to make labor the main campaign issue in our districts. Those who did were gratified by the voters' approval. Organized labor urged the defeat of all Members and Senators who voted in favor of the Case bill but organized labor failed miserably to make good.

When the problem of labor disputes was once again approached in January of 1947 we had all this legislative material available. We had the early Smith amendments, as well as the hearings, investigations, and reports upon which they were based. We had the legislative history that ended in the passage of the Smith-Connally Act, and material on the effect of its provisions on labor-management relations. We had the Case bill and the affirmation of the voting populace that the Case bill, or something similar, was wanted by the American people.

The experienced judgment of such legislators as Judge Howard Smith of Virginia, and the newly elected majority leader, Representative Charles Halleck of Indiana, was available. Both these men had served on the first committee that had investigated the labor situation and they had for years followed the development in detail.

Nevertheless, we did not wish to give the country a rewording of what had previously been proposed in Congress. We were determined to create a 1947 law—a measure that was as up-to-date as we could make it.

V. THE HARTLEY BILL PASSES THE HOUSE

Even before the hearings closed on March 15, most committee members were anxious to start drafting legislation.

We all realized that the sooner we got our own bill started through the legislative mill, the more influence its individual provisions would have on the Senate deliberations.

The difficulties ahead were considerable. For good and sufficient reasons the major portion of the original Hartley bill had to deal with amendments to the National Labor Relations Act, since most of the causes of labor unrest stemmed from this Act.

We were all aware that the labor leaders would spare no effort or expense to convince the Congress and the country that our legislation was undesirable, unnecessary, punitive, and unfair to labor. The labor bosses had, for so long, showed such a complete lack of restraint when amendments to the Wagner Act were proposed, that we knew their fury would know no bounds when the committee bill finally saw the light of day.

Because of this, we were forced to work out the details of our measure behind closed doors. We were to be severely criticized for this procedure, and, in a sense, such criticism may be deserved.

Nevertheless, a certain measure of secrecy was essential. There were many differences of opinion within the Committee on particular legal phraseology, and on the best method of tackling individual problems. Had these differences of opinion become known to the labor leaders here in Washington the well-organized propaganda forces at their disposal would have exploited such differences to defeat the purposes of the legislation, and to make our task even more difficult.

Consequently, we proceeded first to work out a measure that would be acceptable to the majority of the Republican members of the Committee. Once this was done, we then considered the measure in full Committee and gave the minority party members an opportunity to present their amendments in opposition. After this, we took the legislation to the Republican caucus of the House, where further changes were discussed and some adopted. The amended legislation was then

considered again by the full Committee on Education and Labor, additional amendments authorized, and the completed bill reported favorably to the House of Representatives.

I am recording all this legislative detail to refute the charge that a few men drafted the Hartley bill and forced it on the Congress.

The fact is every Member of the House of Representatives had an opportunity, at one time or another, to present his views and recommendations on the pending labor legislation.

No one that wanted to be heard was denied the opportunity. The sum total of all suggestions, recommendations, legislative wording, complaints, and comments was almost beyond human comprehension. Certain proposals with strong support in the House were omitted. Other proposals with less possibilities of acceptance were included.

In fact, I know of no other piece of legislation that was considered as completely on its merits as was the original Hartley bill reported in the House of Representatives.

Many charges were to be made against it on the floor of the House, in the press, and on the radio.

A major point of the opposition centered around the contention that the legislation had been hastily conceived, and that not enough time had been devoted to its consideration.

Anyone reading this far will realize the absurdity of this attack.

So I will turn to another type of argument advanced by exactly the same people, which was that the bill was basically a rehash of the old Smith proposals that Congress had resisted for the past seven years.

This criticism was more reasonable.

The original Hartley bill did embody many of the same objectives that were present in the original Smith amendments to the National Labor Relations Act. The fact that we still considered these objectives desirable is, in itself, a tribute to the farsightedness of Judge Smith and the soundness of his legislative proposals when they were first advanced. The fact that we did not follow his exact language in many respects shows that the passage of time had increased many of the abusive practices which his original amendments were designed to limit, and that it was necessary to recognize the development of new techniques and methods by organized labor.

The Hartley bill, as I presented it to the House of Representatives on April 15, followed the old Smith proposals quite closely in so far as amendments to the National Labor Relations Act were concerned. Many of its provisions covered objectives the House had approved overwhelmingly many times in the past.

I want to trace these similarities for the benefit of the serious student of legislative history. For there is a lesson to be gained. Whenever, in the course of governmental affairs one economic group is favored over another—whether such favoritism is manifest by executive, legislative or judicial acts—forces are created which will eventually restore a proper balance between all economic groups. It took many years to correct the unbalance created by the Wagner Act, but this same unbalance itself insured the adoption of the identical changes its supporters fought so bitterly.

It is the inevitability of such changes that gives our nation its strength. No economic group can, for long, maintain a position of great advantage over the rest of the economy, so long as our representative

form of government is unimpaired. Therein lies the strength of American democracy, the finest form of government this world has ever seen.

Thus the Wagner Act established its own opposition by creating injustices on the part of the government, arrogance on the part of the labor boss, and a determination in the public mind that these things were not to be endured forever.

It was less than five years after the passage of the Wagner Act that the House, then more representative in spite of a continuing Democratic control, finally came to reverse its former approval. It was another seven years before this movement acquired sufficient strength to emerge as the dominant position of the government, but each year that passed without change in the labor law of the nation made the final legislation more certain.

My measure proposed the abolition of the then existing National Labor Relations Board of three members, to be replaced by a different group.

The original Smith amendments, sent to the House of Representatives in March of 1940, would have abolished the then existing Board of three members and replaced it with a new Board of the same size.

Testimony before the Smith Committee eight years previously had brought out evidence of bias and prejudice on the part of Board members, a lack of judicial temperament, and a campaigning zeal for the organized union that hurt both the labor movement and the productive capacity of the nation.

In 1940, a complete change in Board personnel would have remedied the situation, for the volume of work before the Board did not require additional members. As time passed however, the labor-management controversies increased both in number and intensity, and an enlargement of the Board, as well as the selection of new appointees, became desirable.

Not that the Board continued to follow its initial policies through the years. As a matter of fact, as soon as the Congress began its consideration of the Taft-Hartley bill and as far back as the Case bill debates, the Board had reversed a good many extreme decisions of its earlier days, and had given promise of a better administration in the future.

Nevertheless, we in Congress had had quite enough experience with administrative agencies that directly opposed the mandate of Congress. We wanted to remove much of the administrative discretion the old Wagner Act permitted.

A new and enlarged National Labor Relations Board was the first step.

A second step was to separate the judicial and prosecuting functions within the agency itself.

The proposal for a separate administrator was another provision that originated with the old Smith Committee in 1940.

Considerable testimony had been presented before Judge Smith's group tending to establish the view that the combining of judicial and prosecuting functions of the Board simply would not work toward the development of sound labor-management relations. Even if the original NLRB had been composed of impartial individuals possessed of the widsom of the ages, the human temptation to uphold its own findings against employer activities would have been too great. The maintenance of the judicial function unimpaired by incompatible problems

of administration, execution, and punishment is a cornerstone of our system of government.

More recent testimony before our own committee convinced us that while the abuses that had resulted from combining the judicial power with the responsibility for prosecutions had diminished in later years, the main fault that still existed was due to the Board's basic organization and should be corrected.

Another source of unjust action was traced to the lack of adherence to sound legal principles in obtaining and using evidence upon which Board action was based. The framers of the original Wagner Act had sought to simplify the administrative procedure of the Board by providing that the rules of evidence prevailing in courts of law or equity should not be controlling. Unfortunately, the Board's trial examiners and the NLRB members in construing this permissive clause, acted as if it were mandatory upon them to ignore not only the fair and normal rules of evidence, but even common sense in assembling "facts" to support preconceived conclusions.

The old Smith committee had sought to remedy this situation; so did the original Hartley bill. We gave to the courts a genuine authority to review Board actions, and the evidence upon which such action was based. I sincerely believe that time will prove this to be an important piece of insurance against unfair and biased administration of the new law. For the first time, further findings of fact by the NLRB can be directed by the court whenever the court feels that the NLRB findings are incomplete, not supported by substantial evidence, or are against the manifest weight of the evidence.

The Wagner Act had made it an unfair labor practice for an employer to refuse to bargain collectively with acknowledged representatives of his employees. With the usual bias that characterized that law, it did not impose a corresponding obligation upon the representatives of organized labor.

Consequently, when such labor leaders wanted to throw their weight around and call a strike without even attempting to reach a compromise settlement with the employers, they were legally free to do so.

Thus we had a unilateral situation wherein one party to a dispute was hampered in his dealings by legal requirements and administrative rulings that went further than the law had intended, while the other party was free to make, and made, whatever rules served him best.

In 1940, the Smith Committee had tackled the problem by redefining "collective bargaining" so as to include definite limitations on what the NLRB could force the employer to do. By 1947, this simple remedy no longer sufficed. The public interest made it necessary that we write into law what both the employer and the union had to do to comply with legal requirement that *both* must bargain collectively.

In defining "collective bargaining" we went further than the Smith committee had contemplated. The tremendous increase in power now held by the labor leader made it necessary that we include in the various requirements of collective bargaining on his part a provision requiring a secret vote on the employer's final offer before a strike can be called under the law.

Drafted to correct what originally was a simple matter, this provision gives an excellant example of how simple legislative proposals, if successfully resisted for many years, develop into complex legal requirements as the uncorrected abuse continues to grow.

The original Smith amendment on the question of bargaining collectively would have been more desirable legislation. In 1940, it would have corrected the situation; in 1947 it was far from adequate.

So the Congress acted more drastically than would have been necessary had the original Smith recommendation been approved.

Many of the lesser provisions of the Hartley bill also originated from the studies and investigations of the old Smith committee. Space does not permit a detailed discussion of these, but forces us to turn to another measure that possessed many of the major objectives of the Hartley bill.

I refer to the Case bill, passed by both branches of Congress less than a year before my bill reached the floor but successfully vetoed by the President.

From the Case bill we adopted, with considerable changes, many of the more important provisions of the Hartley bill.

Representative Case had attempted to deal with a problem that had not arisen until after the Smith committee had ceased to operate.

No one had ever considered foreman and other types of supervisors as constituting proper personnel for union organizations. This problem would never hase arisen except for the greed of a few union leaders. John L. Lewis was the principal proponent of including supervisors in with the union members they were supposed to supervise. One of his major strike issues had been the foreman dispute. The Case bill provided that no supervisor could have the status of an employee under the National Labor Relations Act. Our committee went further by providing a definition of "supervisor" that included other employees whose particular jobs made it desirable that they be excluded from plant-wide unions of production workers.

Such workers, under my bill, would be permitted their own unions, provided there was no affilation with other non-supervisory organizations of employees.

The Case bill also approached the problem of secondary boycotts and jurisdictional disputes. Both these labor techniques had been illegally and brazenly perverted far beyond their original purposes, and were being used to further unreasonable labor demands. Quite often we found strikes that had forced an employer to disobey clearcut orders of the NLRB, or strikes that had gained ends which were in themselves illegal.

The Hartley bill outlawed the secondary boycott, jurisdictional strike, sympathy strike, and many other such practices.

Another labor practice that Congress had long sought to deal with was mass picketing and violence. While I was a sincere believer in local law enforcement, all too often we have seen where local authorities were powerless to deal with thousands of union pickets that descended upon a struck plant and endeavor, by sheer intimidation of numbers, to prevent even officials of the company from entering or leaving their own premises. The leaders of organized labor have always pleaded that this is a problem of local law enforcement, and, I regret to say, this plea finds considerable support.

Nevertheless, the Hartley measure made such activities a Federal offense, subject to Federal enforcement procedures. This provision went further than did the Case bill on this point, since the Case bill merely deprived workers of collective bargaining rights for engaging in mass picketing or acts of violence.

The Case bill also started us off on another problem, that of Federally sponsored conciliation and mediation efforts. The Case bill would have created a Labor-Management Mediation Board as an independent agency of government, with authority to postpone nationwide strikes for limited periods of time, and to exert non-compulsory efforts toward the settlement of such strikes.

Prior to the enactment of the Taft-Hartley law, Federal conciliation services had been provided by the United States Conciliation Service, a bureau of the Department of Labor.

Practically every witness before our committee had insisted that the administration of such activities should be divorced from the direction of the Secretary of Labor. Recent Secretaries of Labor have shown repeatedly that they conceived their job to be that of advancing the cause of organized labor by all the means at their disposal. Conciliation of national disputes cannot be successful with the conciliator devoted to the furtherance of the intersts of only one party to the dispute.

For this reason we abolished the Department of Labor's conciliation service and replaced it with an Office of Conciliation, which name was later changed to a Federal Mediation and Conciliation Service as the bill progressed. Our experience to date indicates that this change was a fortunate decision.

From the Case bill we also took provisions making labor organizations equally responsible for contract violations, and permitting court suits to recover damages resulting from such violations.

Ever since the passage of the Norris-LaGuardia Act in 1932, labor unions had considered themselves above the law in so far as adherence to the terms of a contract was concerned. While the employer, under the law, could be, and was, sued by the unions for alleged violation of contract, the labor union, under the law had been carefully exempted from any corresponding obligations.

Labor leaders have reacted most violently against this provision in the law.

For my own part, I believe this provision to be of utmost importance in achieveing the objectives of fair and equitable treatment of both labor and management.

I do not expect, as the statements of labor bosses would have us believe, a multiplicity of suits will be filed by employers with the intent of destroying labor unions. Rather I believe the simple act of making the unions also responsible for their contracts will go a long way toward preventing those "wildcat" strikes that are disrupting to production and detrimental to the real good of the worker. Experience to date would tend to support this opinion.

Several other major provisions of the Hartley bill also originated with the old Smith Committee or were from the Case bill. Most of these other provisions were so altered to meet changing conditions that in all fairness, I shall have to consider them as relatively new legislative proposals.

The old Smith amendments had contained a provision that would have served to protect the craft union against the overwhelming weight of numbers that forced many of the old craft locals to be incorporated into plant-wide industrial unions.

Even before 1940, however, this problem had been complicated still further by the almost complete abolition of the independent local

union in favor of one affiliated with the national labor groups. For a time it appeared that no independent union could defend itself successfully against the NLRB's determined opinion that no independent union could possibly be free of employer domination.

In this area of dispute the NLRB acted as a one-way street. While a craft union could defend itself for short periods of time, provided its entire membership was up in arms, once the craft lost to the industrial union it could never regain its independent status, since that path was blocked by a previous Board decision.

The Hartley bill recognized this situation and directed the new Board to consider petitions for craft recognition regardless of previous Board rulings.

Other major provisions of the Hartley bill which I consider as new legislative proposals include the closed shop ban, prohibition against industry-wide bargaining, non-certified status of unions having Communist officers, the bill of rights for union members, prohibition of unfair labor practices by unions, free speech provisions for employers and union members, extension of the anti-trust laws to cover union activities, and establishment of a new concept of unlawful concerted activities.

These provisions will be discussed later.

I have devoted much space to the old Smith amendments and the Case bill provisions up to this point in order to support my contention that the major portions of the Hartley bill were not new thoughts or ideas, but on the contrary, had been developing in the Congress for more than seven years.

The major provisions of the Hartley bill had been supported by thousands upon thousands of pages of testimony extending back for more than six years, testimony obtained by congressional committees on both sides of the Capitol. Members of both parties contributed to its drafting and aided in its enactment.

In the face of this historical legislative background, it would appear ridiculous for the labor bosses and their spokesmen in Congress to attack the legislation as hastily conceived or worked out behind closed doors by representatives of business organizations.

Every member of the House was, as has been said, given an opportunity to present amendments to the Hartley bill. A few were adopted on the floor. The Wagner Act, on the other hand, was not amended in any significant manner during debate. The Hartley bill required three separate roll calls—one on the rule authorizing debate, another on a motion to recommit, and a third on final passage. The Wagner Act, on the other had, was railroaded through without a single roll call, the proponents of the measure having such overwhelming strength as to prevent anyone from recording his vote either for or against it.

The Hartley bill passed the House of Representatives April 17, 1947, by a vote of 308 to 107.

The top labor unions had no dearth of spokesmen to repeat their wild attacks on the floor of the House. Somehow, though, these attacks had begun to pall on all of us for we had heard them so many times.

This same apathy extended to the press and radio. Time and time again spokesmen for labor were to berate the press galleries for not giving their attacks sufficient space in the press and on the radio. These

representatives of the fourth estate, like the Representatives in Congress they were watching, had also heard them so many times.

Not that the newspapers, radio commentators, and magazines did not serve to tell the nation what had been proposed in the House. For my part, I think the reporters did a masterful job of telling the people what the Hartley bill was and what it proposed to do for labor peace. The press of this nation deserves much credit for the part it played and has continued to play in publicizing worthwhile legislative efforts on Capitol Hill.

The passage of the Hartley bill broke the ice for my committee. We had reported out, successfully defended, and gotten the House overwhelmingly to approve the most important single piece of legislation the House had considered that session. For many members of the Committee it was the first legislative program they had participated in, since this was their first year in Congress.

Meanwhile, our attention and that of the public generally, shifted to the Senate.

Not that we were content to rest on our temporary victory. The passage of the Hartley bill had marked the beginning of a torrent of abuse from the top officials of organized labor which was to continue for many weeks. My committee felt its responsibility to combat this organized campaign by labor during the next few weeks and all of thet members performed yeoman service in getting our story across to the public.

In general, though, we felt that the most difficult part of our job was behind us. We had surmounted the initial legislative hurdle.

The Hartley bill had now become The Hartley Act, a change in terminology that indicates approval by one branch of Congress.

VI. HURDLES IN THE SENATE

The Senate of the United States traditionally has been slow to follow shifts in public sentiment.

Students of government have ascribed this tendency to the six-year term which retains a Senator in office for several years after the basic issues on which he may originally have been elected have ceased to be significant. While the entire membership of the House of Representatives faces an election every two years, the Senate sends only one-third of its members before the polls that frequently.

As a result, public opinion recasts the political complexion of the House of Representatives every other year. The Members of the House who voted so overwhelmingly for the Hartley bill were fresh from election campaigns. They remembered vividly the issues of those campaigns, and acted so as to redeem their election promises.

The Senate was a different matter.

While the control of the Senate had shifted from Democratic to Republican, that control was by narrow margin, so narrow indeed that the Republican leaders in the Senate had to watch that margin closely to maintain their leadership.

Many of the Senators who were bitterly opposed to corrective labor legislation in any form had been in the Senate for several years since they were last elected.

This "behind the times" sentiment in the Senate made the passage of really corrective labor legislation more difficult than in the House.

In fact, the Senate leadership had considerable difficulty in getting a bill out of committee, that is, a bill in line with the general thinking prevalent on both sides of the Capitol.

Senator Taft, the Republican chairman of the Senate Committee on Labor and Public Welfare, had selected the members of his committee so as to reflect all shades of opinion within his party. To a very real degree this sense of fairness that characterizes his action also increased his difficulties.

The Senate committee included Republican Senators Ball of Minnesota, Smith of New Jersey, Donnell of Missouri, and Jenner of Indiana, and one Democrat, Ellender of Louisiana—all of whom were known to favor corrective legislation more or less in line with the House-approved bill.

Senator Ives of New York, together with Senator Aiken of Vermont, wanted some legislation but had no intention of proceeding as comprehensively against labor union abuse as the majority of the House had indicated.

Senator Morse, a Republican from Oregon, and two Democratic Senators, Thomas of Utah and Hill of Alabama, would all have voted for a very mild bill if they could have determined exactly what a mild bill might be.

The remaining two Democratic Senators, Pepper of Florida and Murray of Montana, wanted no labor legislation at all, and did all within their power to prevent its enactment. They were later joined in their efforts by Senator Morse when he discovered that in spite of all he could do the Senate was determined to ignore his vast experience and write its own labor legislation.

Senator Taft was faced with a real problem in his committee.

He had drafted a tentative measure for discussion even before my bill reached the House floor.

This measure, which I will cover briefly, followed many of the general objectives of the original Hartley bill.

In regard to the organization of the National Labor Relations Board, the Taft bill would have increased the membership to seven but would have retained the three members of the old Board. My bill would have abolished the old Board.

The Taft and Hartley bills were alike in that both permitted employers to petition the NLRB for elections, limited bargaining units to one plant, and provided for separate certification of craft unions.

The two measures defined collective bargaining similarly, except that the Taft bill provided for prestrike votes only in cases of national emergency.

The two bills were substantially alike in their prohibitions against the closed shop.

The Taft bill attempted to restrict industry-wide bargaining by permitting employers to refuse to bargain on an industry basis. My bill, as passed by the House, prohibited such bargaining entirely.

The two bills were similar in their treatment of sympathy boycotts, jurisdictional, and other strikes in violation of contracts. Both bills permitted damage suits against unions and allowed private parties to seek injunctions to stop such strikes or boycotts.

The Taft and Hartley bills contained similar provisions in regard to mutual responsibility for contractual obligations, although my bill

did permit private injunctions to be sought for breach of contract while the Taft measure did not.

Both measures contained provisions dealing with strikes creating national emergencies.

Those of us who had been active in drafting the Hartley bill were gratified by the inclusion of many of these provisions in Senator Taft's bill. While we were well aware of the divided opinion within the Senate Committee, we felt a good start had been made.

Then too, I hoped for a resounding vote on the passage of the Hartley bill in the House to assist Senator Taft in securing committee approval for his measure.

It should be noted that the Senate Committee was considering the Taft bill at the same time we were debating the Hartley bill on the floor of the House of Representatives. As a matter of fact, the final committee version of their labor bill was reported to the Senate on the same day the House passed my bill.

Unfortunately, the House vote came too late to be of material assistance to Senator Taft.

In all fairness, though, it may be said that the comprehensive manner in which my bill covered all phases of labor-management relations served as a sounding board for public reaction which had its effect later in the Senate.

Influential members of the Senate Committee made no secret of the fact that they intended to weaken the original House bill before permitting it to reach the Senate floor.

The broad objectives of my bill were known to these Senators. I had indicated in press interviews and on the floor during the course of the hearings the several types of union abuse we intended to correct.

Consequently, when Senator Taft brought his tentative draft before the Senate Committee on Labor and Public Welfare, these Senators were prepared to attack those particular features which had been singled out for especial propaganda efforts by the labor unions.

As a result, these Senators were able to strike from the original Taft measure four important provisions.

One of these, designed to protect the worker from "coercion from any source", would have effectively prevented the further use of high-handed organizing techniques that had become the fashion in organized labor circles.

Another provision would have restored a certain measure of autonomy to union locals in conducting their own collective bargaining negotiations with the employers directly concerned.

Another had established certain rules governing the administration of welfare and other funds to which the employer was required to contribute.

The last major provision eliminated by the Senate Committee from Senator Taft's original measure would have permitted any injured party to seek relief in the courts by applying for an injunction against secondary boycotts and jurisdictional disputes.

I was not too disturbed by this train of circumstances.

We had reason to believe that most, if not all, of these provisions could be restored to the measure on the floor of the Senate. The fact that all four of them were already in the House-approved Hartley bill, in even stronger form than Senator Taft had wanted, would serve to strengthen Senate opinion.

What was more important to me, and to the final version of the Labor-Management Relations Act were the provisions that had been approved by the Senate Committee and reported to the Senate.

The approval of the Hartley bill by the House had caused the opposition Senators to concentrate their fire on the four principal provisions outlined above, which had the effect of permitting many other essential proposals to go by relatively unchallenged.

This same effect was to be noted later on the floor of the Senate where major opposition efforts were again concentrated on defeating the amendments that Senator Taft and others were hoping to add to the Senate measure. This concentration of forces against particular amendments weakened the general attack against the measure itself.

I have noticed this same situation present in the consideration of many other pieces of legislation.

It might be called an example of legislative psychology. If you have a particular measure you want approved by any legislative body in a particular fashion, it is sometimes a good practice to include among its provisions at least one that is obviously undesirable, unworkable, or unconstitutional. By doing so, you draw the opposition fire against the particular provision rather than against the measure as a whole.

As the debates progress, the opposition gets all worked up over the horrible things you are attempting to foist on them. At the appropriate time, sensing the temper of the legislators, you bring the matter up for a vote.

You are then defeated, and the undesirable provision is stricken from the bill.

With this out of the measure, the balance of power then shifts to you. Since the opposition had been concentrated on a particular section of the bill, which section has been eliminated, the legislators are now inclined to consider the remainder unobjectional and proceed to approve your measure.

This procedure, on a more magnified scale, worked in the case of the Taft-Hartley Act.

While I personally consider the original Hartley bill a better piece of legislation than the final Taft-Hartley Act, we did include among its original provisions several that could easily have been omitted without sacrificing any of the basic philosophy of the original bill.

Our method was simple but not easily understood. We merely provided several different remedies for the same offense.

For example, for secondary boycotts we provided: first, that any worker engaging in a secondary boycott would lose his collective bargaining rights under the National Labor Relations Board; secondly, that the person against whom the secondary boycott was directed could seek an injunction in a Federal court; thirdly, that injured persons could sue to recover damages resulting from the secondary boycott; and lastly, that all workers indulging in secondary boycotts were guilty of unlawful concerted activities and thus subject to prosecution under the antitrust laws, which my bill made applicable to unions.

Now obviously, we could and did sacrifice one or two of the particular remedies provided for secondary boycotts, yet still retain sufficient legal provisions to hamper future secondary boycott programs.

I could repeat this example of multiple remedies for different types of labor abuse. In general, we listed them as unfair labor practices by union leaders, for which an administrative procedure was available. We opened the courts to private injunctions. We denied collective bargaining rights and we brought labor unions within the scope of anti-monopoly statutes.

Thus, the Senators who echoed the screams of the labor leaders on the floor of the Senate had much to occupy their attention, and even if they had been more successful in their efforts they would not have weakened the Hartley Act in a material sense.

The Senate opened its general debate on the amended Taft bill the week following the passage of the Hartley bill by the House.

The Senate, as the whole country knows, practices unlimited debate. While there is a provision known as cloture, which was written into the Senate rules about thirty years ago, it is seldom invoked.

I, for one, hoped there would be no attempt to invoke cloture. I wanted unlimited debate on the labor bill, since I felt that each day that the bill was debated the people of the country would learn more and more of the respective details of my bill and of those measures under consideration by the Senate. I was convinced that the more information the people had on what we were trying to do, and why we were trying to do it, the greater the final vote would be for our measure.

The first amendment considered by the Senate, and bitterly opposed by labor's Senators in that body, was designed to protect employees from coercion by union organizers. In effect, it would have protected the right of a worker to join or not to join a union as he saw fit.

The objections raised in the Senate to this perfectly reasonable proposal were many and varied. Union organizing efforts would be impeded, it was said, and the growth of union labor organizations brought to a standstill. Employers would send secret agents into local unions and foster attacks on unorganized workers just to break the unions. The Senate spent many hours listening to attacks on this particular provision.

Those of us in the House awaited the first Senate vote with impatience. This would give us an indication of how the Senate might split on final passage.

The vote came, 60 to 28. It was neither encouraging nor discouraging. While it was sufficient to override the veto we all expected, there were seven Senators not voting, a large enough number to sustain a veto had they been present and voting against us.

The next amendment to be presented to the Senate dealt with the problem of industry-wide bargaining.

This is a vexing problem which, so far as I am concerned, is still to be solved. Later on I will go into the many ramifications of the problem and consider what can be done to correct many related abuses.

For the purposes of discussing the Senate action in this matter, it is necessary to outline briefly the major proposals before that body.

The original Hartley bill, as introduced, would have limited certification of a bargaining representative to a single employer, with certain exemptions to permit small unions located in the same general area of production to join together for collective bargaining purposes.

An amendment from the floor by Representative Kersten had strengthened this provision by prohibiting employers from associating themselves together for purposes of collective bargaining with their employees. This would have effectively ended industry-wide bargaining because the union leader would have had no comparable representative of management with whom collective bargaining could have been conducted.

The Ball amendment was a modification of my original provision. In it the NLRB was directed to certify as bargaining agents only the local unions, though the latter were left free to authorize international union officers to bargain for them.

The problem was just too confusing to be gotten across to the Senate.

Meanwhile, many employer groups and some industries which had been practicing industry-wide bargaining for years, with varying degrees of success, added to the confusion.

The result was disappointing.

Opposition Senators, capitalizing on the many different proposals which were advanced and profiting by the resultant variance in sentiment, managed to defeat the Ball proposal, 43 to 44.

We were all disturbed over this vote. Many House committee members had felt that abolition of industrywide bargaining was the keystone of my bill and insisted that I make every effort to restore the provision in conference.

I was not convinced of the wisdom of this position.

I knew we had to write a final bill that could be enacted over a veto. The inclusion of a provision that the Senate had rejected on a formal vote would certainly gain no votes in that body later.

The next amendment dealt with welfare funds and the administration of such funds. My bill prohibited any employer from making any payments into such funds whenever they were to be controlled directly or indirectly by the union.

The amendment offered by Senator Ball proposed the same type of union welfare fund administration as that then in effect in the coal industry through the Krug-Lewis agreement.

The defeat of the industry-wide bargaining amendment had its effect on Senate leaders. While several were convinced, as I still am, the union should be denied the exercise of the sovereign power to tax consumers of the product upon which they work, Senators fighting to restore effective provisions on the Senate floor were discouraged by the industry-wide bargaining defeat. As a result, instead of attempting an all-out prohibition against such funds, they went after a limitation that was, and is, so complex as to be worthless.

Then too, the vote approving the welfare fund provisions by 48 to 40 was not encouraging. While the intensity of the opposition as to these could not be determined, the fact that forty Senators were opposed to such provisions was enough to weaken the fight for other amendments awaiting Senate attention.

The effect of this situation was immediately apparent. Senator Ball's next amendment would have dealt with the secondary boycott in much the same manner as my own bill. Senator Taft, privately favoring the right of private injunction against this particular labor racket, yielded to what he felt was the sentiment of the Senate at that particular moment and proposed a substitute. The Taft amendment directed the

NLRB to seek court injunctions against secondary boycotts whenever that agency was convinced that such action was necessary, but to action by private parties it kept the courts closed.

As later events were to prove, Senator Taft was correct in his analysis of Senate sentiment. His amendment was approved by the Senate, by a vote of 65 to 26, while the Ball proposal was defeated 29 to 62.

With the inclusion of the Taft amendment against a secondary boycott most of us felt we were over the hump in the Senate. While loss of the industry-wide bargaining proposal was a keen disappointment, we had realized from the very beginning the strength of the forces against it I sincerely believe that its inclusion in a final bill would have prevented the Senate from overriding the veto that was ahead.

The remainder of the Senate debate was devoted to a series of delaying actions on the part of the opposition, and to a detailed consideration of the union shop provision of my bill. As passed by the House, my bill permitted the union shop contract, provided a majority of the workers in the plant wanted such a contract as determined by an NLRB election, subject to voluntary approval by the employer.

Senator Malone wanted to make a union shop contract mandatory upon the employer whenever a majority of the workers voted in favor of such a provision. Senator Ball, on the other hand, felt the union shop provisions of my bill (which were also in the Senate bill) represented a hypocritical approach and wanted to outlaw all forms of union security contracts, regardless of the wishes of the workers. The Senate rejected both proposals.

The last major opposition effort in the Senate came from Senator Murray of Montana.

Senator Murray has long been regarded as the leader of the pro-labor forces in the Senate. As the Democratic chairman of the old Senate Labor Committee, he had succeeded in blocking essential labor-reform legislation for many years.

His efforts against the Taft bill in the Senate were not as successful.

His last move was to present to the Senate, in the closing days of debate on the Taft measure, a completely new substitute bill. It is significant that his measure did contain some restrictions against union bosses.

This was the first occasion that an acknowledged spokesman for organized labor had retreated a single step from the universal condemnation of all proposals designed to change the status quo in labor law.

Senator Murray's substitute did recognize possible misuse of the secondary boycott by labor unions, and it provided a remedy against such practices whenever they were used to further organizational strikes or jurisdictional disputes.

Had the labor organizations seen fit to sponsor such proposals back when labor legislation was in its formative stages, I really think a majority of Congress might have given them favorable consideration.

As it was, the proposals came too late.

The vast majority in the Senate considered the Murray substitute as a deliberate delaying action, unworthy of serious consideration.

As a result, the Murray bill was defeated by the resounding vote of 19 to 73, showing overwhelming disagreement with the proposals it advanced.

We all waited the final Senate vote with interest.

The propaganda mills were already beginning to roll against the Senate bill, although the practice of terming the Senate bill weaker than my bill had gotten a head start. This propaganda output was later to boomerang against its sponsors but it did serve at that time to confuse and mislead the public.

Immediately after defeating the Murray substitute, the Senate voted on final passage of the Taft bill. The vote was 68 to 24.

The House was jubilant.

Sponsors of the Hartley bill had followed the Senate debates closely. We did not permit labor's violent campaign to color our thinking or our opinion of the Senate-approved measure.

We knew what was known to few persons outside of Washington at that time. We knew that the Senate bill, far from being the weak and confusing measure it had been described, contained many provisions of real merit. In fact, the discrepancies between the Taft bill and the Hartley bill were more fancied than real. In many important respects the two measures were substantially the same.

There was a still more important point to consider.

The sixty-eight Senators voting for the Taft bill represented the largest majority the Senate had recorded in favor of comprehensive labor legislation. It was, by several votes, more than was needed to override a presidential veto.

Many Senators had joined in making this vote possible.

Senator Ives of New York played an effective role in securing final passage, although he was on record against several of the important provisions of the measure.

Senator Byrd, a Democrat, had taken the lead among the southern Democrats who gave their support to the Taft bill. Senator Ball had proved his right to be considered an outstanding expert in the field of labor law. Senators Smith of New Jersey, and Donnell of Missouri, were active and effective in their support of the measure.

Other Senators whose services were invaluable included Hawkes of New Jersey, Ellender of Louisiana, Jenner of Indiana, and Holland of Florida.

Major opposition forces included Senators Murray of Montana, as noted above, Pepper of Florida, Morse of Oregon, Taylor of Montana, Thomas of Utah, and Kilgore of West Virginia.

The weeks ahead were to be busy. We had to combine in a single measure all the proposals of both the House and Senate, and at the same time retain the votes of sixty-two Senators for the final bill.

I approached the conference with confidence. I saw many possibilities in the Senate measure and had already worked out the basic approach to the problems ahead.

VII. COMPROMISE IN CONFERENCE

The conference on the measure went on for three busy weeks.

The Senate passed its version of H.R. 3020, my bill, on May 13. Three weeks later, on June 3, I reported the combined Taft-Hartley bill to the House of Representatives.

Our strategy at that time was so simple as to be almost transparent.

We had to retain as much of the House measure as we could without jeopardizing the final two-thirds majority in the Senate.

As the situation developed the conference became a battle of nerves and, more than that, a battle of public relations.

We had to create the general impression that most of the original Hartley bill had been discarded by the conferees in favor of the so-called milder provisions of Taft's bill.

The press of the country did an excellent job in presenting the major differences between the two measures. In contrasting the two versions an impression had been created that the Senate bill was weak, confused, and inadequate. More than one member of the House was to approach me during the three weeks of conference and urge that I insist on particular provisions of the House bill "at all costs." Other members took almost opposite views.

Senator Taft was well aware of the sensitive nature of the situation in the Senate. I am convinced, as was Senator Taft at the time, that many Senators who supported the conference measure were still on the fence during the later conference and could easily have been lost to the opposition.

The House of Representatives was proud of the Hartley bill. Its major provisions had been considered many times and represented the results of many years of effort. While I did not have the same problem as Senator Taft, it was necessary that I consider the desires of the great House majority in favor of the Hartley bill. Too many concessions to the Senate would have reduced the margin of approval for the conference bill in the House, possibly not below the two-thirds margin, but sufficiently to affect the legislative sentiment then prevalent on the Hill.

What I wanted, and succeeded in getting, was to record ever-increasing majorities in the House as a means of encouraging our co-sponsors in the Senate.

Anticipating a certain amount of criticism when I took the conference bill to the House floor, I opened the conference session by publicly announcing that I intended to make certain concessions at once.

This was an unusual step.

Conference managers for the two Houses usually maintain stoutly that their versions of legislation are the better, and that they must insist on every provision approved by their respective bodies.

The Taft-Hartley bill required unusual treatment.

Too many weeks and months of effort by too many people had gone into its creation for the personal feelings of any of us to be considered.

The recorded vote in the Senate against industry-wide bargaining prohibitions certainly dictated my course in this respect. Similarly, the Senate had shown clearly that it wanted no part in restoring the right of private injunction in labor disputes. It was obvious to me that two-thirds of the Senate had no intention of approving a measure containing those particular provisions, for this would have required many Senators to reverse announced positions. Such reversals are not easy.

Consequently, even before the conference opened I announced that the House would not insist on the provisions banning industry-wide bargaining, nor the right of private injunctions against labor abuse.

Criticism was immediate.

I was pictured as abandoning the most essential sections of the House bill, and as succumbing to labor union pressures.

Such criticism was all right with me.

First, I had conceded nothing that wasn't already lost.

Second, it contributed to the public impression that the seemingly milder Senate bill would determine the general outlines of the final bill.

Third, it gave my critics time to cool off before the conference bill was to come up for its House vote.

Since the passage of the Taft-Hartley Act I have had no opportunity to discuss the conference measure and to point out how much of the House bill was retained in the Act, in spite of the general impression to the contrary.

The facts are that the Hartley bill set the general outlines of the final Taft-Hartley Act, established its scope, and dictated the final provisions in a majority of instances. To prove this assertion, a detailed discussion will be required.

For a start, let's examine the amendments to the National Labor Relations Act proposed by the different bills.

My bill reworded the preamble to the National Labor Relations Act so as to set the stage for a more equitable era of labor management relations. The Senate bill contained a much shorter preamble with much the same purpose but more limited in its application.

The final version of the new labor law follows the Hartley bill, with the exception of a single clause, omitted as being repetitious.

While I will not dwell on the preamble, since its terms are not considered legally binding, it is significant that this portion of the rewritten labor law was in accord with the House bill.

The Taft-Hartley Act follows the Hartley bill in its definition of persons covered and discards the Senate's version.

The definition of employer represents the combined language of both bills. Of significance was the inclusion of the House language eliminating the old Wagner Act phrase "acting in the interest of an employer," for my language "acting as an agent of" an employer. The Senate version included the old Wagner Act language under which employers had been held liable for acts committed in their behalf, often without the employer's knowledge.

The definition of employee in the final law also represents the combined language of both bills. The House wanted to exclude all agricultural labor by applying the definition contained in the Internal Revenue Code. The Senate version was also discarded in the final language excluding "any individual employed as an agricultural laborer," language far closer to the House version.

The Senate language determined the final definition of supervisor primarily because it was shorter but not because it was more effective. The House version contained considerable detail without achieving a more effective definition.

We compromised with the Senate in determining the present size of the National Labor Relations Board. My bill provided for three new members. The Senate proposed seven members, in effect adding four more members to the old Board. The final bill established a five-man Board.

We yielded to the Senate in regard to the title of the Board and in naming the separate Administrator as the NLRB General Counsel.

Both were concessions in name only since the particular objectives we wanted were approved at the same time.

Other definitions from the original House bill were discarded, since they were tied in closely with either the private injunction provisions or else associated with the industry-wide bargaining prohibitions.

The General Counsel, established as an independent officer to act in conjunction with the new National Labor Relations Board, was given almost precisely the same authority and responsibilities as we had envisaged for the separate Administrator provided by the Hartley bill. He was given complete authority over the Board's field staff, and over all NLRB attorneys. His internal authority over the procedures of the Board in handling charges of unfair labor practices will be discussed more fully later.

The House language prevailed in requiring Board orders and regulations to be subject to the terms and provisions of the Administrative Procedures Act. The Senate had wanted such regulations to be published in the *Federal Register* but had not prescribed any additional restrictions.

To sum up the conference actions thus far, we find that the House view prevailed in most definitions, in the statement of purpose, in the basic organization of the National Labor Relations Board, and in determining many of its procedures. Deviations from the original Hartley bill were, in terms of over-all effectiveness, minor and insignificant.

On the other hand, the Senate conferees could point with pride to the "many" concessions they had achieved. The size of the Board, its title, the "elimination" of the separate Administrator, and the definitions associated with the industry-wide bargaining prohibitions were all considered in this light.

For my own part, I was pleased with our progress.

The next area of discussion centered around the respective rights of employees and employers under the Act.

The Senate wanted to confine employee rights to the terms and language contained in the old Wagner Act, and in its bill so provided. The House wanted to qualify this language so as to clarify the intent of the House in this regard. The final law contains the old Wagner Act language, plus the following: ". . . and shall also have the right to refrain from any and all such activities except to the extent such right may be affected" by the type of union shop agreement provided elsewhere in the law.

The adoption of the House language will, in my opinion, serve an increasingly useful purpose in the future. This clause will protect those workers who do not want to join labor unions or subscribe to their activities. As I have pointed out previously I sought unsuccessfully to have much the same provision made a part of the original Wagner Act.

The omission of the second portion of the House statement of employee rights is not to significant since it was generally repetitious of material contained in other sections of the law.

I used the unfair labor practice section relating to employers to write in a ban against all welfare fund practices of unions. But in the face of a record vote in the Senate permitting such welfare fund operations under certain limitations, it was the wiser course to recede from the original House position.

The Senate worked in its version of the union shop election procedure as a part of the unfair labor practice section concerning employers while I included similar language under the employee unfair labor practice section. We followed the Senate procedure but the total effect was the same.

The provisions in the law listing those practices which are unfair labor practices when committed by a labor union or its agents follow the Senate wording almost entirely in regard to the union shop provisions, as does also the prohibition against the use of coercion and intimidation of employees in the exercise of collective bargaining rights, plus a new provision not in the House bill prohibiting interference with the selection of a collective bargaining representative by an employer. This latter provision is the only clause now in the law which can conceivably operate to interfere with industry-wide bargaining. According to the sponsors of this provision employers can, if they so wish, refrain from joining together with other employers in the selection of a common bargaining representative. Whether or not this will work to restrain monopolistic labor practices remains to be seen. I have definite reservations as to its effectiveness.

The House provision requiring a labor organization to bargain collectively with the employer was retained in conference, plus the Senate definition of collective bargaining. We both approached the definition of collective bargaining similarly—both definitions requiring that formal notice be given to government agencies in the event of disagreements during collective bargaining discussions which might lead to strikes, and containing the provision for a strike vote on the employer's last offer before striking. I had included these provisions at the beginning of the bill under the general heading of definitions; the Senate, under unfair labor practices. While I still think my arrangement was preferable, here again I yielded to the Senate in form, the substance of the House-approved bill having been retained.

Much has been said in regard to the failure of the conferees to retain that section of the House measure publicized under the description of labor's new "Bill of Rights." I want to admit, at the outset, that in so far as the actual House language was concerned a majority of these new provisions were omitted. But I want to insist, as I have many times in the past, that we gained more of the spirit of the House version than is apparent from a brief study of these provisions.

For example, let's examine the House version of its Bill of Rights in regard to union initiation fees.

The House bill would have limited initiation fees to $25, unless the NLRB determined that a greater fee would be reasonable. The final version gives the Board authority to set initiation fees whenever it determines the one established by the labor union is excessive or discriminatory.

Other House provisions were similarly covered, perhaps not so clearly, or with as effective penalties, but nevertheless set forth in substance in other appropriate sections of the measure.

The non-Communist requirements, the failure to hold periodic elections for the union officers, rules and regulations governing membership, and similar provisions were removed from the unfair labor practices section of my bill, but were included under conditions prescribed as being precedent to gaining representative righs and obtaining recognition from the National Labor Relations Board.

I will readily admit that there is much to be said on both sides.

The withdrawal of collective bargaining privileges, enforceable by government authority, from those labor unions who do not comply with what Congress determined to be proper safeguards is not so stringent a penalty as the one that follows an unfair labor practice charge. On the other hand, withdrawal of Board privileges is a far simpler matter requiring really an absence of administration by the government rather than an increase in government interference. To date, we have reason to believe that these sections are proving as effective as if the unfair labor practice approach had been retained.

In any event, the intent of the House bill is preserved through this procedure.

Of course, it is also clear that the union shop provisions prohibiting a labor union from seeking the discharge of any member for any reason other than non-payment of regular dues and initiation fees have prevented, and will continue to prevent, internal labor union abuse of its own members—a practice so prevalent under the old Wagner Act.

Permission for individual employees to discuss their grievances directly with the employer and to adjust their grievances without the sanction of union representatives had long been thought a means of eliminating one of the greatest sources of internal discord, viz., the "playing of favorites" by union leaders. Both measures were directed at this particular point, and the House language approved.

The House had wanted to exclude from the protection of the new law all supervisors, guards, employees handling confidential material, and several other groups of workers. The Senate chose a different approach. Instead of excluding groups of workers, such as guards, it approached the problem through a limitation on the certification authority of the Board by forbidding the certification of a union of production workers which admitted guards to membership.

We took over from the Senate bill the language directing the Board to determine proper organizational units so as to protect professional or craft workers from inclusion in industrial unions against their wishes, and directing the Board to ignore previous NLRB rulings when necessary to effectuate the intent of Congress. My bill had contained similar provisions, but the Senate language appeared equally effective and was far simpler.

The Senate language in regard to petitions for elections, particularly those from employer petitions, was also simpler than the House provision and was approved by the conferees for that reason.

On the other hand, it was the House provisions establishing certain limitations on employee rights in requesting NLRB union shop elections which were adopted, for my bill was more specific in terms of percentage of employee support for such applications and in outlining related procedures.

Similarly, while we took the Senate requirement providing that labor unions must file a detailed statement with the Secretary of Labor as a condition precedent to certification, we followed the House language in specifying just what should be contained in such statements or reports.

The next section of the rewritten Wagner Act dealt with NLRB procedures against unfair labor practices. The House-approved version gained important concessions.

The House requirements in regard to rules of evidence prevailed in conference. The Senate had made no provision in this regard, retaining the old Wagner Act language which permitted NLRB trial examiners to ignore all common law rules covering the submission of evidence, by reason of its (the Wagner Act's) provision that "the rules of evidence prevailing in courts of law or equity shall not be controlling."

The House language which was carried over into the final law read: "any such proceeding shall, so far as practical, be conducted in acordance with the rules of evidence in the district courts of the United States."

The basic decision I had reached at the beginning of the conference made it necessary for us to follow the Senate provisions establishing NLRB authority to seek injunctions against secondary boycotts and jurisdictional disputes. The Senate language was as clear as could be drafted, once the concept of resort to private injunctions by any aggrieved persons had been discarded by the conferees.

Validation of state "right to work" statutes, regardless of the union provisions contained in the Taft-Hartley law, came almost word for word from the Hartley bill. The Senate had not considered this particular problem and hence had no similar provision.

Conversely, Senate language permitting supervisors to organize but not forcing employers to bargain with supervisory unions was included.

As the conference ended its discussions on Wagner Act amendments, I felt the House version had determined the greater portion of the new measure and had been effective in crystallizing sentiment in the conference. So far, I had conceded nothing except those provisions the Senate had already voted against.

The remainder of the conference bill was devoted to establishing a new mediation service as an independent agency of government, permitting suits against labor organizations, the creation of a joint labor-management committee of the Congress, and making provisions for handling strikes creating national emergencies.

Sections creating the new mediation service followed the Senate language rather closely, as did the so-called national emergency provisions.

In the sections permitting suits against labor unions we retained the House language making labor unions responsible for the acts of their agents. All too often employers had sought to hold unions responsible for breaches of contract, only to face the defense that the union wasn't responsible for "wildcat strikes" or similar union activities. The House language will invalidate many such defensive arguments in the future.

The House wishes also prevailed in retaining provisions prohibiting strikes against the government by government employees, and in restricting the political activities of union organizations.

This latter provision has received a great deal of criticism. It is alleged that it violates the freedom of the press amendment to the Constitution, although I do not agree with such an interpretation. What we did was to take from the Corrupt Practices Act the same language that had been applicable to all corporations for many years, and apply it to labor unions. I must comment at this point that never in all my years of experience on the Hill have I heard such a howl as the one the labor unions let out as a result of this particular prohibition.

In my judgment there is nothing in this law which prohibits any labor leader from endorsing a candidate for political office. Indeed there is nothing in the law which interferes with the legitimate and customary function of the labor press.

Persons in the labor movement still have the same rights as every other citizen to engage in political activity and to raise campaign funds on a voluntary basis.

All we endeavor to prevent is the use in a political campaign of funds contributed as dues by the millions of organized workers.

If the current law fails in this intent, Congress will write a new one.

The creation of a joint congressional committee to act as a "watchdog" over the initial operations under the new Act came originally from the Senate bill; there was no opposition from the House conferees.

The joint committee provision, in my opinion, was an important one in the final conference bill. We all realized what a tremendous task had been accomplished in weaving together and harmonizing the provisions of my original bill and those of the Senate version, as it had come to us. A great part of the Senate bill had been written on the floor. It would have been all too easy for an unworkable or undesirable provision to have slipped by in the confusion of the conference.

The Joint Labor-Management Committee was insurance against just such a predicament. We knew that the existence of this committee would provide a forum for all groups if the law proved unworkable or unjust in any particular.

I was fortunate in the helpful assistance of the House conferees who served with me.

In addition to Clare Hoffman, who felt that the original Hartley bill was inadequate to deal with the labor problem, I had Jerry Landis, from Indiana, on the Republican side, and two Democrats, John Lesinski (Michigan) and Graham Barden (North Carolina).

All of us worked many weary hours in getting the conference measure in final shape.

When the time came to report back to our respective houses, I suddenly found that I had lost Hoffman's support for what he termed glaring weakness in the conference measure. The bill had never had Lesinski's approval anyway, so I had to turn to Graham Barden, a southern Democrat, for the deciding vote.

It is a tribute to Barden that he did not hesitate to support me. More than any other man, he held the balance of power that day. Disagreement on his part could have delayed us indefinitely.

I had but one regret.

The Senate's reluctance to ban industry-wide bargaining also extended to the monopolistic sections of the original Hartley bill. These we were forced to abandon in conference.

As we had planned, the conference measure received a larger majority than the Hartley bill had on original passage. The vote, 320 to 79, was better than four to one for the conference bill.

There were a variety of reasons for this.

To begin with, several members had not agreed with the ban on industry-wide bargaining in the original House bill. Its removal to meet the objections of the Senate gained a few House votes.

Furthermore, the actions of the labor unions in attempting to high-pressure into standing pat several members who had originally voted

with them was more than some of the members could take. We gained some votes for this reason.

Lately, the House leadership had canvassed every missing or adverse vote, and had done yeoman service in rounding up additional support.

Charles Halleck, Republican leader in the House, had proved a pillar of strength throughout the whole fight on the labor bill. More than once he had spoken in favor of my measures, and competently refuted attacks by minority leader Representative Rayburn and other prominent Democrats in the House.

The Senate took longer to approve the conference bill than did the House. The principal object for attack proved to be the ban on political expenditures by unions, but the Senate sponsors of labor legislation stood firm. The conference measure, when the final roll-call came, lost no votes in the Senate.

The conference measure then went to the White House.

We felt we had been more than successful thus far.

We had held the major portions of the original House bill against strong attacks, both within and outside of Congress.

We had sent to the White House a measure that had been overwhelmingly approved by both branches of the legislature.

The Congress and the American people awaited President Truman's verdict.

XIII. WHAT WE LEFT OUT

A previous chapter dealt with the conference committee and the actions it took to reconcile conflicting provisions of the two labor bills passed by the House and Senate. I made it clear in that discussion that we were forced to omit several important provisions from the original Hartley bill.

The House conferees felt it impossible to hold enough Senate votes to override a presidential veto without yielding on particular provisions of which a majority of the Senate had previously disapproved.

This chapter will discuss those omitted provisions.

These provisions can be classified broadly into three groups.

The first group includes the Hartley bill provisions regulating industry-wide bargaining, banning industry-wide strikes, and subjecting unions to prosecution for monopoly action under the same antitrust statutes which have been applicable to business enterprise for more than 50 years.

The second group includes those provisions designed to protect the rights of the individual working man against abuse by the union leader.

The third group includes those provisions outlawing entirely certain labor union practices as being against the public interest.

Industry-wide bargaining has long been the source of many undesirable conditions within both industry and labor.

The left-wing elements in the Congress have been most outspoken against what they term a "concentration of economic power" within the industry. There is no similar outcry against an equal concentration of economic power when it is lodged in labor organizations.

I am equally opposed to both.

Whenever either labor or management places too much power and authority in the hands of too small groups of men, such groups tend to reduce every worker to the lowest common denominator and every business problem to the average.

As a result, agreements arrived at between such groups solve no specific problems and tend to satisfy no one since they are designed to meet average problems and average desires. Grievances arising from local conditions are a source of constant trouble, and tend to create contempt for the collective bargaining contract in many of the plants and shops covered by the master agreements.

Furthermore, and most important, industry-wide bargaining between economic giants seldom, if ever, considers the public interest.

In many industries labor costs are the largest factor in arriving at sale prices for products. Industry-wide bargaining on wages thereby removes differing wage costs from the area of competition and, in effect, stifles competition in that industry.

Wherever competition is stifled, the public suffers in the form of higher prices and inferior products.

I am well aware that one of organized labor's principal objectives is to remove wages from the area of competition, and their congressional spokesmen make a good case for this objective.

In one sense, it appears to be the contention of labor that competition on wages is but another example of the cold-blooded corporation approach to driving down the American standard of living.

This argument ignores the fact that this country is still based on a competitive economy. Admittedly, advocates of a controlled economy made great strides during the war in restricting management's freedom of action. Our experience to date indicates that it is far easier to impose such controls than to get rid of them.

Nevertheless, our economy is still a reasonably competitive one.

Competitive enterprise is one of the strongest forces in the world. Industry operated under a system of competitive free enterprise has achieved for American citizens the highest standards of living, the highest wage rates, and the shortest hours of labor of any nation.

If you love your country, you must embrace the historic competitive principle which has made our country great. If you say competition is ruthless and cold-blooded, you are, in effect, saying that America is ruthless and cold-blooded.

I don't believe that.

The first principle of statesmanship today for all of us should be to fight against any action by any economic group which tends to weaken the competitive forces which operate in our economy in any significant way. This is fundamental and goes far beyond considerations of labor law. I hope the Congress will be ever alert in recognizing this principle of statesmanship.

The original Hartley bill banned industry-wide bargaining in a comparatively simple fashion.

To begin with we limited the power of the National Labor Relations Board to certify the same individual as a representative of employees of competing employers. This prevents situations where the single head of a national union is designated as the sole bargaining agent to represent that union in its dealings with many individual employers.

To prevent injustice to small union locals situated closely together who might want to use a single representative in the interests of economy, we made an exception.

Under my bill, the NLRB could have certified a common representative for two or more union locals whenever such locals represented

bargaining units of less than 100 employees and were situated within 50 miles of one another.

This limitation, you will note, placed the operation of an industry-wide system of bargaining on a voluntary basis. Whenever a union felt it was sufficiently powerful to proceed with its collective bargaining negotiations without recourse to the processes of the NLRB, it could then designate its own bargaining representative to deal with the employers on an industry-wide basis.

The employers, on the other hand, would be under no legal compulsion to bargain with such a representative, since he would not be certified by the government as a representative of the employees for the purposes of the rewritten National Labor Relations Act.

To forestall the inevitable criticism that such a legal provision would hamstring unions in their dealings with their international offices and other affiliated organizations, we provided that no restriction would be placed on such relationships unless the collective bargaining arrangements or other concerted activities between these groups were thereby subjected to common control and approval.

This formula was not a popular one, with either management or labor. Too many industries had become accustomed to industry-wide or area-wide bargaining to want to go back to collective bargaining at the plant level. Too many big jobs in both industrial and labor circles are dependent on a continuation of this practice.

I am frank to admit that I am not completely satisfied with this formula. It was a problem where we felt it would be better to make a start this way and see how it worked in practice. Those of us who sponsored the Taft-Hartley Act in both houses of Congress were determined not to fall into the way of thought that would hold the amended National Labor Relations Act as something sacred and all-sufficient and therefore not to be amended. On the contrary if our formula for restricting industry-wide bargaining had worked to the disadvantage of the public, we would have been quick to amend the law.

During the debate on the House floor, another provision was added strengthening our restrictions on industry-wide bargaining.

This provision was proposed by Representative Kersten, a member of the labor committee. The provision made it an unlawful concerted activity for a group of employers to fix or agree to terms of employment through common control or approval whenever the employees were denied a comparable privilege.

This proposal wiped out any chance of industry-wide bargaining on any basis. While unions could have bargained industry-wide, provided they were willing to lose the benefits of NLRB support, employers would have been subject to antitrust prosecutions for similar action.

Of more significance than the restrictions placed on industry-wide bargaining were the provisions making an industry-wide strike unlawful.

While such legislation will not get at the root of many of the evils inherent in industry-wide bargaining as such, a complete ban against industry-wide strikes will weaken the economic power of a labor leader, even if he were in a position to negotiate as a representative of all the employees in an entire industry.

Furthermore, as we designed the original Hartley bill, the prohibitions against industry-wide strikes would apply to all labor organizations and their agents, regardless of their standing before the National

Labor Relations Board. Consequently, those labor bosses who chose to ignore the NLRB would still have been covered by the prohibition.

In the original Hartley bill we defined an industry-wide strike as a "monopolistic" strike, as any "concerted interference with an employer's operation which results from any conspiracy, collusion, or concerted plan of acting between employees of competing employers or between representatives of such employees."

A "monopolistic" strike was further defined as an unlawful concerted activity. Unlawful concerted activities, in turn, were subjected to the Sherman Anti-Trust Act, by means of two amendments to the Clayton Act. Through another amendment, Norris-LaGuardia Act restrictions on injunctions were made inoperative in regard to such prosecutions.

The public has already suffered as a result of the omission of these particular provisions. I am convinced that such legislation, had it been enacted last year, would have saved the American people untold suffering and the loss of millions in production.

The coal strike in early spring, for example, would have been impossible, unless John L. Lewis had been willing to expose himself to criminal prosecution under this law.

During the 80th Congress I again made an effort to get these monopolistic strike provisions enacted into law. I was not successful. But such legislation is inevitable, so long as the leaders of organized labor persist in industry-wide strikes, particularly strikes paralyzing national industry and threatening the welfare of our country.

The second groups of provisions omitted from the original House bill by the conferees dealt with new rights and privileges for union members. We called it a new "Bill of Rights."

The most important provision omitted entirely prohibited the use of force or violence on the picket line and backed up that prohibition with Federal authority. Such actions by organized labor would have been against Federal law, and could thereby have been prevented by use of the national police power. Furthermore, prosecutions under the antitrust statutes could have been directed against any group engaged in such violence in a concerted activity.

A concurrent provision also prohibited mass picketing or picketing establishments where no labor dispute existed.

This Federal prohibition against violence on the picket line was highly desirable at the time and still is. The "right to work" laws of various states, the establishment of good industrial relations practices, and the protection due to citizens of this nation are all at stake when left to the police power of local communities and the states. Few local communities can cope with thousands of paid pickets at the disposal of larger labor unions. These paid pickets are moved about like armies to enforce strikes all over the nation.

Many of the new privileges granted union members by the final provisions of the Labor Management Act are meaningless in the face of pocket line violence which has occurred in several instances since the adoption of the Act.

Many provisions designed for the protection of individual union members were included in the list of unfair labor practices for labor leaders in the original Hartley bill. Some of these provisions were incorporated elsewhere in the final measure, but with weaker penalties, and in some instances no penalties at all.

For example, we limited the size of initiation fees which could be charged new members and prohibited excessive or arbitrary dues or assessments not agreed to by the membership or imposed equally on all members. In the final bill, the NLRB was given the right to pass on the amount of initiation fees in connection with union shop elections only. The final bill also protected the union member from the loss of his job even though he lost his union status for failure to pay such assessments and was employed under a union shop contract.

Similarly, in the Hartley bill we made compulsory insurance plans unfair labor practices. Under the new law, a union member can refuse to participate in such insurance plans without fear of losing his job. Denial of the right of resignation to any union member was an unfair labor practice under the Hartley bill.

Where a union shop contract exists, the Taft-Hartley Act permits a man to resign from the union yet retain his employment, so long as he pays regular dues expected of union members; in the case of a non-union shop, there are no restrictions whatsoever.

Under the unfair labor practice provisions of the original House bill, union leaders were prohibited from fining or discriminating against union members because of criticism of the union, its officers, or disregarding the wishes of the union officials in political campaigns. In the final law, the provisions against having a man fired for any reason other than failure to pay dues operate to protect individual freedom of expression and action.

Under my original bill unions were required to hold a secret ballot on questions involving fees, dues, assessments, fines, striking, nomination and election of officers, or the expulsion of any member. Election of officers was required at least every four years. The final law provides that information as to internal union procedures in such matters shall be filed with the Secretary of Labor, but no standards are provided, nor is this material subject to public inspection. My bill set the standards and made failure to comply therewith an unfair labor practice. The new law merely withdraws NLRB privileges for non-compliance.

Financial accountability to union members by their officers was a required labor practice under my original measure. The current statute requires an annual financial report to the membership as a necessary condition precedent to an NLRB certification.

The third group of provisions omitted in the final bill include those designed to prevent certain practices against the public interest but having little or no effect on the individual union member.

Of course the prohibition against picket line violence could also be included in this category but I have already discussed it.

The anti-featherbedding sections were particularly hard to let go in conference. Admittedly, we retained a provision in the Taft-Hartley Act making it an unfair labor practice for a labor organization or its agents to attempt to get paid for services not performed or not to be performed. How this will work out in practice has not yet been determined.

The original provisions of the Hartley bill on this subject were patterned after the anti-Petrillo bill passed by the 79th Congress. They included an adequate definition of featherbedding, which included such practices as employment of standy-by union members in excess of the number needed for any reason, paying twice for the same work,

or agreements for the privilege of doing business where such restrictions were designed to limit production or the use of particular labor-saving devices or machinery.

The penalties against featherbedding practices were similar to those proposed against monopolistic strikes. First, engaging in featherbedding demands was made an unfair labor practice; second, strikes to enforce featherbedding demands were declared unfair labor practices and made subject to antitrust prosecutions.

The new rights for workers, the ban against mass picketing and violence, the anti-featherbedding and the anti-monopoly provisions for unions constitute the most significant portions of the original Hartley bill discarded in conference.

Considerable importance has been attached to the definition of "agricultural labor" contained in the final law. The House bill would have defined agricultural labor in the same way as the Internal Revenue Code. This would have exempted such workers from the operations of the new law.

The Internal Revenue definition of agricultural labor was desired by the organized farm groups as a defense against attempts of labor unions to organize workers in highly seasonal and highly transitory occupations. The Congress had prevented NLRB elections for such purposes for two years by means of an appropriation rider inhibiting the agency from spending money on such elections.

I regret that the Senate conferees would not agree to my definition in this particular instance.

Another provision omitted from the final law that many of us in the House wanted, would have placed an absolute ban on all forms of union security. You will recall we accepted the union shop provisions on this subject even before the original Hartley bill reached the House floor, so this provision was not one lost in conference. A prohibition against both closed and union shop contracts just never got into the Hartley bill in the first instance.

Senator Ball attempted to write in a closed shop ban on the Senate floor but lost by a sizable vote.

His argument at that time, with which I agreed, was that all forms of compulsory unionism should be outlawed. He contended that the Congress should not compromise with principle in this matter. He wanted America's industrial relations so conducted that any man in this country could get a job anywhere, at any time, without being a member of a union, or without ever being required to join a union against his wishes.

I still agree with Senator Ball. I think the union shop provisions represent a compromise with principle that the Republican party would have been more honest to spurn.

In defense of the union shop provisions, let me say that the compromise did appear necessary to assure the enactment of a final labor bill. I am not so sure today that we had to accept the union shop concept but the damage has now been done.

Time will show whether the union shop provisions will result in a continuation of the many abuses associated with compulsory unionism. It was a carefully drawn provision and we thought we took care of most potential abuses through other provisions in the law.

This concludes the discussion of the provisions which we considered and left out of the final law.

I don't think any of these omitted provisions can be regarded as discarded for all time. Several were reintroduced later in Congress. The principal question is not if they will be enacted, but when.

Enactment of legislation in the Congress depends on many different factors. The political control of the legislature, the public consciousness of the particular evil to be corrected, the demonstrable need for the proposal—all these have a bearing. We must consider, too, the status of related legislation and the over-all effect on particular segments of the economy of too much legislation at one time.

In general, I have no particular regrets over any of the discarded provisions. When the time is ripe and the public necessity is recognized they will receive favorable consideration and public acceptance.

Later I shall outline what I believe to be a desirable legislative program for the 81st Congress. This will include many of these provisions as well as others for which a need is now being developed.

In considering the discarded provisions of the old Hartley bill, it would be well to recall our earliest discussions of the origin of many provisions now contained in the Labor-Management Relations Act. It will be remembered that several significant provisions of the new law can be traced as far back as the old Smith Committee in 1939 and 1940.

Legislating is a dynamic process. Nothing is ever lost. Unsuccessful efforts in one Congress often bring results in the next.

23. (80th Congress, 1st Session, House of Representatives, Report No. 245)

LABOR-MANAGEMENT RELATIONS ACT, 1947

APRIL 11, 1947.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HARTLEY, from the U.S. Congress, House, Committee on Education and Labor, submitted the following

REPORT

[To accompany H. R. 3020]

The Committee on Education and Labor, to whom was referred the bill (H. R. 3020) to prescribe fair and equitable rules of conduct to be observed by labor and management in their relations with one another which affect commerce, to protect the rights of individual workers in their relations with labor organizations whose activities affect commerce, to recognize the paramount public interest in labor disputes affecting commerce that endanger the public health, safety, or welfare, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as so amended do pass.

The amendments are as follows:

Page 4, line 20, before "labor dispute", insert "current".

Page 5, in paragraph (5) before "dealing", strike out "or" and insert "of".

Page 9, line 20, strike out "Procedures and practices relating to".

Page 11, line 7, after "who", insert "by the nature of his duties".

Page 15, line 15, strike out "$15,000" and insert "$12,000".

Page 16, line 24, strike out "$15,000" and insert "$12,000".

Page 19, before the period at the end of section 7 (a), insert the following:

, and shall also have the right to refrain from any or all of such activities: *Provided*, That nothing herein shall preclude an employer from making and carrying out an agreement with a labor organization as authorized in section 8 (d) (4).

Page 21, in subsection (b), strike out "thereof" where it first appears and insert "of a representative".

Page 22, strike out "2 (ii)" and insert in lieu thereof "2 (11)".

Page 24, after "the overthrow of the United States Government by force", insert "or by any illegal or unconstitutional methods".

Page 25, after "to direct or call a strike", insert "or make any request to the Administrator under section 2 (11) for a strike ballot,"; and in the same paragraph strike out "strike" where it appears the second time and insert in lieu thereof "action".

Page 25, at the beginning of subsection (d), strike out "The" and insert in lieu thereof "Notwithstanding any other provision of this section, the".

Page 29, strike out "(c)" at the beginning of the subsection designated "(c)" and insert in lieu thereof "(e)".

Page 33, in the phrase "that believe in or teaches" strike out "believe" and insert in lieu thereof "believes".

Page 33, after "United States Government by force", insert "or by any illegal or unconstitutional methods".

Page 42, in the phrase "certification complained of was entered and the findings and order on certification of the Board", strike out "on" and insert "or".

Page 44, in the phrase "at any designated place or hearing" strike out "or" and insert in lieu thereof "of".

Page 46, strike out the paragraph designated as paragraph (6).

Page 49, after subsection (e), insert a new section reading as follows:

"SEC. 13. Nothing in this Act shall be construed to invalidate any State law or constitutional provision which restricts the right of an employer to make agreements with labor organizations requiring as a condition of employment membership in such labor organization, and all such agreements, insofar as they purport to impose such requirements contrary to the provisions of the law or constitution of any State, are hereby divested of their character as a subject of regulation by Congress under its power to regulate commerce among the several States and with foreign nations, to the extent that such agreements shall, in addition to being subject to any applicable preventive provisions of this Act, be subject to the operation and effect of such State laws and constitutional provisions as well.

Page 50, renumber sections 13 and 14 as sections 14 and 15, respectively.

In section 201 (c) strike out ", and utilize the facilities and personnel of such agencies when adequate and when available without cost".

In section 204 (a) strike out "United States Conciliation Service of the Department of Labor" and insert in lieu thereof "Director of Conciliation".

In section 204 (b) strike out "National Labor Relations Board" wherever appearing therein and insert in lieu thereof "Administrator of the National Labor Relations Act".

In section 204 (c) strike out "Secretary of Labor" and insert in lieu thereof "Director of Conciliation".

After the first sentence of section 204 (c) insert a new sentence reading as follows:

If for any reason the Chief Justice is unable to serve he shall appoint another judge of the United States Court of Appeals for the District of Columbia to act in his place and stead.

In section 204 (d) strike out "National Labor Relations Board" and insert in lieu thereof "Administrator of the National Labor Relations Act".

After section 205 insert a new section reading as follows:

SEC. 206. Until the transfer of functions under section 201 (e) becomes effective, the functions of the Director of Conciliation under section 204 shall be performed by the Secretary of Labor. Until the Administrator of the National Labor Relations Act first appointed qualifies and takes office, his functions under section 204 shall be performed by the National Labor Relations Board.

In section 303 (a) strike out "thirty" wherever appearing therein and insert in lieu thereof "sixty", and before "every labor organization" insert "the principal officers of".

In section 303 (a) (2), before "the name and address of the organization" insert "a detailed financial report including a balance sheet and an operating statement and showing".

At the end of section 303 (a) insert a new sentence reading as follows:

In the case of a report required under this section prior to the expiration of one year from the date of the enactment of this Act, if any of the required information is not available an answer "no information" shall be sufficient.

In section 304 strike out "1935" and insert in lieu thereof "1925".

The committee's recommendation stems from an exhaustive investigation made by the committee of the causes and effects of industrial strife. In the hearings before the committee, extending over a period of more than 6 weeks, 137 witnesses appeared. They came from all parts of the country, from many walks of life, and represented all points of view.

The committee acknowledges the vast amount of work done on the subject by the many Members of Congress, who prepared and introduced bills for consideration by the committee. They, as well as countless private citizens by correspondence with members of the committee, have made contributions of inestimable value to the formulation of the bill herewith reported.

The committee also had the benefit of the studies of committees of previous Congresses—and particularly that of the Special Committee To Investigate the National Labor Relations Board, created in the Seventy-sixth Congress, many of whose recommendations are included in the bill herewith reported.

Necessity for Legislation

During the last few years, the effects of industrial strife have at times brought our country to the brink of general economic paralysis. Employees have suffered, employers have suffered—and above all the public has suffered.

The enactment of comprehensive legislation to define clearly the legitimate rights of employers and employees in their industrial relations, in keeping with the protection of the paramount public interest, is imperative.

The bill herewith reported does just that. It prescribes the rights of all parties having a stake in harmonious industrial relations, and requires that each party respect the rights of the others.

The committee believes that the enactment of the bill will have the effect of bringing widespread industrial strife to an end, and that employers and employees will once again go forward together as a team united to achieve for their mutual benefit and for the welfare of the Nation the highest standard of living yet known in the history of the world.

During the 6 years preceding the enactment of the National Industrial Recovery Act of 1933, the United States had an average of 753 strikes a year, involving an average of 297,000 workers; during the next 6 years 2,541 strikes per year involving an average of 1,181,000

workers; and during the next 5 years—that is, through 1944—3,514 strikes a year involving an average of 1,508,000 workers.

In 1945 approximately 38,000,000 man-days of labor were lost as a result of strikes. And that total was trebled in 1946, when there were 116,000,000 man-days lost and the number of strikes hit a new high of 4,985. The resulting loss in national wealth is staggering.

The above figures do not take into account the man-days lost as a result of the indirect effects of these strikes.

In the face of this record there are few who would have the temerity to assert that labor relations in the United States are today satisfactory. The American people, and their representatives of both parties in Congress, are insistent that some means be found by legislation to reverse this alarming trend and to bring about industrial peace.

In approaching the problem of general labor legislation, the committee has impressed by the absolute necessity of steering a course which would recognize the rights of all interested parties in labor relations and which would be scrupulously fair to each—the employer, the employees, and the public. While the right of the public must, in the last analysis, be treated as paramount, it was the belief of the committee, that, except in extraordinary circumstances, the right of the public will be adequately protected if in turn adequate protection is afforded to employers and employees in the exercise of their legitimate rights.

Accordingly the bill herewith reported has been formulated as a bill of rights both for American workingmen and for their employers.

For the last 14 years, as a result of labor laws ill-conceived and disastrously executed, the American workingman has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in section 1 of the National Labor Relations Act. His whole economic life has been subject to the complete domination and control of unregulated monopolists. He has on many occasions had to pay them tribute to get a job. He has been forced into labor organizations against his will. At other times when he has desired to join a particular labor organization he has been prevented from doing so and forced to join another one. He has been compelled to contribute to causes and candidates for public office to which he was opposed. He has been prohibited from expressing his own mind on public issues. He has been denied any voice in arranging the terms of his own employment. He has frequently against his will been called out on strikes which have resulted in wage losses representing years of his savings. In many cases his economic life has been ruled by Communists and other subversive influences. In short, his mind, his soul, and his very life have been subject to a tyranny more despotic than one could think possible in a free country.

The employer's plight has likewise not been happy. He has witnessed the productive efficiency in his plants sink to alarmingly low levels. He has been required to employ or reinstate individuals who have destroyed his property and assaulted other employees. When he has tried to discharge Communists he has been prevented from doing so by a board which called this valid reason for the discharge a mere pretext. He has seen the loyalty of his supervisors undermined by the compulsory unionism imposed upon them by the National Labor Relations Board. He has been required by law to bargain over matters to

which it was economically impossible for him to accede, and when he refused to accede has been accused of failing to bargain in good faith. He has been compelled to bargain with the same union that bargains with his competitors and thus reveal to his competitors the secrets of his business. He has had to stand helplessly by while employees desiring to enter his plant to work have been obstructed by violence, mass picketing, and general rowdyism. He has had to stand mute while irresponsible detractors slandered, abused, and vilified him.

His business on occasions has been virtually brought to a standstill by disputes to which he himself was not a party and in which he himself had no interest. And finally, he has been compelled by the laws of the greatest democratic country in the world—or at least by their administrators—to treat his employees as if they belonged to a different class or caste of society.

This sordid story was unloaded before the committee in its hearings. Those hearings demonstrate the need for action by Congress—and action now.

The bill attacks the problem in a comprehensive—not in a piecemeal—fashion. It is neither drastic, oppressive, nor punitive. It does not restrict or in any manner interfere with employees' rights to organize and to bargain collectively when they wish to do so. It does not restrict in any way employees' rights to engage in lawful strikes. It does not take away any rights guaranteed by the existing National Labor Relations Act.

It does, however, go to the root of the evils and provides a fair, workable, and long-overdue solution of the problem. In brief outline, the bill accomplishes the following:

(1) It abolishes the existing discredited National Labor Relations Board, and creates in lieu thereof a new board of fair-minded members to exercise quasi-judicial functions only.

(2) It establishes a new official to exercise the various prosecuting and investigative functions under the National Labor Relations Act, to be entirely independent of the Board.

(3) It requires the Board to act only upon the weight of credible legal evidence, and it gives to the courts of the United States a real, rather than a fictitious, power to review decisions of the Board.

(4) It outlaws the closed shop and monopolistic industry-wide bargaining.

(5) It exempts supervisors from the compulsory features of the National Labor Relations Act.

(6) It imposes on both parties to labor disputes the duty of bargaining and requires that the employees themselves be given a voice in the bargaining arrangements through the device of providing for a secret ballot of the employees on their employer's last offer of settlement of the dispute.

(7) It protects the existence of labor organizations which are not affiliated with one of the national federations.

(8) It prohibits certification by the Board of labor organizations having Communist or subversive officers.

(9) It prescribes the rights which an individual member of a labor organization can justly claim of his union, and gives him protection in the exercise of those rights.

(10) It outlaws sympathy strikes, jurisdictional strikes, illegal boycotts, collusive strikes by employees of competing employers, as

well as sit-down strikes and other concerted work interferences conducted by remaining on the employer's premises.

(11) It outlaws strikes to remedy practices for which an administrative remedy is available under the bill or to compel an employer to violate the law.

(12) It outlaws mass picketing and other forms of violence designed to prevent individuals from entering or leaving a place of employment.

(13) It outlaws picketing of a place of business where the proprietor is not involved in a labor dispute with his employees.

(14) For unlawful concerted activities it gives the person injured thereby a right to sue civilly any person responsible therefor.

(15) It prescribes unfair labor practices on the part of employees and their representatives as well as by employers.

(16) It creates a new and independent conciliation agency.

(17) It removes the exemption of labor organizations from the antitrust laws when such organizations, acting either alone or in collusion with employers, engage in unlawful restraints of trade.

(18) It makes labor organizations equally responsible with employers for contract violations and provides for suit by either against the other in the United States district courts.

(19) It provides a means for stopping strikes which imperil or threaten to imperil the public health, safety, or interest.

(20) It guarantees to employees, to employers, and to their respective representatives, the full exercise of the right of free speech.

All of the above provisions are explained in detail in the "Analysis of Provisions" portion of this report. Some of them may well be elaborated upon here with the reasons which the committee had for including them.

Old Board Abolished

The committee found that, while there are a number of important defects in the National Labor Relations Act itself, there are even more in the way the National Labor Relations Board has administered it. The bill therefore abolishes the existing National Labor Relations Board, and creates in its place a new bipartisan Board of three fair and impartial persons. Unlike the old Board, it will not act as prosecutor, judge, and jury. Its sole function will be to decide cases. A new and independent officer, the Administrator of the new act, will investigate cases and present the evidence to the new Board, and the new Board must decide the cases, not according to prejudice and caprice, as the old Board so often has done, but according to the facts.

Besides abolishing the old Board, the bill prevents the new Board from repeating the old Board's mistakes. The new Board, unlike the old, will be unable to condone strikes to compel employers to deprive employees of their rights under the act, illegal boycotts, violence, mass picketing, industry-wide bargaining, strikes against public health and safety, and dictatorial control of workers by unscrupulous union leaders.

The bill does not undertake to punish anyone—employers, employees, or unions—for evils that have arisen under the old act. Rather it undertakes to define the rights of those who are concerned in the broad and important field of labor relations, and to protect the rights of each from interference by any other. The bill thus seeks to reduce

strife and ill will by getting rid of many of their causes, but without impairing just rights.

Rights of Workers

Import among the provisions of the bill are those that really assure to workers freedom in their organizing and bargaining activities. The old act purported to do this, but in the Board's hands it often had the opposite effect.

The bill prescribes rules for the new Board to follow in setting up units for collective bargaining and in holding elections to determine whether or not employees wish labor unions to bargain for them. These rules do away with practices of the old Board by which it has subjected literally millions of workers to control by labor unions notwithstanding that the employees did not wish the unions to represent them and voted against the unions in the Board's elections. Similarly the bill prevents the new Board from continuing the past practice of depriving workers of the right to designate independent unions as their bargaining agents merely because they happened to be independent.

When workers wish a union to represent them, the bill enables the workers to keep greater control of the union's affairs than, in many cases, they have enjoyed in the past. They will be protected against excessive admission fees, fines, dues, and assessments. They will have a voice in deciding upon important questions, and will be assured of the right to speak freely on matters that concern them, to vote in elections of union officers, and to vote on the matter of striking. The committee has done this in response to pleas of many sincere union people who regard democracy in unions as indispensable to the healthy growth of unionism. On the other hand, the bill recognizes the right of the union to maintain discipline in the ranks, and to expel members who are disloyal to the union or who act in ways that bring it into disrepute.

The bill further adds to the freedom of workers by permitting them not only to present grievances to their employers, as the old Board heretofore has permitted them to do, but also to settle the grievances when doing so does not violate the terms of a collective-bargaining agreement, which the Board has not allowed.

The bill also requires that unions that undertake to bargain collectively for workers must actually perform this important duty, and makes it an unfair labor practice for unions, as well as for employers, to refuse to bargain collectively. At the same time, the bill defines the procedure of collective bargaining, and by setting forth the matters on which one side may require the other to bargain, limits bargaining to matters of interest to the employer and to the individual man at work.

By dealing with industry-wide bargaining, the bill enables the workers to keep closer control of the bargaining in their behalf. Although the bill permits international officers, executive boards, and other officials far removed from the shops to advise and guide the workers, it does not subject the workers to control by the union's central office, as the evidence before the committee has shown so frequently to have been the case.

Free Speech

Although the old Labor Board protests it does not limit free speech, it is apparent from decisions of the Board itself that what persons say in the exercise of their right of free speech has been used against them. The bill provides that the new Board is prohibited from using as evidence against an employer, an employee, or a union any statement that by its own terms does not threaten force or economic reprisal.

Rights of Employers

As in the Case bill, which passed the House by a vote of more than 2 to 1 last year, the bill forbids the Board to regard as employees foremen and other representatives of management who act for employers in their dealings with employees and their unions. The evidence before the committee showed conclusively that so-called independent unions of foremen are not in fact independent, but that the unions of men the foremen supervise actually control them. The evidence further shows that management must have in the plants agents who are entirely loyal, just as representatives of the workers must be undivided in their loyalty to the workers.

Equal Responsibility Before the Law

When employers violate rights that the Labor Act gives to employees or to unions, the Board can issue orders against them. When employers violate rights of employees or of unions under other laws, they must answer in court for what they do. Under the bill, when unions and their members violate rights given to employers and to employees, the new Board can issue orders protecting the employers and the employees. Thus, if a union refuses to bargain collectively, if it intimidates workers, if it extorts unlawful payments from its members, or refuses to conduct its affairs fairly and according to democratic practices, it commits an unfair labor practice and the Board can issue an order against it. The bill also lists acts for which, under existing laws, unions and their leaders and members often escape liability but for which all other citizens must answer in court. These acts include violating collective-bargaining contracts, violence in strikes, mass picketing, strikes to force employers to violate the Labor Act or other laws. They also include illegal boycotts, sympathy strikes, jurisdictional strikes, featherbedding, and agreements by which unions and employers seek to restrain trade contrary to the antitrust laws. For all these acts and others like them, unions and their members will be equally responsible with other persons under law.

Industry-Wide Bargaining

The bill is the first serious attempt to deal with one of our country's greatest and more pressing problems, industry-wide bargaining and industry-wide strikes that paralyze our economy and that imperil the health and safety of our people.

The committee has dealt with this problem in two ways:

First, by amending the National Labor Relations Act, the bill forbids the Board to certify one union as the bargaining agent for employees of two or more competing employers, and also forbids

employees of two or more competing employers to conspire together to strike at the same time. There are two exceptions to these rules. One union can represent less than 100 employees of each of several competing employers if the employers' plants are not more than 50 miles apart. This permits small groups of employees to bargain together and permits small employers to bargain together, but limits the kind of bargaining that so often leads to price fixing and other monopolistic practices. The second exception permits unions that represent employees of competing employers to affiliate or associate together if their bargaining, striking and other concerted activities are not subject to common control. Under this exception, national and international unions would be able to perform for local unions functions like those that trade associations perform for member companies now, but would not be able to dictate to them.

Second, the bill arms the President with the authority to seek injunctions against strikes that imperil the public health and safety, and authorizes courts to issue injunctions in such cases without regard to the Norris-LaGuardia Act.

Compulsory Unionism

The bill bans the closed shop. Under carefully drawn regulations it permits an employer and a union voluntarily to enter into an agreement requiring employees to become and remain members of the union a month or more after the employer hires them or after the agreement is signed. Such agreements are lawful, however, only if the employees by secret ballot have selected the union as their bargaining agent, and if the majority of all the employees, by a separate secret ballot, authorize the union to enter into the agreement, and if the agreement is not prohibited by State law. An employee may be expelled from the union and thus forced to leave his job only if the expulsion is by reason of his failing to pay fees and dues imposed upon employees generally. Under this clause, employers may select their own employees. Employees have 30 days to decide whether or not to join the union. Unions may not cause the discharge of employees by discriminating against them. The agreement must be voluntary. Unions may not strike to compel employers to enter into such agreements. They are subject to loss of bargaining rights if they do so.

Conciliation

The bill takes the United States Conciliation Service out of the Department of Labor, which Department is now charged by statute with the conflicting duties of representing labor and, at the same time, trying to serve as a mediator. This bill transfers such conciliation and mediation functions to an impartial agency under a Director of Conciliation, and defines his duties.

Miscellaneous

Besides these major reforms, the bill permits employees, employers, and unions that lose in the Board's elections to appeal from the Board's rulings. Under the present act, as the Board administers it, only employers can appeal, and then only in cumbersome proceedings and at

the risk of being branded "unfair" by the Board. The bill, however, permits employers to ask for elections when they are in doubt as to the legality of a union's claim to representation.

Finally the bill provides that the new Board shall not certify as bargaining agents for workers unions whose officers are Communists or follow the "party line," and that unions may expel from membership Communists and fellow travelers.

Analysis of Provisions

The bill is divided into three titles. Title I amends the National Labor Relations Act to achieve the purposes heretofore referred to. Title II creates a new independent Office of Conciliation to which are transferred the existing conciliation functions of the Department of Labor. Title II also contains provisions arming the President with the power necessary to deal with strikes which imperil the public health, safety, or interest. Title III amends the Clayton Act to limit the exemptions of labor organizations to lawful activities thereof. It also contains provisions making labor organizations usable like all other persons for contract violations, provisions requiring financial reports by labor organizations to their members, and provisions continuing the existing prohibitions on political contributions, etc., by labor organizations.

Title I—Amendment of National Labor Relations Act

Section 1.—The present preamble of the Labor Act, besides reflecting a highly prejudiced approach to the problems with which the act attempted to deal, contains certain assertions that seem not to have been correct when the bill was passed and that experience under the act certainly shows not to be true now. The act did not reduce industrial strife. Under the act strikes increased and, up to the very time this Congress met, they continued to increase. The effect was to impede commerce, not to promote its flow as the act undertook to do.

Section 1 of the act as proposed to be amended does not abuse anyone. It does not contain assertions of facts not proved. It deletes matters of this kind that appear in the first three paragraphs of section 1 of the old act. It then declares, as does the last paragraph of that section, that it is the policy of Congress, in the exercise of its constitutional function—

> to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred.

According to its terms, the old act undertook to accomplish its purpose (1) by "encouraging the practice and procedure of collective bargaining" and (2) by "protecting the exercise by workers" of their organizing and bargaining rights. Congress clearly intended this to mean that workers should be protected in exercising these rights, but only when they wished to do so. The Labor Board, however, appears to have taken this language as a mandate to it to force employees to bargain collectively, even against their will. It also appears to have assumed that when Congress said it wished to protect the rights of "workers" it meant to protect labor organizations (at least those organized into national and international federations), even when the labor

organizations exploited the workers or engaged in other activities that were inconsistent with the interests of workers. To the Board, the interests of the unions, not those of the workers, seem to have been of paramount importance. The Board has had little regard for the rights of employees, and its misconception of its duties doubtless has increased industrial strife.

Consistently with later clauses, section 1 of the act, as proposed to be amended, states its purpose to promote the flow of commerce by protecting the rights not only of employees, but also of those of employers and those of labor organizations, and to prevent any of these parties from acting unfairly toward the others. It protects employees against abuses by their unions, as well as against abuses by employers. It protects unions against abuses by employers, by employees, and by other unions. It protects employers against abuses by unions and their members.

DEFINITIONS

Section 2.—This section in the old act defines 11 terms. In the bill it defines 16 terms, 8 of which appeared in section 2 of the old act and 8 of which are new. The terms defined, and changes in the definitions, are as follows:

(1) "Person": Although in most cases labor organizations are "associations" or "corporations", both of which are included in the definition of "person", it was deemed desirable, in the interest of clarity, to include them in the definition specifically.

(2) "Employer": There are three changes in the definition of this term:

(A) The old act included in the definition of "employer" "any person acting in the interest of an employer". Under this language the Board frequently "imputed" to employers anything that anyone connected with an employer, no matter how remotely, said or did, notwithstanding that the employer had not authorized what was said or done, and in many cases even had prohibited it. By such rulings, the Board often was able to punish employers for things they did not do, did not authorize, and had tried to prevent. (See *Matter of American Steel Scraper Co.*, 29 N.L.R.B. 939; *Matter of Shult Trailers, Inc.*, 28 N.L.R.B. 975, 993; *Matter of John & Ollier Engraving Co.*, 24 N.L.R.B. 896; *Matter of Schwarze Electric Co.*, 16 N.L.R.B. 246; *Matter of Swift & Co.*, 15 N.L.R.B. 992; *Matter of American Oil Co., Inc.*, 14 N.L.R.B. 990; *Matter of Frost Rubber Works*, 23 N.L.R.B. 1071; *Matter of California Walnut Growers Assn.*, 18 N.L.R.B. 493.)

The bill, by defining as an "employer" "any person acting *as an agent* of an employer" makes employers responsible for what people say or do when it is within the *actual* or *apparent* scope of their authority, and thereby makes the ordinary rules of the law of agency equally applicable to employers and to unions.

(B) Under the old act, the term "employer" does not include the United States. The same exemption that applies to the Government should apply equally to instrumentalities of the Government. The bill therefore excludes "the United States or any instrumentality thereof" from the definition of "employer". Up to now, the Board apparently has not applied the act to any of the many instrumentalities

of the United States, but whether or not it should do so, Congress, not the Board, should decide.

(C) Churches, hospitals, schools, colleges, and societies for the care of the needy are not engaged in "commerce" and certainly not in interstate commerce. These institutions frequently assist local governments in carrying out their essential functions, and for this reason should be subject to exclusive local jurisdiction. The bill therefore excludes from the definition of "employer" institutions that qualify as charities under our tax laws. In this respect, the bill is consistent with similar laws in a number of States, notably New York, Pennsylvania, and Wisconsin. The bill does not exclude from the definition institutions organized for profit or those a substantial part of whose activities is carrying on propaganda or attempting to influence legislation.

(3) "Employee": The changes in the definition of this term are as follows:

(A) The old act provides that an employee shall not lose his status as an employee under the act, even though his work has ceased " as a consequence of, or in connection with any current labor dispute" if the employee "has not obtained substantially equivalent employment." The new act will likewise provide that an employee remains an employee under the act notwithstanding that his "work has ceased as a consequence of a current labor dispute". The phrase—in the present act—"or in connection with" is vague and indefinite. The purpose of the whole clause is to prevent a man's losing his job when he engages in a lawful strike. The clause accomplishes its purpose without this vague and indefinite phrase. No case in which the Board has had to use the phrase to protect the rights of employees has come to the attention of the committee. The bill therefore deletes the phrase.

The Board now says that an employer may replace an "economic" striker, one who strikes for higher pay or other changes in working conditions. The bill writes this rule into the act, saying that a striker remains an "employee" "unless such individual has been replaced by a regular replacement"; and, at the end of the subsection, it defines a "replacement" as being an individual who replaces a striker "if the duration of his employment is not to be determined with reference to the existence or duration of such labor dispute". Thus, "strikebreakers" may not be regarded as "replacements".

As under the present act, a striker, under the bill, would lose his status as an "employee" if he obtained "other regular and substantially equivalent employment" while the strike was in progress.

A few States pay strikers after the fifth, sixth, or seventh week of a strike. This clearly is a perversion of the purposes of the social-security laws, which Congress intended to provide for unemployment compensation for those out of work involuntarily and through no fault of their own. We therefore have provided that a striker's status as an "employee "stops when he starts receiving unemployment compensation from any State. He may receive relief from his union, from local welfare funds, or from charity without losing that status.

(B) The next significant change in section 2 (3) concerns "supervisors". The bill, by excluding foremen and other supervisory personnel from the definition of "employee", deprives the Board of jurisdiction over them.

The evidence before the committee showed this to be one of the most important and most critical problems. When Congress passed the Labor Act, we were concerned, as we said in its preamble, with the welfare of "workers" and "wage earners", not of the boss. It was to protect workers and their unions against foremen, not to unionize foremen, that Congress passed the act. In few trades, and in none of the great mass-producing industries, were foremen unionized. It was not until about 7 years after Congress passed the Labor Act that anyone asked the Labor Board to establish a unit composed of supervisors. Notwithstanding that in the act Congress had defined as an "employer" "any person acting in the interest of an employer", the Board held, in the first such case, that supervisors in coal mines are "employees", and it certified as the bargaining agent of supervisors of Union Collieries Coal Co. a union that claimed to be "independent" but that turned out to be a stalking horse for the United Mine Workers of America, and that now is part of the catchall District 50 of that union (*Matter of Union Collieries Coal Company*, 41 N.L.R.B. 96 (1942)). A little later the Board certified as the bargaining agent of foremen of Godchaux Sugars, Inc., the union of rank and file workers whom the foremen were supposed to supervise (44 N.L.R.B. 874 (1942)).

As a result of the Board's certifying unions of foremen in the Union Collieries and Godchaux Sugars cases, there was introduced in Congress a bill taking foremen out of the Labor Act (H. R. 2239, 78th Cong.). While the bill was pending in the Military Affairs Committee of the House, the Board, on May 10, 1943, in *Matter of Maryland Drydock Company* (49 N. L. R. B. 733), reversed itself, holding that, except in trades where foremen organized in 1935, it would not find units of supervisors appropriate for the purposes of collective bargaining under the Wagner Act. The Military Affairs Committee then dropped H. R. 2239.

In deciding the Maryland Drydock case, the Board pointed out that unionizing foremen under the Labor Act would be bad for output, which the act was intended to promote, bad for the rank and file, and bad for the foremen themselves. In several cases, the Board confirmed its decision in the Maryland Drydock case (*Matter of Boeing Aircraft Company*, 51 N. L. R. B. 66; *Matter of Murray Corporation of America (Ecorse Plant)*, 51 N. L. R. B. 94; *Matter of General Motors Corporation (Detroit Diesel Engine Division)*, 51 N. L. R. B. 457). Then, in *Matter of Packard Motor Car Company* (61 N. L. R. B. 4 (1945)), the Board changed its mind again, certifying as the bargaining agent of five ranks of Packard's foremen the Foremen's Association of America, which it had held it ought not to certify as the bargaining agent for foremen of General Motors, Murray Corp., and other companies. Later the Board certified a division of District 50 of the United Mine Workers of America as the bargaining agent of supervisors in the mines, and subjected them to the discipline and control of the United Mine Workers and its leaders.

As a result of the Board's ruling in the Packard case, both Houses of Congress, by overwhelming majorities, passed the so-called Case bill, exempting supervisors from the operation of the Labor Act. The President vetoed the bill, and the Board continued to unionize foremen at an accelerated pace.

The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce, and thus to increase its flow. It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are titled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be "independent" of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them. The evidence shows that rank and file unions have done much of the actual organizing of foremen, even when the foremen's union professes to be "independent". Without any question, this is why the unions seek to organize the foremen.

One of the most important items of evidence in this question came to light after the committee concluded the hearings. In November 1942, Ford Motor Co. recognized the Foreman's Association of America as the representative of several ranks of supervisors. In 1944, the Ford Co. made a full collective-bargaining agreement with the association. In testifying before our committee, the president of the association urged the relation between Ford and the association as ground for unionizing foremen. Other evidence showed, however, that after Ford recognized the association, there were more strikes and stoppages by foremen at Ford's than in any other company. Although the president of the association claimed that productivity was high in plants it had organized, we had quoted to us statements by Mr. Henry Ford II that productivity declined after the foremen organized, and this evidence was supported by evidence from other companies.

On April 8, 1947, Mr. John S. Bugos, vice president and director of industrial relations at Ford's, terminated Ford's contract with the Foreman's Association. His letter to the association constitutes the clearest evidence that supervisors are not properly subject to the Labor Act:

> This is to advise you of the decision of the Ford Motor Co. to terminate the present agreement between the Foreman's Association and the Ford Motor Co.
>
> As you know, under the terms of the agreement it may be terminated on May 9, 1947, provided either your association or the company gives 30 days' notice. It is the purpose of this letter to give such notice.
>
> Our present agreement with you was entered into voluntarily on May 9, 1944. At that time we took the position that whether or not we believed that foremen's unions or associations were sound, we would undertake a practical test. This is in line with our policy of always seeking workable solutions to our human relations problems here at Ford. As you are aware, this company, in reaching the 1944 agreement with you, took a position not supported by the general opinion of industry.
>
> At that time, representatives of your association argued that recognition of a foreman's union would result in making foremen more effectively a part of management than before.
>
> After 3 years' experience—a period which seems to us ample for a test—it is our conclusion that the results have been the opposite of what we have hoped for. Rather than exerting its efforts to draw foremen into closer relationship with the rest of management, your association has worked in the opposite direction. We feel that your association under the agreement has failed to meet the test of practice.
>
> As recently as last Saturday—April 5, 1947—33 foremen, all except 3 from the Rouge rolling mill, walked off the job without permission, and contrary to

specific instructions to remain. They stayed off the job about 2½ hours, attending a meeting of the association. This unauthorized absence involved grave risks to our employees in the rolling mill. The fact that no damage came to men or property was fortunate, but it is something which the absent members of your association could not guarantee.

Efforts were made—we are glad to say unsuccessfully—to induce foremen in the open hearth department to leave their jobs at the same time. There is no need to point out the risk to men and property in leaving open hearth furnaces unattended.

Your association recently instructed its members not to comply with company requirements that they check employees under their supervision at various locations away from the job where they were felt to be loitering. Spokesmen for your association did not agree with the company as to the proper technique for handling an admittedly bad situation. It is clearly the responsibility of the company, and not of your association, to determine the procedure in such situations.

Several months ago we proposed a number of constructive amendments designed to improve our relationships, to define more clearly our separate areas of responsibility, and to close the gulf between foremen and other members of our management team which we feel has been created by the present agreement. In several months of negotiation, your negotiating committee has not agreed to a single major proposal. Your committee has also failed to produce any counterproposal which would lead to these goals.

The Ford Motor Co. has the present and long-term objective of building an exceptional organization of the ablest people. We cannot reach this objective unless we develop within the organization the finest and best-trained foremen in the country. The association is not helping us to advance toward this objective

The essential characteristic of management is responsibility. It follows that the characteristic which distinguishes a foreman is a sense of responsibility. It is our observation that the activities of your association under our agreement has tended to lead our foremen away from management responsibility, and has in fact opposed efforts of the company in this direction.

We are giving you this notice of termination of our agreement for the practical reason that it has not worked under test.

If management is to be free to manage American industry as in the past and to produce the goods on which depends our strength in war and our standard of living always, then *Congress must exclude foremen from the operation of the Labor Act, not only when they organize into unions of the rank and file and into unions affiliated with those of the rank and file, but also when they organize into unions that claim to be independent of the unions of the rank and file.*

The committee received in evidence about 200 letters that the Foreman's Association had exchanged with unions of the rank and file. They showed a closer and more intimate relation between the association and the unions of men the foremen supervise than one ordinarily finds between unions affiliated together in the same federation, and a subservience of the association to unions of the rank and file that is rare among unions.

The evidence shows that foremen's unions are, and must be, wholly dependent upon rank-and-file unions and under constant obligation to them. The foremen cannot strike without the support of the rank and file and its agreement not to do the work of striking foremen. The association admits that it has such an agreement with the CIO. The association has adopted a formal "policy" forbidding *its* members, when the rank-and-file unions strike, to enter the struck plants and protect and maintain them without the consent of the rank-and-file unions.

The evidence further shows that rank-and-file unions tell the foreman's union when the foremen may strike and when they may not, what duties the foremen may do and what ones they may not, what plants the foreman's union may organize and what ones it may not.

It shows that rank-and-file unions have helped foremen's unions, not for the benefit of the foremen, but for the benefit of the rank and file, at the expense of the foreman's fidelity in doing his duties. The chairman of a rank-and-file pit committee summed the matter up when he said:

> Well, we are trying to get them (the supervisors) to join the union, the bosses to join the union, and then we'll be their bosses. We'll be their bosses.

That most foremen themselves see the impropriety of their unionizing, and its danger for their own status, is clear from the fact that, although the Foreman's Association of America is the largest union of foremen, only about 1 percent of the foremen have joined it.

Management, like labor, must have faithful agents.—If we are to produce goods competitively and in such large quantities that many can buy them at low cost, then, just as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to it persons not subject to influence or control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what pay they should receive for it, and to carry on the whole of labor relations.

Labor relations people negotiate labor agreements and handle disputes not settled in the shops. Employment and personnel people hire workers, and sometimes assign them to their departments. Plant policemen and guards prevent disorders and report misconduct of employees and of unions and their members. Time-study men help to fix the pace at which employees work and to determine the number of men the work calls for. Doctors, nurses, safety engineers, and adjusters handle claims for disability benefits and investigate alleged hazards to safety and health.

Other employees handle intimate details of the business that frequently are highly confidential. Some affect the employer's relations with labor. Others affect its relations with its competitors. In neither case should the employee's loyalty be divided. That which affects the company's relations with its competitors certainly ought not to be open to members of a union that deals also with the firm's competitors.

Supervisors are management people. They have distinguished themselves in their work. They have demonstrated their ability to take care of themselves without depending upon the pressure of collective action. No one forced them to become supervisors. They abandoned the "collective security" of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such "security". It seems wrong, and it is wrong, to subject people of this kind, who have demonstrated their initiative, their ambition and their ability to get ahead, to the leveling processes of seniority, uniformity and standardization that the Supreme Court recognizes as being fundamental principles of unionism. (*J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332 (1944).) It is wrong for the foremen, for it discourages the things in them that made them foremen in the first place. For the same reason, that it discourages those best qualified to get ahead, it is wrong for industry, and particularly for the future strength and productivity of our country.

So, by this bill, Congress makes clear once more what it tried to make clear when, in passing the act, it defined as an "employer," not an "employee," any person "acting in the interest of an employer"; what it again made clear in taking up H.R. 2239 in 1943 and in dropping it when the Board decided the Maryland Drydock case, and what, for a third time, it made clear last year in passing the Case bill by a majority of about 2 to 1 and in barely falling short of enough votes to override the President's veto of that bill.

The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its "expertness," changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust.

(C) "Agricultural laborers": The present act excludes from the definition of "employee" "any individual employed as an agricultural laborer," but it does not say who are agricultural laborers and who are not. Congress has defined this term in other legislation. The bill adopts the definition of agricultural laborer set forth in the Internal Revenue Code, section 1426(h), namely:

> The term "agricultural labor" includes all services performed—
>
> (1) On a farm, in the employ of any person, connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.
>
> (2) In the employ of the owner, or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.
>
> (3) In connection with the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in section 1141j (g) of title 12, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes.
>
> (4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.
>
> As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(D) An "employee", according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board* v. *Hearst Publications, Inc.* (322 U.S. 111 (1944)), the Board

expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic "expertness" of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be "employees". The people the merchants hired to sell the papers were "employees" of the merchants, but holding the merchants to be "employees" of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors". "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee".

The definitions appearing in section 2 of the present act of the terms "representative" (4), "labor organization" (5), "commerce" (6), "affecting commerce" (7), and "unfair labor practice" (8) remain unchanged, although, in section 8, the "unfair labor practices" themselves are changed substantially.

Section 2(9) of the present act, which defines "labor dispute", is omitted. The term does not appear anywhere in the present act except in the definitions. It does appear in the bill, but its meaning is clear from the context and from the bill as a whole and does not need defining. In any event, the old definition would be inappropriate in the amended act because, as the Labor Board has construed the act, a "labor dispute" exists whenever a union disagrees with an employer on any subject, notwithstanding that the union does not represent employees of the employer, that the subject matter of the dispute does not concern wages, hours, or other terms and conditions of employment, or that the matter in dispute already has been settled by the terms of a valid existing agreement. The committee therefore has thought it better to omit this definition, and to leave its meaning to the well-known rules of statutory construction that the courts follow. The Board's construction no longer applies.

(9) "Labor-Management Relations Board": The definition of this term replaces the definition of "National Labor Relations Board" in the present act. Clauses abolishing the National Labor Relations Board, establishing in its place a new Labor-Management Relations Board, and defining the duties in the new Board appear in section 102 of the bill and in the amended section 4 of the act.

(10) "Administrator": This new term refers to an independent agency that section 3 creates to take over the investigating and prosecuting functions that the present Board performs, leaving the new Board with no duties inconsistent with its deciding functions.

(11) "Bargain collectively" and "collective bargaining": The present act does not define these most important terms. Some of the most glaring injustices of decisions of the present Board arise from that omission.

The present section 8 (5) requires an employer to bargain collectively with the representatives of his employees. The Supreme Court, in the *Jones & Laughlin case* (301 U. S. 1), upholding the constitutionality of the act, said:

> The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent an employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilaterial action determine * * *." The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the act in itself does not attempt to compel * * *."

Notwithstanding this language of the Court, the present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make. The Board has gone so far as to hold an employer's refusal to compel workers to become and remain members of unions, under so-called "closed shop" arrangements, to be evidence that the employers had not bargained "in good faith". (*See Matter of International Filter Co.*, 1 N. L. R. B. 489 (1936); *Matter of Columbian Enameling and Stamping Co.*, 1 N. L. R. B. 181 (1936); *Matter of Jackson Daily News*, 9 N. L. R. B. 120 (1938); *Matter of Uhlich and Co.*, 26 N. L. R. B. 679 (1940); *Matter of J. I. Case Co.* 71 N. L. R. B. No. 182 (1946).)

The Board has held it "unfair" for an employer to insist that he and the union settle their differences by collective bargaining, instead of submitting them to some form of "collective litigation" like arbitration (*Matter of Dallas Cartage Co.*, 14 N. L. R. B. 411 (1939); *Matter of Register Publishing Co.*, 44 N. L. R. B. 834 (1942). Notwithstanding the difficulties of instituting suits against unions under present law and of collecting judgments resulting from their breaking their contracts, if an employer asks the union to take steps making it legally responsible for its contract violations, the Board is apt to say the employer is "unfair" and punish him for "refusal to bargain" (*Matter of Jasper Blackburn Products Co.*, 21 N. L. R. B. 1240 (1940); *Matter of Scripts Mg. Co.*, 36 N. L. R. B. 411 (1941); *Matter of Interstate Steamship Co.*, 36 N. L. R. B. 1307 (1941)). The Board has held that an employer is not "bargaining in good faith" when he asks the union to agree to a "no-strike clause" and it has disregarded such clauses when unions have agreed to them (*Matter of Metal Mouldings Corp.*, 39 N. L. R. B. 107, 119 (1942); *Matter of Burgie Vinegar Co.*, 71 N. L. R. B. No. 140 (1946); *Matter of United Biscuit Co.* 38 N. L. R. B. 778; *Matter of Highland Shoe Co.*, 23 N. L. R. B. 259). Last year a company offered to the union one of the largest raises ever granted in its industry. The offer was the most generous one then being discussed in the industry.

However, it fell 5 cents short of meeting the union's demand. The union wished to bargain about the employer's *estimated* and *prospective* profits. Notwithstanding the very intense "bargaining" that had gone on, the Board accused the company of "refusing to bargain" (*Matter of General Motors Corporation*, N. L. R. B. Case No. 7–R–1496).

These cases show that unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective-bargaining agreements. (See T. R. Iserman, Industrial Peace and the Wagner Act, McGraw-Hill Book Co., Inc., New York (1947), pp. 31–35; Harold W. Metz, Labor Policy of the Federal Government, The Brookings Institution (1945), p. 73.)

In *N.L.R.B.* v. *J. I. Case Co.* (321 U.S.), the Supreme Court in its decision, and the Board in its brief, indicated that "welfare" arrangements, such as stock purchase plans, group insurance, hospitalization, and medical attention, are *not* within the scope of matters concerning which companies must bargain under the Labor Act. When unions that wished to bargain about such arrangements were independent, not affiliated with one of the great national or international organizations, the Board has seemed to understand what is obvious, that giving unions a voice in controlling welfare arrangements that employers finance, deprives employees of some of their free will in choosing bargaining agents, gives to the union that has the control an unfair advantage over other unions, and at times operates to the disadvantage of nonunion employees, violating sections 8 (1), 8 (2), and 8 (3) of the act. (See *Matter of Service Wood Hill Co.*, 31 N. L. R. B. 1179 (1941); *Matter of Cleveland Worsted Mills Co.*, 43 N. L. R. B. 545 (1942); *N. L. R. B.* v. *J. Greenebaum T. Co.*, 110 Fed (2d) 984; *N.Y. Merchandise Co., Inc.*, 41 N. L. R. B. 1078 (1942); *Matter of Bethlehem Shipbuilding Corp., Ltd.*, 11 N. L. R. B. 105 (1939).) More recently, however, the Board seems to be changing its view.

In view of the Board's rulings on the duty to bargain the committee has deemed it wise to define collective bargaining to mean what the Supreme Court in the Jones & Laughlin case, supra, says it means. This the bill does in two ways: *First*, it sets up objective well as employers be required to bargain collectively, the Chairman standards by which the Board can determine whether or not a party has refused to bargain. In opposing the suggestion that unions, as well as employers, be required to bargain collectively, the Chairman of the Board has stated that whether or not a person is bargaining "in good faith" requires appraising his "state of mind". The possibility of error and injustice when three Board members, none of whom are psychiatrists, undertake to do this is very great, as can be seen from decisions of the Board itself. The committee therefore takes the question out of the realm of speculation, guess work, and, too often, bias and prejudice, and provide that "free opportunity for negotiation" that the Supreme Court said the act should bring about. Since the bill requires unions as well as employers to bargain, the committee's doing this is as important to them as to employers.

When parties have agreed upon a procedure for settling their differences, and the agreement is in effect, they will be required to follow the procedure or be held guilty of an unfair labor practice. Most

agreements provide procedures for settling grievances, generally including some form of arbitration as the last step. Consequently, this clause will operate in most cases, except those involving the negotiation of new contracts.

Bargaining procedure.—In contract negotiations, or when for any reason no procedure for settling disputes is in effect, each of the parties is required to take these steps:

1. Receive the other party's proposals and any counterproposals. (Counterproposals may be made later, unless the parties have agreed otherwise.)

2. Discuss the proposals and any counterproposals at a conference at a mutually agreeable time or within a reasonable time. (It is important that the parties meet face to face if that is at all possible, and that each side, at the very least, listen to the other side state and explain his proposals or counter proposals.)

3. Continue discussing the proposals and counterproposals at not less than four separate additional conferences within a 30-day period after the first conference, unless agreement is sooner reached. (Bargaining is a difficult and highly refined art, and employers and unions have many techniques for arriving at the bargains they wish to reach.

> Playing for time, maneuvering for position, showing indifference to the advantages or disadvantages of possible compromises, beginning low and working up or beginning high and working down, pressing for one thing to get something else, trading one point for another, withholding commitments until the agreement takes shape, all this, and much else, if they know how to do it, * * * bargainers may use.

T. R. Iserman (op. cit. pp. 31–33). Congress ought to assure to each side a full opportunity to use its bargaining abilities. It ought not to say how the parties may use their abilities. The Board has tried to do that, with unfair results.)

4. If agreemnt is reached, reduce it to writing. (This is the rule the Supreme Court laid down in the *H. J. Heinz case* (311 U.S. 514 (1941)).)

5. If agreement is not reached within the 30-day period, the parties must, before striking or locking out, take the following steps:

6. (*a*) Within 5 days, the union must notify the Administrator of the National Labor Relations Act of its desire for a strike vote. (*b*) It must state to the employees in writing its position on the issues in dispute, and send copies of the statement to the employer and to the Administrator by registered mail. (*c*) The Administrator must notify the employer of the request for a strike vote and specify a reasonable time within which the employer shall issue to employees a statement of his position. (*d*) The employer must issue such a statement to the employees and send it to the Administrator by registered mail. (*e*) The Administrator must, within a reasonable time, and after notice to the parties, provide for a secret ballot. (*f*) The ballot shall be conducted in a manner to which the parties may agree, or, if they do not agree, under the direction of the Administrator. (He may use local agencies for this purpose if he so desires.) (*g*) The ballot, besides stating its nature, shall present to the employees the question: "Shall the employer's last offer of settlement of the current dispute be rejected and a strike be called." (*h*) The parties shall not strike or lock out unless the majority of all the employees in the bargaining unit in which the dispute arises vote to reject the employer's last offer, and to strike.

The record shows that, during each of the 10 years after Congress passed the Labor Act, there were on the average about three times as many strikes each year as in the average year for 10 years before Congress passed the act. Two things seemed to bring this about. Largely responsible was the immunity for striking that the act confers by providing that an employee retains his status as an employee, even when he strikes.

There were strong arguments before the committee for abolishing this immunity and letting strikers risk their jobs, just as employers risk their businesses, when strikes occur. By other clauses of the bill, the committee has adopted this approach when the strikes violate contracts, when they constitute unfair labor practices, or when they are unlawful within the meaning of the bill. But the committee has not seen fit to do this in cases of so-called "economic" strikes. It believes that at least the more irresponsible strikes, those called without due consideration, those concerning small issues, and those that leaders call without consulting their constituents, will be greatly reduced by requiring strike votes after each side has had an opportunity to state its position and to urge its fairness upon those called upon to do the striking.

Since, under the act, the union represents all the employees in the bargaining unit, not merely its members and not merely those directly concerned in a dispute that does not concern all, the bill contemplates strikes only when the majority of the bargaining unit wish to strike. This procedure meets two objections to the War Labor Disputes Act that appeared after we passed it. The strike vote comes *after* the bargaining and *after* the parties have stated their position, and it avoids situations that arose under the earlier Act, in which only a small fraction of the employees, 20 percent or less, by voting to strike, "authorized" work stoppages for hundreds of thousands who did not wish to strike.

Scope of bargaining.—Reference has already been made to liberties the Board has taken with the term "collective bargaining" due to the absence from the present act of language defining the scope of bargaining. The last paragraph of section 2(11) cures this defect, limiting the scope of bargaining by either employees or unions to matters of *mutual* concern.

Just as the employer has no right to bargain about who the union's officers and representatives will be, what dues and assessments it shall impose, how it shall spend its money or otherwise conduct its internal affairs so long as they do not affect the employer's operations, so the union has no right to bargain with the employer about who his agents will be, what prices he will charge, what his profits shall be, or how he shall manage his business, so long as he does not violate the union's contract with him or ignore his obligations under the Labor Act. The bill provides, in sweeping terms, for bargaining concerning wages, hours, work requirements or "work loads," discharge, suspension, lay-off, recall, seniority, and discipline.

It likewise provides for bargaining on promotions, demotions, transfers and assignments of people within the bargaining unit to other positions in the same unit and of people from outside the unit to positions in the unit. A union representing people in one unit may not dictate what position shall be held by an employee who leaves the unit and goes to another unit, which another union may represent.

The bill further provides for bargaining on safety, sanitation, and protecting the health of employees in the plant, vacations and leaves of absence, and for bargaining about procedures for settling disputes on all these subjects.

It does not require bargaining on any matter during the term of a collective-bargaining agreement, except as the express terms of the agreement permit. This contemplates that the parties will bargain on grievances in accordance with the agreed grievance procedure, and permits clauses such as those on "wage reopening."

(12) "Supervisor": In the discussion of the definition of the term "employee," the reasons for excluding from that definition persons who act for employers in the employer's dealings with labor have been fully set forth. The substantive language of section 2(12) of the present bill is consistent with that of the Case bill, which passed Congress last year. The only important change concerns confidential employees. These are people who receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally. Most of the people who would qualify as "confidential" employees are executives and are excluded from the act in any event.

The Board, itself, normally excludes from bargaining units confidential clerks and secretaries to such people as these. But protecting confidential financial information from competitors and speculators, protecting secret processes and experiments from competitors, and protecting other vital secrets ought not to rest in the administrative discretion of the Board or on the responsibility of whatever union happens to represent the employees. The bill therefore excludes from the definition of employees persons holding positions of trust and confidence whose duties give them secret information. The bill does not forbid these people to organize. It merely leaves their organizing and bargaining activities outside the provisions of the act.

(13) "Sympathy strike," (14) "Illegal boycott," and (15) "Jurisdictional strike." The activities that these three terms describe have in common the characteristic that they do not arise out of any dispute between an employer and employees who engage in the activities, or in most cases, between the employer and any of his employees. More often than not the employers are powerles to comply with demands giving rise to the activities, and many times they and their employees as well are the helpless victims of quarrels that do not concern them at all. These activities the bill makes unlawful concerted activities under section 12 of the act, and it removes the immunities that the present laws confer upon persons who engage in them.

Sympathy strikes are those a labor union calls against one employer when it has a dispute with another employer, or when the strikers are not concerned in a dispute between their employer and other employees, or when the strike is against a policy of national or local government, which the employer cannot change.

Illegal boycotts take many forms. Often they are to compel employers to force their employees into unions or to give a union control over them as their bargaining agent in violation of the Labor Act itself. Sometimes they are direct restraints of trade, designed to compel people against whom they are engaged in to place their business with some other than those they are dealing with at the time, or *vice versa*. The effects of boycotts upon business, and particularly

upon small commercial enterprises in metropolitan centers, such as New York, Philadelphia, and Pittsburgh, have often been disastrous.

Jurisdictional strikes usually involve quarrels, not between employers and employees, but between rival unions, which use the strike weapon against each other, and they partake of the nature of some forms of illegal boycotts.

All these activities, which the bill carefully defines, even those most in sympathy with the labor movement deplore and condemn. Union leaders themselves acknowledge the evils of most of these practices. They have known of the evils for many years, but they have failed to provide effective remedies. The Nation must, in self-defense, provide its own remedies. This the bill does.

(16) "Monopolistic strike": This is another unlawful activity under section 12. This forbids a strike or other concerted activity interfering with an employer's operations that results from any conspiracy, collusion, or concerted plan of acting between employees of *competing* employers, unless the employees of the competing employers have a common bargaining agent under section 9(f)(1). Section 9 permits employees of competing employers to have a common bargaining agent only if (1) the bargaining agent represents less than 100 employees of each employer and (2) the plants of the competing employers are less than 50 miles apart.

What this language, and that of section 9(f)(1), is intended to do is to put a stop to strikes that paralyze the economy of our country and imperil the health and safety of our people. We have laws to forbid competing employers to conspire together to close their plants, fix their prices, and otherwise to restrain trade. There is no justification for permitting employees of competing employers to enter into conspiracies that have the same effect. The language of the bill does not forbid employees of competing employers to strike at the same time. It forbids their doing so collusively.

The exceptions relating to 100 employees and 50-mile areas are designed to enable very small employers to bargain together in a single locality, and to permit one union to represent the employees of such employers, and, in the case of craft unions, to permit them to represent their members in the plants of a number of competing employers in a single locality, even though the total number of employees of each employer exceeds 100. We believe that employers with 100 or more employees can handle their own labor relations, and that unions with 100 or more members in a plant can form a separate local or other suborganization for them.

For further discussion of this subject, see comments on section 9(f)(1).

(17) "Featherbedding": In this bill, as in the Lea bill, which passed both Houses last year by large majorities and now is law, an attempt is made to deal with a problem that is becoming a more and more serious menace to the productivity of our country and to the manufacture of goods at a cost within the reach of the millions of our citizens.

The present bill is substantially less drastic than the Lea bill. The latter aimed to eliminate the practices of the American Federation of Musicians, which, under the leadership of J. Caesar Petrillo, requires employers to hire people who do no work, to pay for people the employers do not hire, and to hire more people than the employers have

work for. The precise language of the Lea bill is not applicable to industry generally, and so it has been modified accordingly. The bill applies to the practices described in section 2(17) the name "featherbedding," and, by section 12, makes strikes and other efforts to force employers to engage in featherbedding practices unlawful concerted activities.

There can be no possible doubts concerning the practices described in paragraphs (B), (C), (D), and (E) of this definition. In the case of those described in paragraph (A), in every industry standards exist and are applied daily to determine how many employees are "reasonably required" to perform given tasks. Indeed, many collective-bargaining contracts contain language not unlike that appearing in paragraph (A) of the definition. When any question arises as to whether or not a union demands more people than are "reasonably required" to do certain work, industrial engineers and time-study people can, and constantly do, resolve the question by reliable, scientific methods.

Unlike the Lea bill, the bill herewith reported does not by its terms subject persons who engage in featherbedding practices to criminal penalties. It makes strikes and other attempts to impose such practices unlawful, as set forth in section 12.

Section 3.—Section 102 of the bill abolishes the present Board. Section 3 of the National Labor Relations Act, as the bill amends it, creates a Labor-Management Relations Board of three members. Its sole duty will be to decide cases. Sections 9 and 10 establish new guides for the Board to follow in performing this duty. Work that the present Board's staff does will, for the most part, be done by the new Administrator of the Labor Act, an office that section 4 creates. The bill thus achieves a separation of the Board's functions, the need for which has long been obvious. Acting as prosecutor, judge, and jury, and to all intents and purposes as its own Supreme Court insofar as its findings of fact are concerned, the Board seems to have found the temptation to be arrogant, arbitrary, and unfair irresistible.

The present Review Division of the Board is abolished. The Board may employ trial examiners, as it does now, but the members of the Board will be expected to do their own deciding, not permitting trial examiners to attend executive sessions of the Board to defend their reports, as the Board has done in the past.

A significant change requires the President to select members of the Board with reference to their fitness to perform the functions the act imposes upon them "in a fair and impartial manner."

The bill fixes the salaries of members of the new Board at $12,000 a year, being $2,000 more than members of the present Board receive. The members of the Board, not the President, are to designate their chairman.

Section 4.—This section creates the office of Administrator of the National Labor Relations Act and defines his duties, which are more fully set forth in sections 9 (c), (d), (f), and (g) and 10 (b), (e), and (f).

Briefly, the Administrator takes over the investigating and prosecuting functions of the present Board, and will conduct three kinds of elections: (1) those in which employees shall choose or reject bargaining representatives under section 9 (d); (2) those in which employees vote to strike or not to strike, pursuant to the procedure described in section 2 (11), (B), and (3) those in which employees

vote for or against authorizing their bargaining representative to enter into agreements with their employers requiring them to become or remain members of the union, subject to the limitations upon such agreements set forth in section 8 (d) (4) and in section 9 (g) which are discussed later in this report. The Administrator is to be an independent agency of the Government and is to act free of influence and control by the Board and its staff.

It is anticipated that, in representation cases, where unions seek bargaining rights under section 9, the Administrator will proceed largely as the Board's field staff has done in the past, both in conducting preliminary investigations of petitions and in conducting elections. In these proceedings, the Administrator can obtain subpenas from the Board and swear and examine witnesses, as the Board has done in the past, but it is contemplated that occasions when he will need to exercise this power will be rare.

In unfair-labor-practice cases, the Administrator will determine whether or not an alleged unfair labor practice is, indeed, such a practice under the act, and if so, he will proceed as members of the Board's field staff have proceeded in the past.

One important innovation in the bill requires that not only the Administrator but also the head of each of his regional offices and the chief legal officer in each such office be appointed by the President, by and with the consent of the Senate, and that they be selected with regard to their ability to act for employees, employers, and labor organizations fairly and impartially. The committee's investigations, as well as those of preceding Congresses, have shown bias and prejudice to be rampant in the Board's staff, and among some members of the Board itself. It is to be hoped that the Administrator will not employ such people.

Section 5.—This provides, substantially in the language of the present act, for the location of offices of the Administrator and of the Board.

Section 6.—This provides for the issuance of regulations by the Administrator and by the Board, in the manner that the Administrative Procedure Act prescribes.

Section 7.—This, in the language of section 7 of the present act, guarantees, in paragraph (*a*), the rights of employees that the present act guarantees, i.e., their right to join, form, and assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, e.g., to strike, for the purpose of collective bargaining or other mutual aid or protection.

The committee has revised this section by writing into it in express terms that employes who strike or engage in similar activities in violation of collective-bargaining agreements, or who engage in unfair labor practices under section 8 or in concerted activities that are unlawful under section 12, forfeit the protection of the Labor Act. This is consistent with rulings of the courts. Although the Board professes to follow similar rulings, and sometimes reluctantly does so, it often reinstates with back pay employees whose concerted activities are unlawful.

A committee amendment assures that when the law states that employees are to have the rights guaranteed in section 7, the Board will

be prevented from compelling employees to exercise such rights against their will, as it has consistently done in the past. In other words, when Congress grants to employees the right to engage in specified activities, it also means to grant them the right to refrain from engaging therein if they do not wish to do so.

In the *Southern Steamship case* (316 U.S. 31, 1942, involving mutineers) and in the *Fansteel case* (306 U.S. 240, 1939, involving sit-down strikers who destroyed property), the Supreme Court held the employers could discharge the strikers. In the *Draper Corporation case* (145 Fed. (2d) 199, C.C.A. 4, 1944), the Court held that the empoyer could discharge "wildcat" strikers. In the *American News Company case* (55 N.L.R.B. 1302, 1944) the Board itself held that an employer could discharge employees who struck to compel him to break the wage stabilization laws. Although it took the Board 11 years to do so, finally, in its *second* decision in the *Thompson Products case* (decided February 21, 1947), it reversed itself and held that an employer may discharge employees who strike to compel the employer to violate the Labor Act and orders of the Board under the act. In the *Scullin Steel case* and in the *Dyson case* (decided February 7, 1947) the Board held that employers may discharge employees who strike in violation of collective-bargaining agreements. In the *Times Publishing Company case* (decided February 17, 1947), the Board indicated that unions, as well as employers, are under a duty to bargain collectively.

These, obviously, are correct decisions. But they are only decisions. Some of them are very recent, inspired, it seems, by the public demand for fair labor legislation. In cases involving violence in strikes, the Board has seemed reluctant to follow the decisions of the courts. It is inclined to reinstate, with back pay, strikers whom employers discharge for what the Board seems to regard as minor crimes, such as interfering with the United States mail, obstructing railroad rights-of-way, discharging firearms, rioting, carrying concealed weapons, malicious destruction of property, and assault and battery. (See, for example, *Matter of Kentucky Firebrick Co.*, 3 N. L. R. B. 455 (1937); *Matter of Republic Steel Corporation*, 9 N. L. R. B. 219 (1938); *Matter of Berkshire Knitting Mills*, 46 N. L. R. B. 955 (1943).)

The committee has written into the act the rules that the courts and the Board itself have laid down. Under section 7 (a), employees are protected in exercising their right to engage in concerted activities for collective-bargaining purposes and for other mutual aid or protection *unless the concerted activities are unfair labor practices under section 8 (b), are unlawful concerted activities, such as jurisdictional strikes, illegal boycotts, sympathy strikes, violence, mass picketing, and the like, under section 13, or are in violation of collective-bargaining agreements.*

Section 7 (b).—The bill adds a new paragraph (b) to section 7. This is designed to protect members of those unions that, instead of following fair and democratic processes in managing their affairs, treat their members as pawns and exploit them for the enrichment or aggrandizement of self-perpetuating leaders. The committee included this clause in response not only to the demands of simple justice, but in response also to pleas of many sincere union people who regard more democracy in unions as one of the greatest needs of unionism. When,

under the Labor Act, we confer upon unions the power they have as exclusive bargaining agents, entitled by law to handle all the dealings of employees with their employers, clearly it is incumbent upon us, by the same law, to assure to the employees whom we subject to union control some voice in the union's affairs. This we do by the general provisions of section 7 (b), which are implemented by the provisions of section 8 (c).

Section 8.—Although the present act purports, in its preamble, to protect the rights of workers, the act, in the Board's hands, has fallen far short of its goal. Pursuing its predispositions, so different from the objects of the act, the Board has gone far in depriving workers of rights the act guarantees to them, in promoting industrial strife (some of its agents have gone so far as to advocate strikes in lieu of appeals to orderly procedures under the act), and in encouraging irresponsibility rather than responsibility in the labor movement. Much about unions that the public criticizes can be traced to policies of the Board.

The bill changes two clauses of section 8 of the act, and writes into it 13 new ones. Two of these are designed to encourage responsibility on the part of unions in their relations with employers. The rest are designed to insure fair treatment by unions of their members and other employees. The Labor Act has been called labor's magna carta. These new clauses are, indeed, the American workingman's bill of rights.

Section 8(a)(1).—This is identical with the present section 8(1), making it an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7(a)" (now sec. 7).

Section 8(a)(2).—The committee have rewritten this section (1) to make it consistent with actual experience; (2) to protect labor organizations that do not enjoy the Board's favor from suffering discrimination at its hands; (3) to forbid paying royalties, taxes, and other exactions to unions in the guise of "welfare funds" or otherwise.

The present act forbids employers "to dominate or interfere with the formation or administration of any labor organization or to contribute financial or other support to it", but permits employers to reimburse employees for pay lost through conferring with the employers during working hours. (Permission to do this is continued in sec. 8(d)(2)). The fact is that the day-to-day relations between employers and unions require that the employer do much more for the union of his employees than the act, by its terms, permits. Employers generally provide in their plants bulletin boards for the union's use, give union officials preferred treatment in laying off workers and in calling them back, and allow representatives of the union, without losing pay, to confer not only with the employer but as well with employees, and to transact other union business in the plant.

If it is a union that the Board favors that enjoys these and other advantages not permitted by section 8(2) of the old act, the Board does not complain. But if it is a union that the Board does not favor, the Board uses things of this kind as ground not only for punishing the employer but also for penalizing the union. If it is an independent union, not affiliated with a national or international organization, the

Board usually annihilates it by requiring the employer to "disestablish" it, by denying to it a place on the Board's ballots, or by punishing an employer that deals with it. By its ingenious and discriminatory application of this section and of its powers under section 10, the Board has liquidated many unions that workers wished as their bargaining agents. In a few instances, the Board has used the section against affiliated unions, and particularly those connected with the A.F. of L. But in these cases, it has discriminated again, imposing a penalty less than the death sentence that would have been forthcoming had the union been an independent.

The Committee has deleted the general language that the Board has thus abused, and has substituted for it prohibitions upon an employer's (A) preventing a labor organization from determining independently and out of the employer's presence its own policies or planning independently and out of his presence its own objects and course of action, and (B) bribing a union official, directly or indirectly. If the union can meet alone to determine its internal affairs, its demands and its methods of enforcing them, and if the employer is forbidden to tamper with union officials and representatives, he cannot be said to be "dominating" or "interfering" with it in any way that justifies abolishing the union or imposing severe sanctions upon it. If the union does not serve the workers well, they can rid themselves of it, and far more rapidly under the act as the bill will amend it than has been possible under the act as it now stands.

By clause (C) (i) of section 8 (a) (1), the bill in effect forbids check-off of union dues, fees, fines, assessments and other levies upon members, without the written consent of the employee, revocable upon 30 days' written notice. This is a form of "union security" that is in effect in many plants, where it has proved popular with employers, employees, and unions, saving time and trouble for all of them.

By clause (C) (ii) of the same section, the bill forbids employers to pay to or for unions, or to any funds or trusts established, maintained, or controlled by them, in whole or in part, directly or indirectly, royalties, taxes, and other exactions, instead of paying the money directly to workers in the form of wages. In discussing the definition of "collective bargaining" in section 2 (11), it has been pointed out that the Supreme Court has indicated that such payments as these are inconsistent with the provisions of section 8 (1), section 8 (2), and section 8 (3) of the present act. Certainly, it is not in the national interest for union leaders to control these great, unregulated, untaxed funds derived from exactions upon employers. The clause forbids employers to conspire with unions to mulct employees, without their consent, of huge amounts that ought to go into the workers' wages.

Section 8 (a) (3).—In the language of the present act, this section forbids employers to discriminate in regard to the hire and tenure of employees or any term or condition of employment to encourage or discourage membership in any labor organization. Consistently with court decisions, the bill expressly makes this clause applicable to persons seeking employment, thereby banning "black lists."

The bill omits from section 8(a)(3) the proviso of the present section 8 (3) that permits employers and unions, by agreement, to require employees to become and remain members of unions as a condition of employment. By a later clause (sec. 8 (d) (4)), the bill permits, subject to certain regulations and limitations, "union security"

agreements in the nature of union shops and maintenance of membership, but it bans the closed shop.

Section 8 (a) (4).—In the language of the present section 8 (4), this forbids employers to discriminate against employees for filing charges or testifying under the Labor Act.

Section 8 (a) (5), like section 8 (5) of the present act, requires employers to bargain collectively. In discussing section 2 (11), there have been described the standards by which the new Board will determine whether or not a party has complied with the new requirements of this section, and the subjects concerning which employers and representatives of their employees must bargain, and the reasons were set forth why these clauses are necessary.

The bill makes another change in this section. The present section 8(5) requires an employer to bargain "subject to the provisions of section 9(a)," which provides that a representative chosen by the majority of the employees in a bargaining unit is the exclusive representative of all the employees in the unit. The bill imposes the obligation to bargain upon an employer if the union is "currently recognized by the employer or certified as such (exclusive representative) under section 9." Under this language, if an employer is satisfied that a union represents the majority and wishes to recognize it without its being certified under section 9, he is free to do so as long as he wishes, but as long as he recognizes it, or when it has been certified, he must bargain with it. If he wishes not to recognize an uncertified union, or, having recognized it, stops doing so, the union may ask the Board to certify it under section 9.

Section 8(b) (1).—This is new, making it an unfair labor practice for labor organizations, their officers, agents, and representatives, or for employees, to interfere with, restrain or coerce employees. There is included in this provision a qualification which is not found in the corresponding paragraph covering employers—namely, that the interference proscribed is interference by intimidation. Although it is not intended to permit representatives and their partisans and adherents to harass or abuse employees into joining labor organizations or designating them as their bargaining representatives, it is the purpose of the committee to make entirely certain that Congress does not forbid representatives, by reasonable means, to persuade employees to join the unions.

By section 8(B) (2), the bill requires a union or other representative that is acting as and is currently recognized as an exclusive representative of employees, by an employer, or that is certified as such a representative, to bargain collectively with the employer. The standards and definitions which have been discussed in relation to section 2(11) apply in the case of unions, as well as in the case of employers. The duty to bargain now becomes mutual. This, the committee believes, will promote equality and responsibility in bargaining.

Section 8(b) (3).—This makes an unfair labor practice, and therefore not within the protection of the act, any strike or other concerted activity an object of which is to compel an employer to bargain on a subject that is not specified 2(11) as a proper subject of collective bargaining. The sweeping terms of section 8(a) (1) make unnecessary a like clause, dealing with lock-outs by employers to enforce improper demands. The Board already holds such conduct to be an unfair labor practice by an employer.

Section 8(c).—This is a bill of rights for union members. Having given to unions a great power over workers, we now make sure that the unions will operate democratically, that they will use their powers in the interests of the workers, and that those that heretofore have exploited the workers no longer can do so. The permitting, subject to certain limitations and regulations, of agreements between employers and labor organizations requiring union membership makes this bill of rights of even greater importance than would be the case if union membership were in all respects, entirely voluntary.

Section 8(c) (1).—Using the device of section 8(a) (1), the bill makes it an unfair practice for unions to interfere with, restrain, or coerce members in the exercise of the general rights guaranteed by section 7(b).

Section 8(c) (2).—In addition to the general provisions of section 8(c) (1), the bill of rights, like section 8(a), sets forth specific unfair practices. The first of these, section 8(c) (2), requires that fees, dues, and assessments be reasonable and uniform, as well as authorized by the members. The section specifies a maximum of $25 for initation fees except when the Board finds a larger amount is reasonable. What is reasonable will depend upon the size of the organization, the wage rates of its members, the benefits it confers, the stability of membership and of employment in the trades and industries in which the members work and other relevant factors. The section also prohibits the practice by some unions of selling "work permits" and similar practices by which union officials, with or without actual authority from their organizations, exact payments from workers without admitting them to membership.

Section 8(c) (3).—Arrangements by which unions provide insurance, health and accident benefits, and similar plans, when well managed and when voluntary, are to be encouraged. But workers, whether or not members of the unions, should be free to decide for themselves whether such arrangements are well managed, are safe investments for them, are economical, are fair, and are otherwise desirable. The merits of such arrangements, not compulsion, should lead workers to contribute to them. The bill therefore forbids labor organizations, their representatives and supporters, to compel members to contribute to or to participate in any so-called benefit plan or fund.

Section 8(c) (4).—The right to resign from any organization is a fundamental right. This section preserves that right for union members. (If, when a member resigns, there is in effect as to him an agreement permitted under sec. 8(d) (4), his resigning may result in his losing his job, unless his resignation results from an unfair labor practice by the union under sec. 8(b) (1) or under sec. 8(c).)

Section 8(c) (5).—This assures to union members the right of free speech, in and out of the union (except that, as provided in sec. 8(c) (6), members may not abuse this right) and the right to vote as they please, both in civil elections and in union elections.

Section 8(c) (6).—This guarantees fair hearings for union members before the union can expel or suspend a member, and specifies the grounds on which unions may suspend or expel members. Under the constitutions of some unions, the unions, or even individual leaders, may suspend or expel members upon mere suspicion of having criticized a union official or a union policy, or upon other unfair and

unreasonable grounds. The bill provides for suspending and expelling members only upon fair and substantial grounds.

The bill has another advantage for working people. Now, when a union expels a man unfairly, the member, to regain his status, must hire his own lawyer and go to court. Under the act as amended, he may file a charge of unfair labor practice against the union with the Administrator; the Administrator must prosecute the case, at no cost to the employee. The Board can order the employee reinstated in the union, with such compensatory award as may seem proper, and the Adminstrator can proceed in court to compel the union to comply with the Board's order.

Section 8(c)(7).—While section 8(c)(7) permits unions to suspend or expel members upon any one or more of six grounds, several of which are quite broad, section 8(c)(7) provides, in effect, that if the suspension or expulsion results from anything other than nonpayment of initiation fees and dues uniformly required of members, the union may not require an employer to discharge the member under an agreement such as section 8(d)(4) permits, making union membership a condition of employment. Similarly, if a union has such a contract with an employer, it may not refuse membership to an employee, and thereby deny him the right to work, except for his failure to pay uniformly required initiation fees and dues. In brief, a union may deny membership to an employee upon any ground it wishes, but the only ground on which it can have him discharged under a "union security" clause is nonpayment of initiation fees and dues; and under section 8(c)(6), once it has admitted a man to membership it can suspend or expel him for several reasons, but its action cannot cost him his job unless it was for his not making the specified payments.

Section 8 (c)(8).—This clause calls for secret ballots and open count of ballots on important questions of union policy or union action. The clause is consistent with present provisions of most democratically run unions, which are not always followed. The clause insures democracy in unions.

Section 8 (c)(9).—The purpose and effect of this clause, forbidding espionage and intimidation by unions and their supporters, and its propriety, are clear.

Section 8 (c)(10).—This requires unions to report to members concerning their financial affairs. Every poll of opinion among union members, as among citizens generally, overwhelmingly supports the purpose of this clause. The clause is consistent with the provisions of section 303 of the bill, concerning reports by unions to their members, and gives to the members a means of enforcing their rights by filing charges with the Administrator of the Labor Act.

Section 8 (d).—This section concerns exceptions to the prohibitions of sections 8(a), 8(b), and 8(c).

Section 8(d)(1).—This guarantees free speech to employers, to employees, and to unions. Although the Labor Board says it does not limit free speech, its decisions show that it uses against people what the Constitution says they can say freely. Thus, if an employer criticizes a union, and later a foreman discharges a union official for gross misconduct, the Board may say that the official's misconduct warranted his being discharged, but "infer," from what the employer said, perhaps long before, that the discharge was for union activity, and reinstate the official with back pay. It has similarly abused the right

of free speech in abolishing and penalizing unions of which it disapproved but which workers wished as their bargaining agents. The bill corrects this, providing that nothing that anyone says shall constitute or be evidence of an unfair labor practice unless it, by its own express terms, threatens force or economic reprisal. This means that a statement may not be used against the person making it unless it, standing alone, is unfair within the express terms of sections 7 and 8 of the amended act.

Section 8(d) (2).—This continues the proviso of the present section 8(2), which permits employers to pay employees for time during their working hours that they spend bargaining with the employer and conferring with him on grievances and other subjects of collective bargaining.

Section 8(d) (3).—During World War II, many employers, with the help of the Government, set up labor-management committees, with which they discussed matters of mutual interest. This exception to section 8(a) (2) permits employers whose employees have not designated a bargaining representative to set up similar committees and to discuss with them wages, hours, working conditions and other subjects of collective bargaining as well as other matters of mutual interest; *but an employer may discuss subjects of collective bargaining only if the employees do not have a certified representative or one that the employer currently recognizes as the exclusive representative of the employees.* This clause does not permit "company unions". The employer and the committee may discuss and reach decisions, but neither side may require the other to make an agreement, or to follow the procedure of collective bargaining set forth in section 2(11). The employees generally may elect members of the committee, but section 8(a) (1) and (2) forbid the employer to create a formal organization having members among employees generally or other common characteristics of a labor union.

Section 8(d) (4).—The bill prohibits what is commonly known as the closed shop, or any form of compulsory unionism that requires a person to be a member of a union in good standing when the employer hires him. The evils of the closed-shop system have been obvious and well known for many years. The system enslaves workers to the union, creates a tight monopoly that deprives deserving men of the right to work and that is the cornerstone of practices of unions, acting alone or jointly with employers, that raise prices, impair output, and restrain trade.

While the bill abolishes the closed shop, it permits, subject to limited conditions and strict regulations (including the provisions of sec. 8(c)), such forms of compulsory unionism as the union shop and maintenance of membership. As we have seen, unions may require employers to discharge employees under such agreements only when the union suspends or expels the employees for nonpayment of initiation fees or of dues.

Agreements such as those that section 8(d) (4) permits are valid only if they are valid under the laws of any State in which they are to be performed, and by section 13 the United States expressly declares the subject of compulsory unionism one that the States may regulate concurrently with the United States, notwithstanding that the agreements affect commerce, and notwithstanding that the State laws limit compulsory unionism more drastically than does Federal law. It goes

without saying that no State may invalidate, as to agreements affecting commerce, restrictions or conditions that the amended Labor Act will put upon compulsory unionism.

At least 12 States (Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Louisiana, Minnesota, Nebraska, North Dakota, South Dakota, and Tennessee) have laws forbidding compulsory unionism. Four others (Colorado, Kansas, Utah, and Wisconsin) allow agreements compelling union membership only after the employees authorize such agreements by large majorities. California, Connecticut, Delaware, Iowa, Kansas, Maine, Massachusetts, Missouri, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, and Texas have under consideration laws forbidding compulsory unionism. The demand for legislation of this kind is widespread and pressing.

Additional conditions to the carrying out of agreements compelling union membership appear in section 9(g).

Section 9(a).—Like the present act this clause of the amended act would make representatives chosen by the majority of the employees in a bargaining unit the exclusive representative of all the employees for the purposes of collective bargaining. The present act provides that any individual employee or group of employees may "present grievances to their employer." Putting a strange construction upon this language, the Labor Board says that while employees may "present" grievances in person, the representative has the right to take over the grievances. The present bill permits the employees and their employer to settle the grievances, but only if the settlement is not inconsistent with the terms of any collective-bargaining agreement then in effect. The proviso is thus given its obvious and proper meaning.

Section 9(b).—This section is like section 9(b) of the present act, except that it requires the Board, in finding what employees constitute a unit appropriate for the purposes of collective bargaining, to follow the provisions of a new subsection (f). The need for clearer guides for the Board to follow in setting up units has been generally recognized, even by some members of the Board, since the act was passed. Subsection (f) is discussed in full below.

Section 9(c).—This sets forth the procedure by which employers, employees, and representatives may obtain elections in which employees may determine whether or not they wish a representative to act as their exclusive representative, and, if so, which one. The principal differences between the present section and the amended section are as follows:

(A) The Administrator, rather than the Board's field staff, makes preliminary investigations and conducts elections.

(B) Employers may ask for elections, *but only after a representative has claimed collective-bargaining rights.* This prevents an employer from demanding an election as soon as organizing begins and before the union has a majority. By not asking for bargaining rights until they believe they have organized the majority of the employees, unions can time the holding of an election to suit themselves. The present Board's regulations permit employers to ask for elections, but only when two or more unions demand bargaining rights. This condition no longer will apply.

(C) Although the terms of the act would permit them to do so, the Board has denied to employees who have designated an exclusive representative the right to have it decertified unless, at the

same time, they subject themselves to control by another representative. The bill restores to employees this right of which the Board deprived them. If they engage in collective bargaining through an exclusive representative and the experience proves disappointing, 30 percent of them can ask for an election in which the majority can withdraw their designation of the representative.

(D) To obtain an election, a representative must, in the preliminary investigation by the Administrator, show that it represents at least 30 percent of the employees in the unit it claims to be appropriate. The present Board usually follows a similar rule now.

Sections 9(b) and 9(c).—These remain in substantially their present form, except that, in setting up bargaining units, in directing elections, and in certifying representatives, it shall be subject to the limitations of section 9(f).

Section 9(f).—This contains a number of new and important clauses.

Section 9(f)(1).—Probably the most important clause of section 9(f) is that which limits industry-wide bargaining and which, with Sections 2(16) and 12(3)(A), dealing with monopolistic strikes, is designed to put an end to strikes, such as we have experienced particularly in the coal and steel industries, in which powerful and nation-wide unions have brought the compelling pressure of strikes to bear more upon the Government and the public than upon the employers involved. Arrangements by which competing employers combine, voluntarily or involuntarily, to bargain together, and arrangements by which great national and international labor monopolies dictate the terms upon which competing employers must operate seriously undermine our free competitive system. They undermine, also, the rights of the men in the mines and in the shops, who find their terms of employment determined not according to their circumstances and those of their employers but by arbitrary decisions of the national and international officers.

Such arrangements as these stifle competition among employers, and slow down the development of new techniques for producing more goods to sell at lower prices. They tend, in some cases, to reduce the resistance of employers to extravagant demands of the unions, and, in others, to holding down wages in plants where greater efficiency than prevails in others might, but for the group arrangements, result in better wages for the employees. The arrangements often are the foundation of shocking restraints of trade, such as we find in the construction trades and in parts of the clothing industry.

It is no answer to all this to say that some employers like to combine together to bargain collectively. It is natural that they should dislike having their plants struck while the plants of employers who are competitors, or who ought to be, are operating. Most employers believe that the disadvantages of industry-wide bargaining outweigh its advantages. Our concern, however, is not with its advantages and disadvantages for either employers or unions. Our concern is the public interest, and the public interest demands that monopolistic practices in collective bargaining come to an end.

Section 9(f)(1) deals with the problem of industry-wide bargaining by forbidding the new Board to certify one union as the bargaining agent for employees of two or more competing employers. There are two exceptions of this rule: One union can represent less than

100 employees of each of several competing employers if the employers' plants are not more than 50 miles apart. This permits small groups of employees of competing employers in one locality to bargain together and permits small employers in one locality to bargain together, but limits the kind of bargaining that so often leads to price fixing and other monopolistic practices. The second exception permits unions that represent employees of competing employers to affiliate or associate together if their bargaining, striking, and other concerted activities are not subject to common control. Under this exception, national and international unions would be able to perform for local unions or other subdivisions of their organizations functions like those that trade associations perform for member companies now, but would not be able to control them, dictate to them, or to disapprove of what they do.

By section 102 (f) of the bill, employers and unions are allowed appropriate periods for revising their bargaining arrangements to conform to section 9 (f), and section 9 (h) enables employers and unions to facilitate proceedings for new certifications where they are required.

Sections 9(f)(2) and 9(f)(3).—These two clauses concern units that the Board sets up under sections 9 (b) and 9 (d). Under these sections it is the duty of the Board to determine what group or groups of employees may appropriately be placed in any unit for which a representative sits as the exclusive bargaining agent.

The act says that the Board shall determine in each case whether the "appropriate" unit is "the employer unit, craft unit, plant unit, or subdivision thereof." Under this broad grant of authority, the Board often has acted in a way that has seemed arbitrary, and it has shown little regard for distinguishable minorities that did not wish a union to represent them, and has forced many such minorities into bargaining units against their will. The Board seems to have wished to make bargaining units as large as it could, notwithstanding that its policy deprived large minorities of that freedom to decline to bargain collectively that the Labor Act and the Norris-LaGuardia Act both declare to be our national policy. (See Howard W. Metz, Labor Policy of the Federal Government, The Brookings Institution (1945), pp. 92–93.) The Board has gone far in this. Although the employees in several plants or mines may wish one union, or no union at all, to represent them, the Board may include these employees in a single unit with employees in other plants or mines who wish another union as their representative and who, by greatly outnumbering them, can force upon them a bargaining agent they do not choose. (See *Matter of Pittsburgh Plate Glass Co.*, 10 N. L. R. B. 1470 (1939); *Matter of Inland Steel Co.*, 9 N. L. R. B. 783 (1938); *Matter of Sears, Roebuck Co.*, 34 N. L. R. B. 244 (1941); *Matter of Alston Coal Co.*, 13 N. L. R. B. 683 (1939); *Matter of Gulf Oil Corporation*, 19 N. L. R. B. 334 (1940); *Matter of Iowa Southern Utilities Co.*, 15 N. L. R. B. 580 (1939).)

Carrying out the national policy to assure full freedom to workers to choose, or to refuse, to bargain collectively, as they wish, is an important task for this Congress. Sections 9 (f) (2) and 9 (f) (3) are steps in carrying out that task. The first extends and writes into the act, and requires the Board to apply without discrimination, a rule it developed itself, but which it applies only at the instance of unions, usually those in the A. F. of L. Under this rule, which the

Board laid down in *Matter of Globe Machine and Stamping Company* (3 N. L. R. B. 294 (1937)), when the Board orders, for example, a plant-wide election, and there is in the plant one or more groups of craftsmen, the Board holds separate elections for the craftsmen, so they can vote against the union that is the choice of the rest of the employees, or vote for another union.

The bill provides that, in the Board's hearings, any interested person, the employer, a union, or employees themselves, may ask that the Board hold a separate election for any "craft, department, plant, trade, calling, profession, or other distinguishable group" included in the unit that the Board finds to be appropriate. If, in the election that the Board orders, the majority of any such group votes against being represented by an exclusive bargaining agent, or if it votes in favor of a bargaining agent other than the one favored by the majority of the whole unit, the Board must exclude that group from the unit. If no representative receives the majority of the total number of votes cast in the election, the Board will not certify any representative, except that, subject to section 9 (f) (5), the Board may order a run-off. If a representative receives the majority of all ballots cast in the election, the Board shall certify it, but shall exclude from the unit distinguishable groups for which it directed separate ballots and who voted against the representative.

Section 9 (f) (3) strikes at a practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time. Sometimes, but not always, the Board pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate (*Matter of New England Spun Silk Co.*, 11 N. L. R. B. 852 (1939); *Matter of Botany Worsted Mills*, 27 N. L. R. B. 687 (1940)). While the Board may take into consideration the extent to which employees have organized, this evidence should have little weight, and, as section 9 (f) (3) provides, is not to be controlling. If, for example, a group votes itself out of a unit under section 9 (f) (2), it does not necessarily constitute a separate unit that is appropriate for the purposes of collective bargaining.

The act still leaves the new Board wide discretion in setting up bargaining units.

Section 9 (f) (4).—This section forbids the new Board to discriminate, as the old Board frequently has done, in handling representation cases before it. How the old Board has discriminated against independent unions is disclosed in House Report No. 1902, Seventy-ninth Congress, third session, as well as in the hearings before the committee. This new paragraph forbids that kind of discrimination.

Section 9 (f) (5).—This paragraph deals with run-offs. For 2 years after Congress passed the act, when two or more unions sought bargaining rights, the Board provided no space on its ballots for voting for no union. The Board later changed this rule (*Matter of Interlake Iron Corporation*, 4 N. L. R. B. 55 (1937)). The Board then held that when the first balloting was inconclusive, the employees could, in the run-off, vote for a union or for no union (*Matter of Coos Bay Lumber Co.*, 16 N. L. R. B. 476 (1939)). This rule obviously was just, but the Board soon abandoned it and in run-offs, compelled employees to choose between two unions, providing no space for voting for no union (*Matter of C. K. LeBlond Machine Tool Co.*, 22 N. L. R. B. 465

(1940)). Its present practice is to compel employees, except in rare instances, to choose between the two leading unions unless, in the first balloting, the no-union vote was highest.

The act does not, by its terms, seem to contemplate run-offs, and there is good reason for saying there should not be run-offs. The committee believes, however, that at times they are justified, if they are fair. The committee therefore adopts, with some modification, the rule of the Coos Bay case, providing in section 9 (f) (5) for a run-off if, within 60 days after an inconclusive election, a union that received votes in an election furnishes to the Board satisfactory evidence that it represents more than 50 percent of the employees in the unit. The run-off is to be between that union and no union. The Board is given discretion to determine what evidence of representation it will treat as satisfactory in such a case. But obviously, if before the first election, or in applications for run-off, each of two or more unions produced evidence that it represented a majority of the employees (dual membership sometimes causes this to happen), the Board will require more "satisfactory" evidence, or it may refuse to direct a run-off.

In the beginning, one member of the Board seems to have believed that even when only one union sought bargaining rights, the Board's ballots ought not to provide space for voting for no union. Section 9 (f) (5) prevents the Board's adopting such a rule.

Section 9 (f) (6).—At least 11 great national unions and a large number of local unions seem to have fallen into the hands of Communists, although in every case Communists appear to compose only a very small minority of the membership. In most of these cases the rank and filed object to communistic influence in their unions. By the bill of rights set forth in section 8 (c), the bill helps them to rid themselves of communistic control. Section 9 (f) (6) makes it incumbent upon union leaders who now tolerate Communist infiltration in their organizations, affiliates, and locals, and temporize with it, to clean house or risk loss of rights under the new act.

Although there are instances in which Communists have used unions as "front" organizations, the Board holds evidence of their influence to be irrelevant. Communists use their influence in unions not to benefit workers, but to promote dissension and turmoil. They should be weeded out of the labor movement. It is well to remark in passing that, by revising section 10 of the Labor Act, the bill makes it possible for employers, also, to rid themselves of Communists, something that, as the Board has applied the act, has been very hard for them to do before. Testimony before the committee indicates that, by making themselves especially obnoxious in carrying on alleged "union activity," Communists often can make themselves, in the eyes of the Board, all but immune to discharge.

Section 9 (f) (7).—This provides, consistently with a rule the Board now seems to follow, that elections under section 9 (d) shall not be held more often than once a year, except that, upon application by 30 percent of the employees in a bargaining unit for which the Board has certified a representative, the Board shall direct an election under section 9 (c) (2) to determine whether or not the employees wish to keep the representative.

Section 9 (f) (8).—When, during the term of a collective contract, employees choose a new representative in proceedings under section 9,

the certification of the new representative is not to be effective until it becomes a party to the contract and becomes bound by it. This seems to be consistent with present law. Implicit in the provision are two things: (1) The employer and the new representative may waive its requirements, and (2) it cannot apply to that part of any agreement that requires membership in a labor organization that formerly was the representative.

Section 9 (g).—This outlines the procedure by which employees, by secret ballot, approve agreements requiring them to become or to remain members of a union, pursuant to section 8 (d) (4). The majority of all the employees who are to be subject to such an agreement must vote for carrying it out. Section 8 (b) makes it an unfair labor practice for a labor organization to engage in, or to threaten to engage in, a strike or other concerted activity to induce an employer to enter into such an agreement, and in applying for a secret ballot under section 9 (g) the organization must state under oath that it did not engage in, or threaten to engage in, such activities in order to obtain the agreement. The employer has the right to object to the organization's application, notwithstanding his having signed an agreement, and especially if he controverts the organization's claim that it did not use duress in securing the agreement. Any other interested person, a rival union or employees, for example, may intervene.

An agreement permitted by section 8 (d) (4) may remain in effect only during the term of any contract of which it may be a part, and in no event for more than 2 years.

Section 9 (h).—The present act does not, by its terms, provide for so-called "consent elections", but the Board frequently holds them. The bill permits parties to waive hearings before the Board (providing no other interested person intervenes and objects), but when the parties waive a hearing, the Administrator must conduct a secret ballot, not check membership cards as the Board sometimes has done in the past.

Section 10.—Consistently with the scheme of the amended Labor Act, section 10 contemplates separating the Board's prosecuting functions and its deciding functions, and assigning the former to the Administrator. The committee has rewritten section 10 of the act to give effect to this important reform.

As under the present act, the power of the Board under the amended act in the matter of unfair labor practices is exclusive. This rule has necessitated a special provision (sec. 13, hereafter discussed) to give to the States a concurrent jurisdiction in respect of closed-shop and other union-security arrangements. The rule of exclusive jurisdiction was developed many years ago by the Supreme Court in order to provide for uniformity in matters of national policy under the commerce clause. The Labor Act is an illustration of such a policy. It can readily be seen what mischief might be wrought if, for example, foremen should be subject to State law at the same time that the workers they supervise are subject to national law. Moreover, the bill herewith reported very definitely states a national policy in respect of organization and collective bargaining by foremen.

Section 10 (b).—The Administrator, not the Board, receives from complaining party a charge of unfair labor practice. The Administrator promptly notifies the person or persons complained of that the charge has been filed. The Administrator may investigate the charge

by interrogating the complainant and by asking the person complained of for his version of the affair. He may not compel either party to give evidence to him in an unfair practice case. If the Administrator has reasonable cause to believe that the charge is true he issues a complaint and has it served on the person complained of. It is only when the facts the complainant alleges do not constitute an unfair practice, or when the complainant clearly cannot prove his claim, that the Administrator has any discretion not to issue a complaint. It is to be expected that, if a case is weak or is inconsequential, he may attempt to persuade the charging party to drop the case, or he may, without acting as a mediator, conciliator, or arbitrator, suggest that the parties try to settle the dispute between themselves.

Changes in procedural provisions of section 10 (b) are clear.

A more important change is one that requires charging parties to file their charges within 6 months after the unfair practice is alleged to have occurred, and that requires the Administrator to issue the complaint within 6 months after the charge is filed. It has not been unusual for the Board, in the past, to issue its complaints years after an unfair practice was alleged to have occurred, and after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused. Allowing 6 months for filing a charge and another 6 months for the Administrator to act upon it does not seem unreasonable.

Evidence.—Another important change concerns the evidence before the Board. The present act (sec. 10 (b)) says that rules of evidence prevailing in courts of law and equity shall not be controlling. In the circuit courts of appeals, the court must regard the Board's findings of fact as "conclusive" if they are "supported by evidence" (sec. 10 (e) and 10 (f)).

Thus the act gives the Board great latitude in choosing the evidence that it will believe and gives great effect to findings that rest on that evidence.

The Supreme Court has insisted that the circuit courts of appeals, in reviewing decisions of the Board, adhere strictly to those terms of the act that deal with the Board's findings and with the kind of evidence upon which the Board can rest them (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197 (1938); *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939); *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 79 (1940); *National Labor Relations Board* v. *Automotive Maintenance Mach. Co.*, 315 U.S. 282 (1942); *Foote Bros. Gear & Machine Corp.* v. *National Labor Relations Board*, 311 U. S. 620 (1940); *Link-Belt Co.* v. *National Labor Relations Board*, 311 U.S. 584 (1941)). Anything more than a "modicum," a "scintilla" of evidence is enough, or the Board may rely upon "inferences," "imponderables," "background material," or "the whole congeries of facts."

These clauses of the act have resulted in what the courts have described as "shocking injustices" in the Board's rulings, "assinine reasoning" by the Board, findings "overwhelmingly opposed by the evidence," findings that "strain our credulity," and "remarkable discrimination" on the part of the Board in believing its own witnesses and in disbelieving others. (See for example, *Wilson & Co.* v. *N.L.R.B.*, 126 Fed. 114, 117 (C.C.A. 7, 1942); *Wyman-Gordon Co.* v.

N.L.R.B., 17 L. L. R. (C.C.A. 7, 1946; *N.L.R.B.* v. *Columbia Products Corp.*, 141 Fed. (2d) 687 (C.C.A. 2, 1944); *N.L.R.B.* v. *Union Pacific Stages, Inc.*, 99 Fed. (2d) 153 (C.C.A. 9, 1938), and cases cited therein.

However repugnant to the courts the Board's decisions may seem, the act, by making the Board in effect its own Supreme Court so far as its findings of fact are concerned, renders the courts all but powerless to correct the Board's abuses.

Courts often have deferred to the assumed expertness of the Board when their own judgment would lead them to disagree. The Board's expertness is largely theoretic. See: T. R. Iserman, *op. cit.*, pp. 60–62.

Requiring the Board to rest its rulings upon facts, not interferences, conjectures, background, imponderables, and presumed expertness will correct abuses under the act.

The bill does this, by providing in section 10(b) of the amended Labor Act that "so far as practicable," the new Board's proceedings shall be conducted "in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure." There is no such diversity in the rules of evidence among the several States as to make this clause unduly burdensome to the Board or to its trial examiners. Local lawyers and the Administrator's regional attorneys appearing before the trial examiners can always advise them of oddities in local laws. And, in any event, an error in admitting or excluding evidence can be grounds for reversal only if it is substantial.

To enable the courts to correct glaring errors in the Board's findings, sections 10(e) and 10(f) of the amended act, instead of making the Board's findings of fact "conclusive," provides that they shall have this quality only if they are not against the "manifest weight of the evidence" and are supported by substantial evidence. Although many have urged that the courts be authorized to modify and set aside findings of the Board when they were against the simple weight of the evidence, the committee believes that with a new and *impartial* Board, trials *de novo* in the courts will not be required.

Section 10(c).—This section, dealing with remedies the Board may prescribe, contains these three significant changes.

A. One, in language like that which is applicable to employers who violate section 8(a), authorizes the Board to cease and desist from their adherents who violate section 8(b) to cease and desist from their unfair practices and to take such affirmative action as will effectuate the policies of the act. The Board is authorized to deprive them of rights under the act for a period of not more than 1 year. Under this clause the Board may also require a union to reimburse to an employee whom it causes to lose pay the amount he loses.

B. A second change forbids the new Board to continue the admitted practice of the old Board of discriminating against independent unions, simply because they are independent, by ordering with respect to them more drastic penalties than it orders for unions affiliated with the A.F. of L. or the C.I.O. in similar circumstances. (See hearings, House Special Committee to Investigate the N.L.R.B., part 9, pages 1867, 1908–9, 2052–3, part II, page 2242; *Matter of E. T. Train Lock Co.*, 24 N. L. R. B. 1190 (1940); *Matter of Eagle-Pisley Mining & Smelting Co.*, 16 N.L.R.B. 727 (1939)).

C. A third change forbids the Board to reinstate an individual unless the weight of the evidence shows that the individual was not suspended or discharged for cause. In the past, the Board, admitting that an employee was guilty of gross misconduct, nevertheless frequently reinstated him, "inferring" that, because he was a member or an official of a union, this, not his misconduct, was the reason for his discharge.

Matter of Wyman-Gordon Company, 62 N.L.R.B. 561 (1945), is typical of the Board's attitude in such cases. In that case, the employer discharged an active union member for interrupting other employees at their work on materials for war. The Board reinstated the man with back pay. The company appealed. In court, the Board agreed that the employee's conduct did not "seriously" interfere with output for war, or cause "undue" spoiling of materials, and that the employee was not "enormously" delinquent. Declaring that "*any* interference, slight or moderate" justified discharge, the court said (17 L.L.R. 823):

> If it were not before us in print, we would find it difficult to believe that any responsible person or agency would resort to such asinine reasoning.

The change made in section 10(e) on this subject is intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct. The bill will require that the new Board's rulings shall be consistent with what the Supreme Court said in upholding the act, that it (the act)—

> does not interfere with the normal right of the employer to select its employees or to discharge them. * * * the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than * * * intimidation and coercion.

(*Labor Board* v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1, 45–46). The Board may not "infer" an improper motive when the evidence shows cause for discipline or discharge.

Section 10(d).—This section, concerning modification of the Board's orders, is substantially unchanged.

Section 10(e).—It has been the practice of the present Board to obtain orders of the courts enforcing its orders even when the persons against whom the Board issues its orders comply with them. Under the new section 10(e), the Administrator will proceed in court against parties only when they fail to comply with the Board's orders, or thereafter violate the orders.

In discussing section 10(b), reference has been made to changes in the rules of evidence before the Board and to the conclusiveness of the Board's findings on petitions for review and petitions for enforcement under sections 10(e) and 10(f). These changes, it is believed, will require the Board to support its rulings with facts, and will end the substitution of assumed "expertness" for evidence insofar as the new Board is concerned.

Section 10(f).—This section, concerning petitions for review, contains the changes concerning the Board's findings that have been discussed in connection with sections 10(b) and 10(e).

Appeals from certifications.—This section brings about another important reform in procedure. The present act permits appeals from

certifications by the Board only by employers, and then only through cumbersome proceedings that always involve risk of strike and of a finding that, by following the only course by which he could appeal, the employer committed an unfair labor practice, no matter how much in good faith he doubted the validity of the certification. This procedure is unfair to everyone; the union that wins, which frequently must wait for many months to exercise its rights; the union that loses, which has no appeal at all no matter how wrong the certification may be; the employees, who also have no appeal; and the employer, for whom an appeal involves grave risks. The bill permits any person interested to appeal from a certification, as from a final order of the Board.

Sections 10 (g), (h), and (i) remain unchanged in the amended act.

Section 11.—Besides making such changes as are required by creating an Administrator of the act, this section, dealing with subpenas and serving documents, clarifies one point. Heretofore it has not been clear whether or not, in unfair labor practice cases, the Board had authority to subpena witnesses in advance of its hearings. The Board sometimes has done so, but it does not appear to have tested this point in court. The bill provides that the Administrator may obtain and serve subpenas and examine witnesses in advance of hearings in representation cases under section 9, but that he may not require employers, unions, or employees to disclose their evidence in advance of hearings in unfair labor practice cases under section 10.

Section 12.—In discussing section 2 (13), (14), (15), (16), and (17), this report refers to the definitions of sympathy strikes, illegal boycotts, jurisdictional strikes, monopolistic strikes, and featherbedding, and states reasons for forbidding these and other indefensible practices that, fortunately, are common only among the more irresponsible unions. Section 12 does this.

Under this section, these practices are called by their correct name, "unlawful concerted activities." It is provided that any person injured in his person, property, or business by an unlawful concerted activity affecting commerce may sue the person or persons responsible for the injury in any district court having jurisdiction of the parties and recover damages. The bill makes inapplicable in such suits the Norris-LaGuardia Act, which heretofore has protected parties to industrial strife from the consequences of their lawlessness, no matter how violent their disputes became. Persons who engage in unlawful concerted activities are subject to losing their rights and privileges under the act.

Section 12 (a) (1).—This section forbids force, violence, physical obstruction or threats thereof in labor disputes, and forbids picketing in numbers or in ways other than those reasonably necessary to give notice of the existence of a labor dispute at the place being picketed. The clause preserves the right of free speech, but forbids exercising it by engaging in mass picketing and by intimidation. What is reasonable in any case depends upon the facts of that case. Courts frequently have specified how many pickets should patrol entrances to plants, how far apart they should remain, and other conditions for picketing that preserve order and prevent intimidation, and there are many precedents for establishing what conduct is reasonable on picket lines.

Section 12(a)(2).—There obviously is no justification for picketing a place of business at which no labor dispute exists.

Section 12(a)(3).—In discussing the definitions of sympathy strikes, jurisdictional strikes, monopolistic strikes, illegal boycotts, sit-down strikes, and feather bedding, the committee has referred to conditions that have made it necessary to outlaw these practices and to provide means for preventing them and for providing remedies for them when they occur.

Strikes and other concerted activities in lieu of using peaceful procedures for settling disputes that the National Labor Relations Act provides are unjustifiable on any grounds. Congress has provided elaborate machinery for handling disputes over recognition, bargaining rights, and alleged unfair labor practices. Those who turn to striking instead of using the procedures that Congress has provided certainly are not entitled to the immunity that they now enjoy under the Labor Act and other laws.

Section 13.—Since by the Labor Act Congress preempts the field that the act covers insofar as commerce within the meaning of the act is concerned, and since when this report is written the courts have not finally ruled upon the effect upon employees of employers engaged in commerce of State laws dealing with compulsory unionism, the committee has provided expressly in section 13 that laws and constitutional provisions of any State that restrict the right of employers to require employees to become or remain members of labor organizations are valid, notwithstanding any provision of the National Labor Relations Act. In reporting the bill that became the National Labor Relations Act, the Senate committee to which the bill had been referred declared that the act would not invalidate any such State law or constitutional provision. The new section 13 is consistent with this view.

Section 14.—This separability clause is identical with the one in the present act.

Section 15.—Unchanged.

Section 102.—This section abolishes the present Labor Board and provides for the transfer of certain of its records and property to the Labor-Management Relations Board, which the bill herewith reported creates.

The section provides also for transfer of proceedings from the old Board to the new Board without abatement of those that could have been maintained had the amended act been in effect when they were instituted. It provides also that no act that was not an unfair labor practice when the amended act takes effect and that is not continued after the effective date of the new act shall be punishable as an unfair labor practice under the amended act.

The section further provides that no act or practice that a union's constitution or bylaws requires shall constitute an unfair labor practice under section 8(c) of the amended act until 1 year after the enactment of the bill. It also provides that section 9 of the new act shall not affect certifications of representatives that were issued under the present act until 1 year after the date of the certification or, if there is in effect a collective-bargaining agreement that was entered into before the enactment of the amended act, until the end of the contract period or until 1 year after the date of the enactment of the amended act, whichever first occurs.

Title II.—Conciliation of Labor Disputes in Industries Affecting Commerce

Sections 201 and 202 create an Office of Conciliation, an independent agency, and transfer to it the functions of the United States Conciliation Service, and define the duties of the Office of Conciliation.

Sections 203 to 206 give the President, through the district courts of the United States, power to deal with strikes that have resulted in or imminently threaten to result in the cessation or substantial curtailment of interstate or foreign commerce in essential public services. The court is granted jurisdiction to issue an injunction if it finds that the cessation or substantial curtailment of commerce alleged exists and that the public health, safety, or interest is imperiled or threatened thereby.

These sections of the bill are, except for minor drafting changes, the same as those contained in H.R. 2861, reported by the committee under date of April 3, 1947 (Rept. No. 235). Their provisions are fully explained in that report.

Title III.—Monopolistic Practices of Labor Organizations; Liability of Labor Organizations; Miscellaneous Provisions

Section 301 contains the amendments to the Clayton Act that were included in the Case bill of last year, and which at that time passed the House by an overwhelming majority. The provisions of section 301 (a) make one addition to the Case bill provisions, by treating as activities which are not accorded the protection of the exemptions of labor organizations under sections 6 and 30 of the Clayton Act, those activities which are unlawful under section 12 of the amended National Labor Relations Act.

Section 302 deals in improved form with another subject which was included in last year's Case bill. It provides that actions and proceedings involving violations of contracts between employers and labor organizations may be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if the agreement affects commerce, or the court otherwise has jurisdiction of the cause. Thus if the district court has jurisdiction of the cause by reason of diversity of citizenship, the suit may be brought.

It is provided that a labor organization whose activities affect commerce is to be bound by the acts of its agents and may sue or be sued as an entity in the courts of the United States. A money judgment against a labor organization can be enforced only against the organization, and not against the individual members.

Provision is made for serving process on labor organizations and for determining the venue of suits by or against them.

When labor organizations make contracts with employers, such organizations should be subject to the same judicial remedies and processes in respect of proceedings involving violations of such contracts as those applicable to all other citizens. Labor organizations cannot justifiably ask to be treated as responsible contracting parties unless they are willing to assume the responsibilities of such contracts to the same extent as the other party must assume his. Public opinion polls in evidence before the committee show that nearly 75 percent of the

union members themselves concur in this view. For this reason, not only does the section, as heretofore pointed out, make the labor organization equally suitable, but it also makes the Norris-LaGuardia Act inapplicable in suits and proceedings involving violations of contracts which labor organizations voluntarily and with their eyes open enter into. Among other things, this change makes applicable in such cases as these the rules of evidence that apply in suits involving all other citizens.

Section 303 contains provisions requiring labor organizations whose members are employed in industries affecting commerce to make detailed annual reports to their members. Control of the content of such reports and the manner in which the data therein is presented, is secured by requiring that such reports also be filed with the Secretary of Labor along with a sworn statement that the report so filed was the one actually sent to each member. This section is also one widely demanded by union members.

Section 304 places on a permanent basis the provisions which were contained in the War Labor Disputes Act whereby labor organizations were prohibited from making political contributions to the same extent as corporations. In addition this section extends the prohibition, both in the case of corporations and labor organizations, to include expenditures as well as contributions. Moreover, expenditures and contributions in connection with primary elections and political conventions are made unlawful to the same extent as those made in connection with the elections themselves.

Changes in Existing Laws

In compliance with paragraph 2a of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as introduced, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

National Labor Relations Act

[findings and declaration of] policy

Section 1. [The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employers who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of strife and unrest, by encouraging

practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.]

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by [encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.] *providing means for protecting the rights of employers, employees, and their representatives in their relations one with the other, and for preventing the commission by either of unfair labor practices.*

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person' 'includes one or more individuals, partnerships, associations, corporations, *labor organizations,* legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting [in the interest] *as an agent* of an employer, directly or indirectly, but shall not include the United States *or any instrumentality thereof,* or any State or political subdivision thereof, or any person subject to the Railway Labor Act, *as amended from time to time,* or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization, *or any corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation.*

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual [whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.] *who has been discharged by his employer where such discharge constitutes an unfair labor practice under section 8 (a) and who has not obtained any other regular and substantially equivalent employment, and shall also include any individual whose work has ceased as a consequence of a labor dispute (unless such individual has been replaced by a regular replacement, or has obtained other regular and substantially equivalent employment, or is receiving unemployment compensation from any State), but shall not include any individual employed as a supervisor, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual engaged in agricultural labor (as defined in section 1426 (h) of the Internal Revenue Code) or any individual employed by any person other than an employer as herein defined, or any individual having the status of an independent contractor. For the purposes of this paragraph a "regular replacement" means an individual who replaces an individual whose work has ceased as a consequence of a labor dispute, if the duration of his employment is not to be determined with reference to the existence or duration of such labor dispute.*

(4) The term [''representatives''] "*representative*" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in

the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

[(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

[(10) The term "National Labor Relations Board" means the National Labor Relations Board created by section 3 of this Act.

[(11) The term "old Board" means the National Labor Relations Board established by Executive Order Numbered 6763 of the President on June 29, 1934, pursuant to Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), and reestablished and continued by Executive Order Numbered 7074 of the President of June 15, 1935, pursuant to Title I of the National Industrial Recovery Act (48 Stat. 195) as amended and continued by Senate Joint Resolution 133 approved June 14, 1935.]

(9) The term "Labor-Management Relations Board" means the Labor-Management Relations Board created by section 3 of this Act.

(10) The term "Administrator" means the Administrator of the National Labor Relations Act provided for in section 4.

(11) The terms "bargain collectively" and "collective bargaining" as applied to any disputes between an employer and his employees or their representative, mean compliance with the following minimum requirements:

(A) If an agreement is in effect between the parties providing a procedure for adjusting or settling such disputes, following such procedure.

(B) If no such agreement is in effect, complying with the following procedure:

(i) receipt of any proposal or counterproposal of the other party;

(ii) discussion of such proposal and any counterproposal at a conference with the other party held at a time mutually agreeable to the parties or, in the absence of such an agreement, within a reasonable time after such receipt;

(iii) continued discussion of the matters in dispute at not less than four separate additional conferences with the other party held within the thirty-day period following the initial conference, unless agreement is sooner reached;

(iv) if agreement is reached, putting such agreement in writing;

(v) if agreement is not reached by the end of such thirty-day period, complying with the requirements of clause (vi) before authorizing, conducting, or participating in any lockout or strike in connection with such dispute;

(vi) The following requirement shall be applicable as a condition of authorizing, conducting, or participating in, any lockout or strike in connection with the dispute:

(a) The collective-bargaining representative shall notify the Administrator of its desire to have a strike vote conducted in connection with the dispute;

(b) Within five days thereafter, such representative shall inform the employees in writing of the issues in the dispute and the representative's position thereon. Copies of such statement shall be sent by registered mail to the employer and to the Administrator;

(c) The Administrator shall promptly notify the employer of the representative's request for the strike vote;

(d) The employer shall have a reasonable time, fixed by the Administrator, to inform the employees of the issues and his position thereon, and of his last offer of settlement. Copies of such statement shall be sent by registered mail to the representative and to the Administrator;

(e) Within a reasonable time thereafter, the Administrator shall, after due notice to the parties, provide for a secret ballot of the employees in the bargaining unit concerned on the question whether

such employees desire to reject the employer's last offer of settlement and to strike;

(f) The ballot shall be conducted in such manner as may be mutually agreed upon by the parties, or, in the absence of such agreement, conducted and supervised by or under the direction of the Administrator;

(g) The ballot shall read: "Shall the employer's last offer of settlement of the current dispute be rejected and a strike be called?"

(h) A lockout or strike may not be authorized or conducted unless in such secret ballot a majority of the employees in the bargaining unit concerned vote to reject the employer's last offer of settlement, and to strike.

Such terms shall not be construed as requiring that either party reach an agreement with the other, accept any proposal or counterproposal either in whole or in part, submit counterproposals, discuss modification of an agreement during its term except pursuant to the express provisions thereof, or discuss any subject matter other than the following: (i) Procedures and practices relating to wage rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, layoff, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects.

(12) The term "supervisor" means any individual—

"(A) who has authority, in the interest of the employer—

(i) to hire, transfer, suspend, lay off, recall, promote, demote, discharge, assign, reward, or discipline any individuals employed by the employer, or to adjust their grievances, or to effectively recommend any such action; or

(ii) to determine, or make effective recommendations with respect to, the amount of wages earned by any individuals employed by the employer, or to apply, or to make effective recommendations with respect to the application of, the factors upon the basis of which the wages of any individuals employed by the employer are determined, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the exercise of independent judgment:

"(B) who is employed in labor relations, personnel, employment, police, or time-study matters, or in connection with claims matters of employees against employers, or who is employed to act in other respects for the employer in dealing with other individuals employed by the employer, or who is employed to secure and furnish to the employer information to be used by the employer in connection with any of the foregoing, or

"(C) who is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.

(13) The term "sympathy strike" means a strike against an employer, or other concerted interference with an employer's operations, which is called or conducted not by reason of any dispute between the employer and the employees on strike or paticipating in such concerted interference, but rather by reason of either (A) a dispute involving another employer or other employees of the same employer, or (B) disagreement with some governmental policy.

(14) The term "illegal boycott" means a concerted refusal, or threat of a concerted refusal, by individuals in the course of their employment—

(A) to render services, where an object of the refusal or threat is to force a person to do business or to cease doing business with another person; or

(B) to render services, where an object of the refusal or threat is to force a person to deal with or to cease dealing with a labor organization as the representative of individuals other than themselves; or

(C) to use, install, handle, transport, or otherwise deal with particular articles, materials, or commodities by reason of the origin or proposed destination thereof, or by reason of the character of a prior or proposed future handling thereof, or by reason of the policies or practices of any person (not their employer) having any direct or indirect relationship thereto.

(15) the term "jurisdictional strike" means a strike against an employer, or other concerted interference with an employer's operations, an object of which is

to require that particular work be assigned to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class.

(16) The term "monopolistic strike" means a strike or other concerted interference with an employer's operations which results from any conspiracy, collusion, or concerted plan of acting between employees of competing employers or between representatives of such employees, where the employees of such competing employers do not have a common bargaining representative certified under section 9.

(17) The term "featherbedding practice" means a practice which has as its purpose or effect requiring an employer—

(A) to employ or agree to employ any person or persons in excess of the number of employees reasonably required by such employer to perform actual services; or

(B) to pay or give or agree to pay or give any money or other thing of value in lieu of employing, or on account of failure to employ, any person or persons, in connection with the conduct of the business of an employer, in excess of the number of employees reasonably required by such employer to perform actual services; or

(C) to pay or agree to pay more than once for services performed; or

(D) to pay or give or agree to pay or give any money or other thing of value for services, in connection with the conduct of a business, which are not to be performed; or

(E) to pay or agree to pay any tax or exaction for the privilege of, or on account of, producing, preparing, manufacturing, selling, buying, renting, operating, using, or maintaining any article, machine, equipment, or materials; or to accede to or impose any restriction upon the production, preparation, manufacture, sale, purchase, rental, operation, use, or maintenance of the same, if such restriction is for that purpose of preventing or limiting the use of such article, machine, equipment, or materials.

[NATIONAL LABOR] *LABOR-MANAGEMENT* RELATIONS BOARD

SEC. 3. (a) There is hereby created a board, to be known as the [“National Labor Relations Board” (hereinafter referred to as the “Board”)] *“Labor-Management Relations Board” (in this Act called the “Board”)*, which shall be composed of three members who shall be appointed by the President by and with the advice and consent of the Senate. *Not more than two of the members shall be members of the same political party and all of the members shall be appointed with reference to their fitness to perform the functions imposed upon them by this Act in a fair and impartial manner.* [One of the original members] *Of the members first appointed after the date of the enactment of the Labor-Management Relations Act, 1947, one* shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, *from such date,* but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. [The President] *The Board* shall *annually* designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

[SEC. 4. (a)] *(d)* Each member of the Board shall receive a salary of [$10,000] *$15,000* a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board [shall] *may* appoint, without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended, an executive secretary, [and such attorneys, examiners, and regional directors,] *and a secretary to each member,* and [shall] *may* appoint such other *officers and* employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary for the proper

performance of its duties and as may be from time to time appropriated for by Congress. *The Board may not appoint or employ any attorneys except (1) such legal assistants as each member may require, (2) employees to maintain an index and digest of its decisions, and (3) trial examiners to conduct hearings.* [The Board may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court.] Nothing in this Act shall be construed to authorize the Board *or the Administrator* to appoint individuals for the purpose of conciliation or mediation [(] or for statistical work [)] [, where such service may be obtained from the Department of Labor].

[(b) Upon the appointment of the three original members of the Board and the designation of its chairman, the old Board shall cease to exist. All employees of the old Board shall be transferred to and become employees of the Board with salaries under the Classification Act of 1923, as amended, without acquiring by such transfer a permanent or civil-service status. All records, papers, and property of the old Board shall become records, papers, and property of the Board, and all unexpended funds and appropriations for the use and maintenance of the old Board shall become funds and appropriations available to be expended by the Board in the exercise of the powers, authority, and duties conferred on it by this Act].

[(c)] *(e)* All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

ADMINISTRATOR OF THE NATIONAL LABOR RELATIONS ACT

"Sec. 4. There is hereby established as an independent agency in the executive branch of the Government an office of Administrator of the National Labor Relations Act (in this Act called the 'Administrator'). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, with reference to his fitness to perform the functions imposed upon him by this Act in a fair and impartial manner, and shall receive compensation at the rate of $15,000 per annum. He shall not engage in any other business, vocation, or employment. The Administrator may establish or utilize such regional, local, or other agencies, as may from time to time be needed. The Administrator may appoint such officers and employees as he may from time to time find necessary to assist him in the performance of his duties, except that the heads of the regional offices and the chief legal officer in each of such offices shall be appointed by the President, by and with the advice and consent of the Senate. Attorneys appointed under this subsection may, in the discretion of the Administrator, appear for and represent the Administrator in any case in court. In case of a vacancy in the office of the Administrator, or in case of the absence of the Administrator, the President shall designate the officer or employee of the Administrator who shall serve as Administrator during such vacancy or absence. Expenses of the Administrator, including all necessary traveling and subsistence expenses incurred by the Administrator or employees of the Administrator under his orders while away from his or their official station, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Administrator or by any employee he designates for that purpose. It shall be the duty of the Administrator, as hereinafter provided, to investigate charges of unfair labor practices, to issue complaints if he has reasonable cause to believe such charges are true, to prosecute such complaints before the Board, to make application to the courts for enforcement of orders of the Board, to investigate representation petitions and conduct elections under section 9, and to exercise such other functions as are conferred on him by this Act. The Administrator shall be made a party to all proceedings before the Board under section 10, and shall present such testimony therein and request the Board to take such action with respect thereto as in his opinion will carry out the policies of this Act.

LOCATION OF PRINCIPAL OFFICES OF BOARD AND OF THE ADMINISTRATOR

SEC. 5. The principal [office] *offices* of the Board *and of the Administrator, respectively,* shall be in the District of Columbia, but [it] *they may* [meet and] exercise any or all of [its] *their respective* powers at any other place. The Board may, by one or more of its members or by [such agents or agencies as it

may designate, prosecute any inquiry necessary to its functions] *any trial examiner or examiners, conduct hearings* in any part of the United States. [A member who participates in such an inquiry shall not be disqualified] *The conducting of any such hearing by a member shall not disqualify such member* from subsequently participating in a decision of the Board in the same case.

SEC. 6. [(a)] The Board *and the Administrator, respectively,* shall have authority from time to time, *in the manner prescribed by the Administrative Procedure Act,* to make, amend, and rescind such [rules and] regulations as may be necessary to carry out [the provisions of] *their respective functions under* this Act. [Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.]

RIGHTS OF EMPLOYEES

SEC. 7. (*a*) Employees shall have the right to self-organization, to form, join, or assist any labor [organizations] *organization,* to bargain collectively through representatives of their own choosing, and to engage in *other* concerted activities[.] (*not constituting unfair labor practices under section 8 (b), unlawful concerted activities under section 12, or violations of collective-bargaining agreements*) for the purpose of collective bargaining or other mutual aid or protection.

(*b*) *Members of any labor organization shall have the right to be free from unreasonable or discriminatory financial demands of such organization, to freely express their views either within or without the organization on any subject matter without being subjected to disciplinary action by the organization, and to have the affairs of the organization conducted in a manner that is fair to its members and in conformity with the free will of a majority of the members.*

UNFAIR LABOR PRACTICES

SEC. 8. [(a)] It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 (*a*).

(2) To dominate or interfere with the formation or administration of any labor organization [or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay] (*A*) *by preventing such organization from determining independently or out of the employer's presence its own policies or planning independently or out of the employer's presence its own objects and courses of action, or* (*B*) *by giving, or offering to give, any reward, favor, or other thing of value to any person in a position of trust in such organization for the purpose of perverting his judgment or corrupting his conduct in respect to such organization, or* (*C*) *by assisting any labor organization* (*i*) *through deducting from the wages of any employee dues, fees, assessments, or other contributions payable by the employee to a labor organization, or collecting or assisting in the collection of any such dues, fees, assessments, or other contributions, unless such action has been voluntarily authorized in writing by such employee and such authorization is revocable by the employee at any time upon thirty days' written notice to the employer, or* (*ii*) *through making payments of any kind to such organization, or to any fund or trust in respect of the management of which, or the disbursements from which, such organization can, either alone or in conjunction with any other person, exercise any control, directly or indirectly;*

(3) 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 *by any employee or any individual seeking employment as an employee;* [: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.]

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) To refuse to bargain collectively with the representatives of his employees [, subject to the provisions of section 9 (a)] *currently recognized by the employer or certified as such under section 9.*

(b) It shall be an unfair labor practice for an employee, or for a representative or any officer thereof, or for any individual acting for or under the direction of a representative, or for or under the direction of any officer thereof—

(1) By intimidating practices, to interfere with the exercise by employees of rights guaranteed in section 7 (a) or to compel or seek to compel any individual to become or remain a member of any labor organization;

(2) In the case of a representative acting and currently recognized by the employer, or certified under section 9, as the representative of employees, to refuse to bargain collectively with the employer;

(3) To call, authorize, engage in, or assist any strike or other concerted interference with an employer's operations, an object of which is to compel the employer to accede to the inclusion in a collective bargaining agreement of any provision which under section 2 (11) is not included as a proper subject matter of collective bargaining.

(c) It shall be an unfair labor practice for a labor organization or any officer thereof, or for any individual acting for or under the direction of a labor organization or for or under the direction of any officer thereof—

(1) To interfere with, restrain, or coerce individuals in the exercise of rights guaranteed in section 7 (b);

(2) To impose initiation fees in amounts in excess of $25 per member unless the Board shall find that initiaation fees greater than that amount are reasonable under the circumstances; or to impose any dues, or general or special assessments that are not uniform upon the same class of members, or are in excess of such reasonable amounts as the members thereof, whom such organization represents or seeks to represent as a representative under section 9, by a majority of those voting, after due notice to the membership, shall authorize; or to impose any tax or exaction on any person for any work permit or other arrangement whereby the person paying such tax or exaction would receive in return therefor the ostensible right to work or to conduct his business free from interference from such organization;

(3) To compel any member to agree to contribute to, or participate in, any insurance or other benefit plan;

(4) To deny to any member the right to resign from the organization at any time;

(5) To fine or discriminate against any member, or subject him to any discipline or penalty on account of his having criticized, complained of, or made charges or instituted proceedings against, the organization or any of its officers, or on account of his having supported or failed to support any candidate for civil office or for any office in the labor organization, or on account of his having supported or failed to support any proposition submitted to the labor organization, or to citizens generally, for a vote;

(6) To expel or suspend any member without affording him an opportunity to be heard, or on any ground other than (A) nonpayment of dues, (B) disclosing confidential information of the labor organization, (C) participating in a violation of a collective-bargaining agreement to which the labor organization was a party, (D) being a member of the Communist Party, or actively and consistenly promoting or supporting the policies, teachings, doctrines of the Communist Party, or advocating, or being a member of any organization that advocates, the overthrow of the United States Government by force, (E) conviction of a felony, or (F) engaging in scandalous conduct tending to bring the labor organization into disrepute or in other conduct subjecting it to civil damages or criminal penalties;

(7) To take any action or make any arrangements that would have the effect of requiring an employer to deny employment to, or terminate the employment of, any individual (A) to whom membership in such organization was not available on the same terms and conditions as those applicable to other members, or (B) to whom membership in such organization was denied on some ground other than failure to tender the initiation fees and dues uniformly required as a condition of acquiring or retaining membership therein;

(8) To deny a secret ballot and an open count of ballots cast, on any questions involving fees, dues, assessments, fines, striking, the nomination and election of officers of local labor organizations, or the explusion of any member; or to fail to hold elections of its officers and elective personnel at

least once every four years; or to direct or call a strike unless at least a majority of those voting on the question have, after the membership has received due notice of proposed balloting thereon, authorized such strike.

(9) To employ, engage, or direct any person to spy upon any member respecting his exercise or enjoyment of any lawful right, or to intimidate his family, or injure the person or property of such member of his family.

(10) To fail to keep adequate record of its financial transactions or to fail to present annually to each member whom it represents or seeks to represent as a representative under section 9, within sixty days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement.

(d) The following shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act:

(1) Expressing any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, if it does not by its own terms threaten force or economic reprisal.

(2) Permitting employees to confere with the employer during working hours without loss of time or pay.

(3) Forming or maintaining by the employer of a committee of employees and discussing with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions, if the Board has not certified or the employer has not recognized a representative as their representative under section 9.

(4) Agreeing to, and after the procedure specified in section 9 (g) has been complied with (but not before), making effective and carrying out, provisions of a collective-bargaining agreement between an employer and a labor organization that is certified under section 9 as the representative of the employees in any bargaining unit of the employer (if such provisions are not in conflict with the law of any State in which the agreement is to be carried out), whereby the employer obligates himself in either of the following respects:

(a) Not to retain in his employ in such unit any employee who, being a member of such organization thirty days from the date such provisions become effective, or becoming a member thereafter, fails to maintain his membership therein;

(b) Not to retain in his employ in such unit any employee who fails to become a member of such organization within not less than thirty days after his employment, or within not less than thirty days after the date such provisions become effective, whichever last occurs, or who, having become a member within such period, fails to maintain his membership therein;

except that no such provision may have the effect of denying employment or continued employment to any individual who on or before the time required tenders to the ogranization the initiation fees and dues regularly imposed as a condition of membership therein and to whom, in spite of such tender, membership therein was denied, or of denying employment or continued employment to an individual who has been suspended or expelled from the organization on some ground other than nonpayment of regular dues.

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purpose 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 purpose of collective bargaining [in respect to rates of pay, wages, hours of employment, or other conditions of employment]: *Provided,* That any individual employee or [a] group of employees shall have the right at any time to present grievances to, *and settle grievances with,* their employers *without the intervention of the bargaining representative if the settlement is not inconsistent with the terms of a collective-bargaining agreement then in effect.*

(b) The Board shall *upon application under, and subject to the provisions of subsection (f) of this section,* [decide] *determine* in each case whether, in order to insure to employees [the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act,] *full freedom to exercise their rights under section 7 (a),* the unit appropriate for [the purposes of collective bargaining] *that purpose* shall be the employer unit, craft unit, plant unit, or subdivision thereof.

[(e) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, 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.]

(c) Whenever written application is made to the Administrator under oath—

(1) by a representative representing at least 30 per centum of the employees in a unit claimed by such representative to be appropriate for the purposes specified in subsection (b), requesting an election to determine whether the employees in such unit do or do not desire to designate such representative as their representative for collective bargaining; or

(2) by employees, or some person acting for employees, who constitute at least 30 per centum of the employees in a unit claimed by them to be appropriate for the purposes specified in subsection (b), requesting an election to determine whether a representative that has been certified or is currently recognized by the employer as the bargaining representative is no longer a representative under subsection (a) of this section; or

(3) by an employer alleging that any representative has presented to him a claim that such representative represents a majority of the employees in a specified unit for the purposes of collective bargaining;

the Administrator shall investigate such application, and if he has reasonable cause to believe that the facts stated therein are true and that a question of representation affecting commerce exists, he shall transmit such application, together with all documents pertaining thereto, to the Board.

(d) The Broad thereupon shall give due notice to interested persons of the filing of such application and set the matter for hearing within a resonable time. Any interested person may intervene under regulations prescribed by the Board. If upon the evidence adduced at the hearing the Board finds that a question of representation affecting commerce exists and that the action requested in the application is necessary in order to effectuate the purposes specified in subsection (b), it shall by order determine the unit appropriate for the purposes so specified (subject, however, to the limitations of subsection (f), shall direct the Administrator to provide for a secret ballot of the employees in the unit so determined, and shall certify the results thereof.

[(d)] *(e)* Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following [an investigation] *a hearing* pursuant to subsection [(c)] *(d)* of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such [investigation] *hearing* shall be included in the transcript of the entire record required to be filed under subsections [10 (e) or 10 (f)] (e) or (f) of section 10, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(f) *The Board shall exercise its powers under subsections (b) and (d) subject to the following limitations:*

(1) A representative that has been designated or acts as the representative of employees of any employer shall be ineligible to be certified as the representative of employees of any competing employer, unless the employees of such employers whom the representative seeks to represent are regularly less than one hundred in number and the plants or other facilities of such employers at which the representative acts and seeks to act as such are less than fifty miles apart, but nothing in this paragraph shall prevent any representatives from being affiliated or associated, directly or through a federation, association, or parent organization, with representatives of employees of competing employers, if the collective bargaining, concerted activities, or terms of collective bargains or arrangements of such representatives are not subject, directly or indirectly, to common control or approval.

(2) Upon application of any interested person or persons, the Board shall direct the Administrator to provide for a separate ballot for any craft, department, plant, trade, calling, profession, or other distinguishable group within a proposed bargaining unit, and shall exclude from the bargaining unit any such group if less than a majority of the employees in it who cast ballots shall have voted for the representative that the Board shall certify for such unit.

(3) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(4) In determining whether a question of representation affecting commerce exists, the same regulations and rules of decision shall apply regardless of the identity of the person or persons filing the application or the kind of relief sought; and in no case shall the Administrator or the Board deny to employees the right to designate or select a representative by reason of an order of the Board with respect to such representative or its predecessor that would not have issued in similar circumstances with respect to a labor organization national or international in scope or affiliated with such an organization.

(5) In all elections held to select representatives for collective bargaining, employees shall be given the choice on the ballot of voting for a representative (including one not appearing on the ballot) or for no representative; and where an election does not result in a majority vote for any representative, there shall be no run-off unless within sixty days following such election a representative receiving votes in such election furnishes the Board satisfactory evidence that it represents more than 50 per centum of the employees in the bargaining unit in question, in which event the run-off shall be between such representative and no representative.

(6) No labor organization shall be certified as the representative of the employees if one or more of its national or international officers, or one or more of the officers of the organization designated on the ballot taken under subsection (d), is a member of the Communist Party or by reason of active and consistent promotion or support of the policies, teachings and doctrines of the Communist Party can reasonably be regarded as being a member of or affiliated with such party, or believes in, or is a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force.

(7) No election shall be directed in any bargaining unit or any subdivision thereof, within wihch, in the preceding twelve-month period, a valid election shall have been held, except upon an application filed by employees under subsection (c) (2) of this section.

(8) If, pursuant to any election under this section, a bargaining representative is chosen for any unit and a collective-bargaining contract covering such unit is then in effect, certification of the new representative shall not be effective unless and until such new representative becomes a party to such contract and agrees to be bound in all respects by its terms for the remainder of the contract period.

(g) A labor organization which has made an agreement with an employer containing provisions described in section 8 (d) (4) shall be required, as a condition to being entitled to have such provision carried out by the employer, to make application to the Administrator for a secret ballot of the employees in the bargaining unit concerned on the question of whether the employees in such unit desire to have such provision carried out. The application shall be under oath and must state that the employer's agreement to such provision was not obtained either directly or indirectly by means of a strike or other concerted interference with the employer's operations, or by means of any threat thereof. The Administrator shall forthwith give notice to the employer of the filing of such application, and if within such reasonable time thereafter as may be prescribed by regulations of the Board the employer has not made objection to such application, the Administrator shall provide for a secret ballot of the employees in the bargaining unit concerned on the question of whether they desire to have such provision carried out. If within the time so prescribed the employer does make objection to the application and if in the opinion of the Administrator the matter is one concerning commerce, he shall transmit the application, together with all documents pertaining thereto, to the Board, the Board shall thereupon give due notice to interested persons of the filing of such application and set the matter for hearing within a reasonable time. Any interested person may intervene under regulations prescribed by the Board. If upon the evidence adduced at the hearing the Board finds that the facts stated in the application are true and that the matter is one affecting commerce, it shall direct the Adminisrator to provide for a secret ballot of the employees in the bargaining unit concerned on the question of whether they desire such provision of the agreement with the employer carried out. Such provision may be carried out by the employer only if upon the secret ballot taken under this subsection a majority of all of the

employees in the bargaining unit have voted in favor thereof. An election under this subsection shall be effective to authorize the carrying out of provisions described in section 8 (3) (4) only for a period which does not extend beyond the date of the termination of the agreement in which such provisions are included, or beyond two years from the date on which such agreeemnt was entered into, whichever first occurs.

(h) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to [prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.] *adjudicate complaints of unfair labor practices affecting commerce filed by the Administrator. Such power of the Board shall be exclusive.*

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair practice, [the Board, or any agent or agency designated by the Board for such purposes, shall have power to] *the Administrator shall forthwith give notice to the party complained of, shall investigate such charge, and if he has reasonable cause to believe such charge is true, he shall* issue and cause to be served upon such person a complaint stating [the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.] *such charge, except that the Administrator shall not have power to issue a complaint stating a charge of any unfair labor practice that occurred more than six months prior to the date on which such charge was filed with the Administrator, or stating a charge of any unfair labor practice that was filed with the Administrator more than six months prior to such issuance. The person complained of shall have twenty days within which to answer and serve such answer on the Administrator, unless such period is extended by the Administrator. The Administrator shall file the complaint and any answer thereto with the Board. Upon application of the Administrator or any person charged in the complaint, the Board shall set the case for hearing before the Board or a member thereof, or before a designated trial examiner or examiners, at a place which the Board shall fix, not less than fifteen days after the making of such application. Any such complaint or answer may, with the approval of the Board, or with the approval of the member, examiner, or examiners conducting the hearing, be amended at any time prior to the issuance of an order based thereon.* The person so complained of shall have the right to [file an answer to the original or amended complaint and to] appear in person or otherwise [and] give [testimony] *evidence* at the place and time fixed [in the complaint] *by the Board.* In the discretion of [the member, agent, or agency conducting the hearing or] the Board, or the member, examiner, or examiners conducting the hearing, any other person may be allowed to intervene in the said proceeding and to [present testimony] *give evidence.* [In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.] *Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C. title 28, secs. 723–B, 723–C).*

(c) The [testimony taken by such member, agent or agency of the Board] *evidence before the Board, member, examinr, or examiners* shall be reduced to writing and filed with the Board. Thereafter [, in its discretion,] *upon application of any party,* the Board upon notice may, *in its discretion,* [take] *receive* further [testimony] *evidence* or hear argument. If upon [all the testimony taken] *the weight of the evidence* the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any [such] unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cause and desist from such unfair labor practice, and to take such affirmative

action [, including reinstatement of employees with or without back pay,] *requested in the complaint (which in the case of unfair labor practices under section 8 (a) may include reinstatement of employees with or without back pay, and in the case of unfair labor practices under section 8(b) or 8(c) may include deprivation of rights under this Act for a period not exceeding one year)* as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time *to the Administrator* showing the extent to which [it] *he* has complied with the order. If upon [all the testimony taken] *the weight of the evidence* the Board shall *not* be of the opinion *in the case of any person named in the complaint* [that no person named in the complaint] *that such person* has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint *as to such person. No order of the Board shall require or forbid any action by an employer with respect to any labor organization that in similar circumstances would not be required or forbidden with respect to a labor organization national or international in scope, or affiliated with such an organization. No order of the Board shall require the reinstatement of any individual as an employee, or the payment to him of any back pay, if the weight of the evidence shows that such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.*

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may [at any time], *upon application of any party,* upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) [The Board shall have power to] *If any person against whom an order of the Board shall issue fails to comply therewith and within such reasonable period as the Board shall specify, or thereafter shall violate such order, the Administrator shall* petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which *the* application may be made are in vacation, any district court of the United States (including the [Supreme Court] *District Court of the United States for* [of] the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall [certify and] file in the court a transcript of the entire record in the proceeding, *certified by the Board,* including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, [agent or agency,] *or its examiner or examiners,* shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts [, if supported by evidence,] shall be conclusive *unless it is made to appear to the satisfaction of the court either (1) that the findings of fact are against the manifest weight of the evidence, or (2) that the findings of fact are not supported by substantial evidence.* If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, [agent, or agency,] *examiner or examiners,* the court may order such additional evidence to be taken before the Board, its member, [agent, or agency,] *examiner or examiners,* and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and

it shall file such modified or new findings, which [, if supported by evidence,] shall be conclusive *unless it is made to appear to the satisfaction of the court either (1) that such findings of fact are against the manifest weight of the evidence, or (2) that such findings of fact are not supported by substantial evidence,* and *the Board* shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board (*including an order or certification under section 9*) granting or denying in whole or in part the relief sought may obtain a review of such order *or certification* in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the *United States* Court of Appeals [of] *for* the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside *or, in the case of a certification, that the certification be set aside.* A copy of such petition shall be forthwith served upon the [Board] *Administrator*, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleadings and testimony upon which the order complained of was entered and the findings and order *or certification* of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the [Board] *Administrator* under subsection (e), and shall have the same exclusive jurisdiction to grant to the [Board] *petitioner* such temporary relief or restraining order as it deems just and proper and in like manner to make and enter a decree enforcing, modifying, and enforcing as [so] modified, or setting aside in whole or in part the order of the Board, *or affirming or setting aside the certification; and* the findings of the Board as to the facts[, if supported by evidence, shall in like manner be conclusive.] *shall have the same weight as in the case of an application by the Administrator.*

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not unless specifically ordered by the court, operate as a stay of the Board's order *or certification.*

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U.S.C., title 29, secs. 101–115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

INVESTIGATORY POWERS

SEC. 11. For the purpose of [all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—] *any proceeding before the Board, or before a member, examiner, or examiners thereof, or for the purpose of any investigation by the Administrator under section 9—*

(1) [The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue] The Board, or any member thereof, or any trial examiner shall, upon application of the Administrator or any party to such proceedings, forthwith issue to the Administrator or to such party as the case may be, in the name of the *Board*, subpenas requiring the attendance and testimony of witnesses [and] *or* the production of any evidence [that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation] *in such proceeding or investigation requested in such application. Within five days after the service*

of a subpena or any person requiring the production of any evidence in his possession or under his control, such person may petition the Board or its duly authorized agent or agents to revoke, and the Board, or such agent or agents, shall revoke, such subpena if in its, his, or their opinion, as the case may be, the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its, his, or their opinion, as the case may be, such subpena does not describe with sufficient particularity the evidence whose production is required. The Administrator or any member of the Board [, or any agent or agency] *or any examiner or examiners* designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession or the [Supreme Court of] *District Court of the United States for* the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by [the Board] *the person to whom such a subpena was issued by the Board*, shall have jurisdiction to issue to such *persons so guilty of contumacy or refusal to obey* an order requiring [such person] *him* to appear before the Board, its member [agent, or agency,] *examiner, or examiners, or before the Administrator if the subpena so directs*, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending or testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(4) Complaints, orders and other process and papers [of the Board, its member, agent, or agency,] *provided for in this Act* may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned *before the Administrator or* before the Board, its member, [agent, or agency,] *examiner, or examiners*, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the [Board] *Administrator*, upon [its] *his* request, all records, papers, and information in their possession relating to any matter before the Board.

[SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.]

Unlawful concerted activities

Sec. 12. (a) The following activities, when affecting commerce shall be unlawful concerted activities:

(1) By the use of force or violence or threats thereof, preventing or attempting to prevent any individual from quitting or continuing in the employment of, or from accepting or refusing employment by, any employer; or by the use of force, violence, physical obstruction, or threats thereof, preventing or attempting to prevent any individual from freely going from any place and entering upon an employer's premises, or from freely leaving an employer's premises and going to any other place; or picketing an employer's place of business in numbers or in a manner otherwise than is reasonably required to give notice of the existence of a labor dispute at such place of business; or picketing or besetting the home of any individual in connection with any labor dispute.

(2) Picketing an employer's premises for the purpose of leading persons to believe that there exists a labor dispute involving such employer, in any case in which the employees are not involved in a labor dispute with their employer,

(3) Calling, authorizing, engaging in, or assisting—

(A) any sympathy strike, jurisdictional strike, monopolistic strike, or illegal boycott, or any sit-down strike or other concerted interference with an employer's operations conducted by remaining on the employer's premises;

(B) any strike or other concerted interference with an employer's operations, an object of which is to compel an employer to accede to featherbedding practices;

(C) any strike or other concerted interference with an employer's operations, any object of which is (i) to compel an employer to recognize for collective bargaining a representative not certified under section 9 as the representative of the employees, or (ii) to remedy practices for which an administrative remedy is available under this Act, or (iii) to compel an employer to violate any law of any regulation, order, or direction issued pursuant to any law.

(b) Any person injured in his business, person, or property by an unlawful concerted activity affecting commerce may sue the person or persons responsible therefor in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, and may recover the damages sustained by him as a result of such unlawful concerted activity, together with the costs of the suit, including a reasonable attorney's fee.

(c) No provision of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall have any application in any action or proceeding in a court of the United States involving any activity defined in this section as unlawful.

(d) A person who is found to have engaged in any activity herein defined as an unlawful concerted activity shall be subject to deprivation of rights under this Act to the safe extent as a person found to have engaged in an unfair labor practice under section 8 (b) or 8 (c).

(e) Except as specifically provided in this section, nothing in this Act shall be construed to diminish the right of employees to strike or to engage in other lawful concerted activities. No provision of this Act, and no order to any court issued hereunder, shall be construed to require any individual to perform labor or service without his consent.

[LIMITATIONS]

[SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

[SEC. 14. Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a)), as amended from time to time, or of section 77B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided,* That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.]

[SEC. 15.] *Sec. 33.* If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of

[this] *the* Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

[SEC. 16.] *Sec. 14.* This Act may be cited as the "National Labor Relations Act".

SECTION 20 OF THE ACT ENTITLED "AN ACT TO SUPPLEMENT EXISTING LAWS AGAINST UNLAWFUL RESTRAINTS AND MONOPOLIES, AND FOR OTHER PURPOSES", APPROVED OCTOBER 15, 1914

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States: *Provided, That nothing in this paragraph shall be construed in any proceeding, civil or criminal, under the antitrust laws to make lawful any combination, contract, or conspiracy in constraint of trade having as its purpose one or more of the objects which are defined in section 6 as not being legitimate objects of a labor organization.*

ACT OF OCTOBER 15, 1914, ENTITLED "AN ACT TO SUPPLEMENT EXISTING LAWS AGAINST UNLAWFUL RESTRAINTS AND MONOPOLIES, AND FOR OTHER PURPOSES"

SEC. 6. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws: *Provided, however, That it shall not be within the legitimate objects of labor organizations or the officers, representatives, or members thereof, to make any contract, or to engage in any combination or conspiracy, in restraint of commerce if one of the purposes or a necessary effect of such contract, combination, or conspiracy is to join or combine with any person to fix prices, allocate customers, restrict production, distribution, or competition, or impose restrictions or conditions, upon the purchase, sale, or use of any product, material, machine, or equipment, or to engage in any concerted activity declared to be unlawful under section 42 of the National Labor Relations Act, as amended.*

FEDERAL CORRUPT PRACTICES ACT, 1925

SEC. 313. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution *or expenditure* in connection with any election to any political office, *or in connection with any primary election or political convention held to select candidates for any of the foregoing offices*, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation or labor organization which makes any contribution *or expenditure* in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution *or expenditure* by the corporation or labor organization, as the case may be, in violation of this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both. For the purposes of this section "labor organization" shall have the same meaning as under the National Labor Relations Act.

MINORITY REPORT

Introductory

As the minority of this committee we protest most strongly against the tactics adopted by the majority in reporting out this bill. No general meetings of the committee were held to discuss the proposed measure and we have therefore had no opportunity to make our views known. We first received copies of the bill on April 10, 1947, with a statement that any minority report which we cared to submit should be available by April 12. Since the proposed committee bill contained 66 pages of text, covering proposals which have the most far-reaching consequences upon our industrial and labor policies, upon the development of relations between the Federal Government and the States, upon the functioning of important departments of the Government and upon the well-being of our people, it has been manifestly impossible for us, in preparing this minority report, to consider its provisions with the deliberation which the importance of the subject requires. Hence, we do not consider this in any sense a committee bill.

It does not, however, require mature reflection to realize that these proposals are deliberately designed to wreck the living standards of the American people. Under the false guise of "correcting labor abuses" this bill is designed to so weaken, as in effect to repeal, the National Labor Relations Act. By making practically all strikes unlawful it repeals the Norris-LaGuardia Act, signed by President Hoover. By removing the protection of the Clayton Act from practically all trade-union activity, it makes trade unions and their members subject to suits for treble damages under the Sherman Antitrust Act of 1890. It revives the common law doctrine of conspiracy against workers who band together to protect their living standards and thereby throws the law back to where it was in England in the late 1700's. This bill does not merely wipe out labor's gains under the beneficient administration of President Roosevelt; it turns the clock of history back at least a century and a half, and eliminates safeguards and protections which both Republican and Democratic Congresses have sponsored for generations.

It undertakes to do this at a time when rising price levels have begun to squeeze the American worker dry. It does not propose, as the answer to our economic problems, the hope of a rising standard of living made possible by our enormously increased productivity. It does not propose to treat with fairness those millions of American workers who contributed so signally to our victory in war and our reconversion to peace. It only proposes to swell the coffers of gigantic industrial combinations by rendering labor impotent.

By placing heavy penalties upon industry-wide bargaining this bill forces workers to compete with each other to see which can work for the lowest wages. It forces the fair-minded employer to cut his wages to the level of his worst sweat-shop competitor. It strikes from the hand of labor its most effective weapon—the right to strike. It discourages collective bargaining by encouraging individual bargaining, though our experience from 1920 to 1929 proved that individual bargaining can only result in reduction of wages and consequent depression. It revives company unionism as a method by which the employer may sit on both sides of the bargaining table. It lumps together for punitive

action the criminal or slothful employee and the honest and conscientious worker; it deprives the patriotic citizen of long-established rights in order to punish the misguided. The bill is not designed to help employers but to punish labor. It strikes at the established Federal policy of encouraging collective bargaining, to make of the Federal Government a mere police court, taking over functions which have, with few exceptions, been well handled by States and local communities.

While preaching economy, the majority would enormously increase the size of the Federal establishment devoted to the handling of labor problems. While denouncing bureaucracy, the majority would set up two new independent agencies within the executive branch of the Government. While they decry Federal intervention in local affairs, the majority would transfer from State and local authority to the Federal Government, or would duplicate within the Federal Government, matters traditionally left to State action. While purporting to defend free enterprise and free collective bargaining, the majority would throw about employers, employees, and trade-unions shackles not heretofore proposed in any legislative assembly in the country. While pretending to seek industrial peace, the majority have included in their bill proposals which would unsettle labor relations, make illegal countless heretofore accepted industrial practices, destroy many well-recognized legal rights, and bring to labor relations a confusion and chaos which must result in bitter and costly strikes.

The President's Proposals

Under the guise of punishing a few labor leaders, the majority bill strikes down many legitimate rights of the rank and file of labor. It wholly ignores the warning voiced by President Truman in his State of the Union Message to the Congress on January 6, 1947, that—

> * * * We must not, under the stress of emotion, endanger our American freedoms by taking ill-considered action which will lead to results not anticipated or desired.

In reporting the bill the majority has paid little attention to the evidence before the committee on the score of major problems in labor relations and labor disputes dealt with in the bill. This bill could have been written by the would-be destroyers of organized labor just as well before as after the hearings.

It is not our contention that this field is not a proper subject for fair, carefully developed legislation. We take the position that, as President Truman said in his State of the Union Message:

> We should enact legislation to correct certain abuses and to provide additional governmental assistance in bargaining. But we should also concern ourselves with the basic causes of labor-management difficulties.

That message first outlined certain immediate steps to be taken: (*a*) Legislation to prevent jurisdictional strikes intended to compel employers to bargain with a minority union instead of the majority unions in their plants; (*b*) legislation to provide for peaceful and binding determinations of jurisdictional disputes over which union is entitled to perform a particular work task: (*c*) legislation to prohibit secondary boycotts "when used to further jurisdictional disputes or to compel employers to violate the National LaborRelations Act"; and (*d*) legislation to provide for final and binding arbi-

tration of disputes concerning the interpretation of the terms of collective-bargaining agreements.

As the second point in his program, equally as important as the first the President urged the strgenthening of facilities within the Department of Labor for assisting the processes of free and voluntary collective bargaining. As the message stated:

> * * * There is need for integrated governmental machinery to provide the successive steps of mediation, voluntary arbitration, and—ultimately in appropriate cases—ascertainment of the facts of the dispute and the reporting of them to the public. Such machinery would facilitate and expedite the settlement of disputes.

Point 3 of the President's program called for broadening Federal programs of social legislation to alleviate the causes of workers' insecurity. The President pointed out:

> On June 11, 1946, in my message vetoing the Case bill, I made a comprehensive statement of my views concerning labor-management relations. I said then, and I repeat now, that the solution of labor-management difficulties is to be found not only in legislation dealing directly with labor relations but also in a program designed to remove the causes of insecurity felt by many workers in our industrial society. In this connection, for example, the Congress should consider the extension and broadening of our social-security system, better housing, a comprehensive national-health program, and provision for a fair minimum wage.

Finally, the President urged creation of a temporary joint commission to inquire into the entire field of labor-management relations, composed of 12 Members of Congress chosen by the Congress and 8 members representing the public, management, and labor appointed by the President. He suggested that this commission investigate and make recommendations on certain subjects such as (1) Nation-wide strikes in vital industries affecting the public interest; (2) methods and procedures for carrying out the collective-bargaining process; and (3) the underlying causes of labor-management disputes.

The undersigned believe that the procedures recommended by the President represent a sound approach to the problem of legislation designed to facilitate settlement of labor controversies with a minimum of strikes and other work stoppages. The approach followed by the majority of this committee is inconsistent with the steps recommended by the President at every point.

The majority bill strikes out against alleged abuses in all directions. The majority is not content to prohibit jurisdictional strikes and disputes; it would wholly destroy labor's right to strike as an organizational weapon. It wholly fails to distinguish between justified and unjustified secondary boycotts and bans all boycotts indiscriminately. Instead of providing for binding arbitration of questions concerning the meaning of contract terms it opens the Federal courts wide to suits for breach of contract without regard to the ordinary prerequisites of Federal jurisdiction, such as the requirement that the amount in controversy must exceed $3,000 and the constitutional stipulation limiting suits in the Federal courts to cases arising under the Constitution or the laws of the United States or involving diversity of citizenship.

Far from strengthening the facilities of the United States Conciliation Service in the Department of Labor, the majority would remove these facilities from this Department. Instead of bringing greater order and effectiveness into the Government's activities in the promotion of stable labor relations and peaceful settlement of labor-

management disputes, they would create a multiplicity of new agencies handling such matters, including even the courts, and would promote disorder and confusion.

Little has been heard in this committee of measures designed to remove causes of workers' insecurity. Yet, such measures are pending action by this committee.

Finally, this committee has had before it since January 23, 1947, House Joint Resolution 83, which would create a temporary labor relations commission to make a study and recommendations concerning labor relations along lines proposed by the President in his message. No action has been taken by the majority to report legislation authorizing such a study. The undersigned believe that such a study is an essential preliminary to any Federal legislation designed to promote labor-management peace and stability which will be fair to the public, to management, and to labor alike.

Instead, the majority proposes to deal with the whole problem *now* in a single bill, without study, without fair or adequate consideration. They have (A) proposed a bill which completely rewrites the National Labor Relations Act and which incorporates into this act provisions which change its entire structure and destroy its purpose. In addition, they would (B) wipe out the existing Conciliation Service in the Department of Labor and establish a new agency to handle conciliation and mediation of labor disputes for the Federal Government. Finally, (C) they propose a number of miscellaneous legislative provisions relating to the application of the antitrust laws to labor unions, suits by and against unions in the Federal courts, regulation of unions and filing of financial statements, and restrictions on political contributions by labor unions. The destructive nature of these measures can best be understood by discussing them by titles and sections.

A. National Labor Relations Act Amendments

DECLARATION OF POLICY

Section 1(a) contains a short title and declaration of policy of the act and title I, section 101, section 1, contains a statement of policy of the National Labor Relations Act as amended. It is notable that neither declaration of policy places any emphasis upon the national interest in encouraging the use of collective bargaining for the settlement of labor disputes, though it has long been recognized that in a free society collective bargaining is the best available means of settling industrial problems. Title I, section 101, section 1, states it to be the policy of the act to prevent "the commission by either [employers, employees, or their representatives] of unfair labor practices"; this is consistent with the approach of the bill which would dilute Federal labor policy to mere police measures against employers and employees, rather than seeking the establishment of stable collective bargaining relations.

DEFINITIONS

1. Employer

Title I, section 101, section 2, contains definitions which amend in many important respects the present language of the National Labor Relations Act. Section 2(2) changes the definition of employer (which now includes "any person acting in the interest of an employer directly

or indirectly") to read "any person acting as an agent of an employer directly or indirectly." The apparent intention of this redefinition is to change the rule, adopted by the Supreme Court in the case of *International Ass'n of Machinists* v. *N.L.R.B.* (311 U.S. 72), that an employer is responsible for the actions of his superintendents and foremen even though he might not be under the strict common-law rules of agency. It would make necessary proof that an employer had specifically authorized his foremen or superintendent to engage in unfair labor practices; matters which are easily concealed. In modern industrial enterprises foremen and superintendents *are* management to the workers under them and employers should be held responsible for their actions.

The definition would also exclude from the coverage of the act charitable enterprises, which are very broadly defined, if none of their net earnings "inure to the benefit of any private shareholder or individual." While the Board has, generally speaking, not taken jurisdiction of such enterprises, this proposal would exclude from the coverage of the act organizations which, for example, conduct a large insurance business as was the case in *Polish National Alliance* v. *N.L.R.B.* (322 U.S. 643).

2. Employee

Section 2(3) redefines the term "employee." Under the present act, strikers remain employees so long as the labor dispute is current; under this bill a striker ceases to be an employee if he has been "replaced by a regular replacement, or has obtained other regular and substantially equivalent employment, or is receiving unemployment compensation from any State." A regular replacement is apparently defined in the same section to exclude strikebreakers. Here again the employer is given the power to terminate the status of a striker by replacing him. The bill apparently intends to discourage States from paying unemployment compensation to strikers by penalizing employees who accept unemployment compensation. Under the Social Security Act, however, the determination of these matters was advisedly left to the States.

3. Agricultural labor

The bill adopts the definition of agricultural labor contained in section 1426 (h) of the Internal Revenue Code. That definition covers services performed "in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits and vegetables for market." The effect of the amendment is to exclude from the present coverage of the act persons employed in processing, packaging, grading, and all other handling operations of fruits, vegetables, and other agricultural products in their preparation for market. This amendment is not in the interest of farmers but of the operators of industrial and commercial processing plants. The National Labor Relations Board has carefully observed the distinction between commercial operations and exemption to persons who are actually engaged in industrial operations.

4. Collective bargaining

Section 2 (11) defines the terms "bargain collectively" and "collective bargaining." As the Supreme Court has often pointed out, the term "collective bargaining" under the present act means the carrying on of negotiations in a good faith effort to reach an agreement covering wages, hours, and conditions of employment. The encouragement of the process of collective bargaining clearly requires that the Government insist that parties make a good faith effort to reach an agreement, or, put in another way, that they not enter into negotiations with the fixed intention not to reach an agreement. Yet nowhere in the definition of collective bargaining in this act is there any reference to good faith. The parties are required to hold at least five conferences during a 30-day period to discuss the issues in the dispute but the 30-day period does not begin to run until the first conference has been held. The vague requirement that this conference must be held within a "reasonable time" after receipt of a proposal by one party would permit a determined employer to employ numerous delaying tactics designed to delay the start of this period. The only recourse of a union in the face of such tactics would be the filing of an unfair labor practice charge before the Board. After a long period necessary for a hearing and appeal the employer would be ordered to bargain collectively. During this period the union would be denied the use of its only weapon—the strike.

If the parties could not reach an agreement during the 30-day period the employees would still be prevented from engaging in a strike to enforce their demands because of further procedural requirements which by their nature would permit further delay. Thus, the employer would be given a "reasonable time" to inform the employees of the issues (although the union is only given 5 days after notice of desire to hold a strike vote) and his last offer of settlement. And after the employees are so informed the Administrator is given a "reasonable time" to provide for the required secret ballot. Even if the Administrator desires to expedite the balloting the present practice of the majority party of denying sufficient funds to labor agencies in the executive branch of the Government would undoubtedly make it impossible to employ sufficient personnel to hold such elections promptly.

A further weakness in the bill is the provision requiring the union and the employer to make separate submissions of the issues and their positions on the issues to the employees. This method of presenting the issues would resolve itself into a confusing propaganda campaign in which each side would attempt to place his position in the most favorable light. A comparison of "issues" and "offers," as presented by newspaper advertisements during a labor dispute, illustrates the confusion which might be created by this procedure. It is difficult to see how constructive collective bargaining can be carried on in the atmosphere of charges and counter charges which would be created by these provisions.

Since under section 8 (b) (2) unions are also required to bargain collectively with employers, this subsection means that neither party to the dispute need do more than go through a pretense of bargaining before engaging in a strike or lock-out. The present act is designed to encourage collective agreements; this bill makes collective bargaining

a matter of certain formalities to be complied with before engaging in a strike or lock-out. It is clear that its only effect can be to encourage industrial strife, and discourage the making of collective agreements.

Section 2 (11) (B) (vi) states the requirements which must be met before a strike or lock-out is called and, in essence, requires the holding of a strike vote in which employees have an opportunity to accept or reject the employer's last offer. The effect of these provisions is to revive the unfortunate experience of the Smith-Connally Act and to interject the Federal Government still further into the bargaining process.

The same section states that "Such terms shall not be construed as requiring that either party reach an agreement with the other, accept any proposals or counterproposal, either in whole or in part, submit counterproposals, or discuss modification of an agreement during its term except pursuant to the express provisions thereof." All of these are deliberately designed to render collective bargaining sterile and ineffectual. The law does not now require that either party reach an agreement with the other, but it does require that both parties make a good faith effort to reach an agreement. By stating the matter negatively and by omitting any requirement of good faith, the bill indicates an apparent hope that agreements will not be reached. The law does not now require either party to accept proposal or counterproposal, either in whole or in part; the legislation as drafted is designed to encourage persons *not* to accept proposals or counterproposals. The law does not now require a party to submit counterproposals, yet an employer who is not willing to make a proposal, to embody existing terms and conditions of employment in an agreement, may frequently be said to be acting in bad faith. By negativing in legislation any duty to make counterproposals, one of the readiest indicia for determining good or bad faith is removed in enforcement of the present statute. We think it desirable that parties submit counterproposals as part of the process of collective bargaining, and believe it highly undesirable to state that there is no duty to do so. The blanket removal of any obligation to discuss modification of an agreement during its term except pursuant to its express provisions, is similarly designed to discourage employers and employees from discussing changes necessitated by unforeseen business or other exigencies. We do not believe it desirable in this over-all fashion to foreclose the possibility of peaceful accommodation.

This section attempts to limit narrowly the subject matters appropriate for collective bargaining. It seems clear that the definitions are designed to exclude collective bargaining concerning welfare funds, vacation funds, union hiring halls, union security provisions, apprenticeship qualifications, assignment of work, check-off provisions, subcontracting of work, and a host of other matters traditionally the subject matter of collective bargaining in some industries or in certain regions of the country. The appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors. What are proper subject matters for collective bargaining should be left in the first instance to employers and trade-unions, and in the second place, to any administrative agency skilled in the

field and competent to devote the necessary time to a study of industrial practices and traditions in each industry or area of the country, subject to review by the courts. It cannot and should not be straitjacketed by legislative enactment.

3. Supervisors

Section 2 (12) purports to define the meaning of "supervisor"; actually, supervisors play only a minor role in this definition, which clearly includes all persons having only slight authority such as pushers, gang bosses, leaders, second hands, and a host of similarly placed persons with no actual supervisory status. It is sufficiently broad to cover a carpenter with a helper. In addition, it would include time-study men, many types of pay-roll and plant clerks, plant guards, inspectors, and other who have quite as much need of trade-union organization as other rank-and-file employees. To deny to this large group of employees the protection of the law, to give the employer the unlimited right to discharge them for union activities and otherwise to interfere with their rights, is to penalize those employees who have shown the most skill and conscientiousness in the performance of their duties. The provisions of the bill are so broad that employers would be encouraged ostensibly to place many employees in these categories in order to deprive them of their rights under Federal legislation.

It is estimated that there are between 4 and 5 million men and women working in supervisory jobs in this Nation's industry. The right of these employees to organize and bargain collectively in a manner which is insured to other workers will be materially impaired by the proposed bill. The recognition of the necessity for organization by workers as a means of achieving a fair share of the country's wealth is the gravamen of the National Labor Relations Act. The rejection of this principle in the case of supervisory employees can be considered only in terms of discrimination against such employees.

Supervisory employees, it is true, play a dual role in our industrial life. The fact that they are, for some purposes, the agent of management does not derogate from the companion fact that even agents have an interest to protect against their principal. The identity of supervisors with management is far from complete. Their working conditions, wages, and tenure are determined by management policy which in the absence of organization they are in an unfavorable position to oppose.

The issue of the inability of the supervisory employee, who is unionized, to discharge his functions with loyalty and competency is constantly raised. This issue may be partially met by providing that supervisors are entitled to organize and bargain collectively with their employers provided that they do not belong to the union to which the production employees of the employer belong, or to any union dominated or controlled by the union to which the production employees belong. The record of industries where the unionization of supervisors is prevalent, such as the building industry, the maritime industry, the printing industry, and the railroad industry, refute the suspicion of conflict and betrayal on the part of such supervisors. The essential loyalties required of supervisors in the effective accomplishment of their duties are no more inconsistent with their interest in the conditions of their employment than is true in the case of other employees.

Recognition by the National Labor Relations Board of the right of supervisors to organize and bargain collectively has reduced the number of strikes by this class of employee. To withdraw this recognition and with it the orderly machinery for achieving organization will not eliminate unionism among supervisors. It will force them instead to the alternative of economic self-help and in this state of affairs there is no incentive for supervisory employees to create unions which would be truly autonomous and separated from the pressures of union groups subordinate to them in the employment structure.

Section 2 (13) defines a sympathy strike as one which is "called or conducted not by reason of any dispute between the employer and the employees on strike or participating in such concerted interference, but rather by reason of either (A) a dispute involving another employer or other employees of the same employer, or (B) disagreement with some governmental policy." Under this definition a strike, started in one department of an employer's operations and participated in by employees in another department, would be a "sympathy" strike. Indeed, if an employer were to reduce the wages of some few employees, who thereupon went on strike, any employees who participated with them because they felt their own living standards endangered would be guilty of conducting a sympathy strike.

6. Boycotts

Section 2 (14) defines the term "illegal boycott" in extremely broad terms, to include any refusal to render services when an object of the refusal or threat is to force a person to do business or to cease doing business with another person, or where an object of the refusal is to force a person to deal with or to cease dealing with a labor organization as the representative of individuals other than themselves, or to use, install, handle, transport, or otherwise deal with particular commodities by reason of their origin, proposed destination, prior or proposed future handling, or the policies or practices of any person not their employer. Under section 2 (14) (C) it seems clear that the refusal of employees to work on commodities produced under sweatshop conditions, which the employees felt threatened their own standard of living, would be illegal.

Section 2(16) defines the term "monopolistic strike" as one which results from "any conspiracy, collusion, or concerted plan of action between employees of competing employers or between representatives of such employees." This definition is designed to implement the prohibitions against industry-wide bargaining which are discussed in connection with section 9 of the bill. The use of the emotional terms "monopolistic strike," "conspiracy," "collusion," and "concerted plan of action" cannot disguise the fact that this definition is designed to strike a body blow at the efforts of trade-unions to improve the working conditions of their members. As early as 1914 the Clayton Act declared that the "labor of a human being is not a commodity." A wage is not merely a price paid by a manufacturer for a raw material. The wages of the worker represent the living standard of our people; a demand that workers compete with each other concerning wages is an invitation to a race to see which of our citizens can live at the lowest level. This provision and those allied with it will introduce into the law the common law of conspiracy which we had thought was laid to rest by Chief Justice Shaw's famous opinion in *Commonwealth* v.

Hunt, in 1842. Any prohibition of such action in concert by employees must require the benevolent employer to reduce his wages to the level of his competitor who pays the lowest wages. We had supposed that it was the policy of the United States to encourage competition in paying higher wages rather than to place a premium upon payment of sub-standard wages.

7. Feather bedding

Section 2 (17) defines "feather-bedding practices." They include any effort to require an employer to employ any person in excess of the number of employees reasonably required to perform actual services; to pay anything in lieu of employing, or on account of failure to employ, any person or persons in excess of the number reasonably required; to pay or agree to pay more than once for services performed; to pay for any services which are not to be performed; to pay for the privilege of producing, preparing, manufacturing, or selling any article to prevent or limit its use. The bill does not make clear who is to determine how many employees are reasonably required by an employer. In any event, either the employer or the Government (rather than the employees) is now to determine these matters, so that employees who find, or think they find, themselves victims of a "speed-up," are to be left without remedy. The use of the union label in order to protect working standards is by these definitions abolished. It is noteworthy that no exceptions are made for industrial appliances or machinery thought by employees to present a physical danger. These definitions, while ostensibly directed at certain undesirable or questionable practices, have the clear effect of outlawing many usual and desirable trade-union practices for the protection of the working standards and health of our people.

SEPARATION OF FUNCTIONS

Section 3 of the bill replaces the National Labor Relations Board with a new Labor-Management Relations Board, thereby throwing into the discard the experience gained by the present National Labor Relations Board and its staff over the past 12 years. It is to be read with section 4 of the bill which sets up a new and independent agency in the executive branch of the Government to be known as the "Administrator of the National Labor Relations Act." The functions of the Board are to be limited solely to the decision of cases and the Administrator is to assume all of the investigatory and prosecuting functions of the present National Labor Relations Board.

This so-called "division of functions" is undesirable. It is proposed to divide the National Labor Relations Board, alone among administrative agencies, despite the fact that the administrative process is now firmly imbedded in our governmental system in such well-established agencies as the Federal Trade Commission, the Interstate Commerce Commission, Securities and Exchange Commission, Federal Communications Commission, and many others. The reasons for the adoption of the administrative process for enforcement of the National Labor Relations Act were stated by the Senate Committee on Education and Labor in its report on the National Labor Relations Act (report, 74th Cong., 1st sess., p. 15; see also pp. 5, 8, 14, and 15) to be "to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority."

The Congress last June, by unanimous vote of both Houses, passed the Administrative Procedure Act of 1946. That act was the result of more than 10 years of careful study of all administrative agencies, including the National Labor Relations Board, and embodied the conclusions of the Attorney General's Committee on Administrative Procedure, the American Bar Association, and similar interested groups. In that act the Congress concluded that an internal separation of functions best met the problem of fairness and impartiality in enforcement of law. No claim has been made that the National Labor Relations Board has not fully complied with its provisions. Any proposals for complete separation of functions should await experience under the Administrative Procedure Act, and, if finally thought desirable, should be applied to administrative agencies generally rather than to the National Labor Relations Board alone. The final report of the Attorney General's committee out of which the Administrative Procedure Act grew, stated (pp. 57 and 59) the "heavy costs" of complete separation of functions to include "substantial dangers both to private and to public interests." It pointed to danger of friction and of a break-down of responsibility as between two complementary agencies. It stated that "the added responsibility of deciding exercises a restraining influence which limits the activities of the agency as a whole." An agency devoted solely to prosecuting is likely to be intent on making a record of prosecutions as often and as successfully as possible without regard to the consequent harassment of the private citizen. This proposal would clearly discourage the making of amicable settlements, since prosecuting officials could no longer turn to the deciding branch to discover applicable policies. At present less than 15 percent of National Labor Relations Board cases require formal procedures, the balance being disposed of on an informal basis by settlement, withdrawal, or dismissal.

The hearings before the committee did not, in our opinion, disclose any abuses arising out of the present procedures of the National Labor Relations Board. The proposal for separation of functions made by the bill would further complicate and delay the settlement of matters which, by their very nature, require expeditious handling.

Under section 6 of the bill the Board and the Administrator are authorized to prescribe regulations as may be necessary in the manner provided for by the Administrative Procedure Act. This is a limitation upon the present authority of the Board under the National Labor Relations Act "to make, amend, and rescind *such rules* and regulations" as may be necessary to carry out its duties. In considering the provisions in connection with section 9(h), the intent of the majority is made abundantly clear. In the latter section provision is made for the conduct of consent elections "in conformity with regulations and rules of decision of the Board." It seems clear that it is the intent of the authors to eliminate the statutory authority of the Board to issue, in addition to procedural regulations, substantive changes which under the Administrative Procedure Act might be construed as "substantive rules." Reliance by the proponents of the measure on the Administrative Procedure Act in this respect is the more striking in view of other provisions of the measure which effect a separation of functions and impose unworkable and discriminatory procedural requirements on the proposed Board and Administrator.

RIGHTS OF EMPLOYEES

In section 7 the bill purports to guarantee to employees the right of self-organization to form, join, or assist labor organizations, and to bargain collectively with representatives of their own choosing or "to refrain from any and all such activity." This fundamental right is not dependent upon legislative enactment. It is a natural right that exists and existed prior to passage and independent of the National Labor Relations Act. The bill would seriously compromise this natural right by the addition of language purporting to guarantee a specious right "to refrain from any and all such activity." The amendment to the present guaranty is unnecessary and illogical and can only lead to a serious increase in litigation and controversy. Long-established contractual relationships and mutually satisfactory bargaining arrangements of the vast majority of American industry are made prey to the whims and caprice of malcontents. Not counting the inevitable substantial increase in the cost of administration to the Federal Government, and in turn to private persons, the country at present cannot afford the unstabilizing effects that the proposal will have upon our industrial economy. That such results will follow becomes abundantly clear when the amendment is considered in connection with sections 8(b), 2(11) and 7(b) of the bill, commented on elsewhere in this report.

Experience before 1935 had shown that most individual wage earners in the United States were unable to bargain on an equal plane with their employers because most of those employers continued in a position of dominance and used their superior economic power to render abortive any attempt of wage earners to pool their strength. Thus it was impossible, to use the language of Mr. Justice Holmes, "to establish that equality of position between the parties in which true liberty of contract begins." It is impossible to have collective bargaining until employees are free to act collectively without fear of employer retaliation. Governmental protection of the natural right of working people to associate to protect their interests was therefore necessary to convert that natural right into an effective one.

Mere protection of this right does not require its exercise. The guarantee of security in the exercise of the right carries with it the power not to invoke it. There is no demonstrable need that this fundamental guarantee needs compromise in the manner proposed by the bill. Especially is this true when the negative provisions are considered in conjunction with section 2(11), 7(b), and 8(b) which in their totality render organizational activities a hazardous pursuit and collective bargaining a sham.

REGULATION OF UNIONS

No existing Federal legislation attempts to regulate the internal affairs of labor organizations. This bill makes detailed provision for such regulation and subjects labor organizations to an external control of purely internal functions which is without parallel when compared to any other form of voluntary association. This it seeks to accomplish in several ways.

Section 7 of the National Labor Relations Act is amended to include a provision that guarantees union members freedom from unreasonable or discriminatory financial demands by the union, freedom of

expression without subjection to union disciplinary action, and fair conduct of the union's affairs and in accordance with the will of the majority of its members. Interference with, restraint, or coercion of individuals exercising these rights, by a labor union or its officers or agents, constitute an unfair labor practice under section 8(c), and then follows a list of unfair labor practices by labor organizations which result in an extreme restriction of the internal activities of the union. The matters regulated include the amounts of the initiation fees and dues, contributions by members, grounds for suspensions and expulsions, elections, officers, financial records and reports to members, and differences or controversies on union and political policies and candidates.

These regulatory measures are not an appropriate subject for Federal legislation. Attempts by the Board to secure these rights for employees and union members and to regulate these activities would be attempting the impossible, i.e., attempting a regulation of the infinite details involved in the internal functioning of thousands of trade-unions having millions of members. No standards are provided in the bill to guide the Board, and none exist in fact. For years most of our State courts have carefully refrained from such interference in the internal affairs of unions, realizing both the encroachment on individual liberty involved in thus attempting to regulate the inner functioning of voluntary associations and the sheer impossibility of doing so effectively, wisely, and equitably.

Union members are guaranteed a right "to freely express their views, either within or without the organization on any subject matter without being subjected to disciplinary action by the organization." Such a limitation on the authority of the organization to discipline its members is an open invitation to the rebirth of the insidious occupation of the "agent provocateur." No labor organization is free from attacks irrespective of relevance, truth or falsity, or provocation. The bill would deny power to discipline, even by vote of the entire membership, if the offense is an expression of views. We know of no such restriction on any other type of organization—business, social, professional, fraternal, or otherwise. The purpose of the majority is clear: To invite disruption of unions and render them powerless against the tactics of "boring from within." And it becomes clearer upon analysis of the additional guarantee of the right of the members of the organization "to have the affairs of the organization conducted in a manner that is fair to its members and in conformity with the free will of a majority of the members." This is an open invitation to complete and unlimited control by the Federal Government of the internal affairs of any labor organization. It is clear that such a provision openly invites harassment by agents of employers or rival organizations and inevitably leads to strife and destruction of the organization itself. Such provisions place labor organizations under the constant threat of a struggle for existence.

UNFAIR LABOR PRACTICES

Section 8(a) of the bill lists unfair labor practices of employers. Although the bill recites in sections 8(a) (1), (3), (4), and (5) substantially the language of the National Labor Relations Act, the guarantees are more imaginary than real. Considered in isolation it

would appear that these provisions retain at least in substance the present protection accorded labor. Upon analysis, however, it becomes abundantly clear that the guarantees are mere words without substance or reality. Particularly is this true respecting section 8(a)(2), which is an unconcealed and open invitation to the revival of company unions. This view is corroborated by the provisions of section 8(d)(3). The same is true of the obligation of the employer to bargain collectively, as provided for in section 8(a)(5). Although the words of the National Labor Relations Act are substantially retained, it is necessary to consider them in connection with other provisions of the bill, particularly sections 2(11) and 8(b)(1).

1. Legalization of company unions

Under section 8(a)(2), the precise and clear language of the National Labor Relations Act, prohibiting the employer from creating and maintaining company unions, and the abundant Board and court precedents giving vitality to this guarantee, gives way to a confusing definition that would permit numerous forms of employer domination of such labor organizations. Instead of looking to the substance of the matter—Is the organization dominated by the employer?—only certain minor pitfalls need be avoided to legalize organizations actually under employer control. If the organization is not *prevented* from meeting outside the employer's presence (it *may* meet in his presence) and if no "reward, favor, or other thing of value" is given to a person in a "position of trust" in the organization, it is legally constituted. Fear of the employer's disfavor, acts of favoritism not amounting to a "reward, favor, or other thing of value", control exercised by subtle and devious means, are no longer relevant. This section amounts to an open invitation to revival of company-dominated unions. Especially is this true when considered in conjunction with section 9(d)(3).

2. Check-off

Section 8(a)(2)(C)(i) defines an additional unfair labor practice in prohibiting employers from making deductions from employee's compensation for union dues, etc., or assisting in making collections of amounts due a union, unless such action is voluntarily authorized in writing by the individual employee, who may revoke such authorization upon 30 days' notice.

The check-off system, whereby pay-roll deductions are made for payment to union organizations of certain authorized funds, is well established in the American industrial pattern and widespread in its application. In the manufacturing industries alone, nearly 5,000,000 workers, approximately 50 percent of all workers in this industry, had their dues checked off in 1946, as compared to 4,000,000 in 1945. The manufacturing industries which are predominantly covered by automatic check-off provisions which would be nullified by the proposed legislation are: Aircraft engines, aluminum, automobiles, carpets and rugs (wool), cigarettes and tobacco, electrical machinery, hosiery, leather, except gloves and shoes, meat packing and slaughtering, nonferrous smelting and refining, rubber tires and tubes, steel (basic), and sugar (beet).

In nonmanufacturing industries approximately 1,300,000 workers are covered by check-off provisions. Approximately 6,000,000 workers of the 14,800,000 workers covered under agreements have their dues

checked off. Of these, more than one-half are under agreements providing for the automatic check-off. The effect of the proposed bill would be to invalidate the check-off provision of all of the existing agreements.

The check-off is in the nature of a legal assignment of wages to a creditor. It is a method of facilitating the payment by union members of their union obligations, which represents a minimum of inconvenience to all parties concerned, namely, employer, employee, and union organization.

Both in effect and in theory, the subject of the check-off is a legitimate subject of contract. The withdrawal of this lawful objective from the area of collective bargaining imposes a regulation where no rational ground for regulation can be demonstrated to exist. No abuse can be said to derive from a union's collecting what is due it or a union member's paying what he owes.

The result of the proposed section is to weaken union organizations by visiting upon them inconvenience, loss of time, and the threat of loss of funds which are vital to the maintenance of their existence.

3. Union welfare funds

Section 8 (a) (2) (C) (ii) would amend the National Labor Relations Act to make it an unfair labor practice for an employer to assist any labor organization through making payments of any kind to such organization, directly or indirectly, or to any fund or trust established by such organization, or to any fund or trust in respect of the management of which, or the disbursement from which, such organization can, either alone or in conjunction with any other person, exercise any control, directly or indirectly.

We would have no objection to requiring that trust funds to which an employer makes contributions be jointly controlled by the employer and the union but under this bill an employer would be forbidden to contribute to any fund over which the union has any control even though it is jointly administered with the employer. This result is completely unreasonable. Its full implications can only be appreciated when we realize that health-benefit funds are a part of collective-bargaining agreements involving more than 15 international unions covering some 600,000 workers. A study by the Bureau of Labor Statistics (Health-Benefit Programs Established Through Collective Bargaining, 1945, bull. 841, p. 2) states:

> A little more than a third of the employees covered by health-benefit programs included in this report are under plans which are jointly administered by the union and the employer. Another third are covered by programs for which insurance companies assume the major administrative responsibility; and somewhat less than a third are under those administered by the union.

If the contracts examined in this study are representative, this bill would invalidate almost two-thirds of the existing health-benefit agreements. The resulting industrial unrest is a factor that cannot be ignored.

It is also important to note that not only are welfare funds and related plans over which the union has any control banned by this bill; but such plans are omitted in section 2 (11) from the subjects upon which an employer is required to bargain even when there is no such control. By the simple expedient of refusing to discuss health and welfare plans an employer can either preclude them entirely or,

what is more likely, require that the union strike in order to obtain them. In view of the increasing degree to which workers are insisting on these provisions, it is not difficult to see how this measure will promote industrial strife.

By banning any payments by an employer "to assist any labor organization," this section would furthermore throw into doubt the legality of many common and accepted provisions in existing collective-bargaining agreements. In many industries, for example, the employer is required to affix a union label to his products. The employer pays the union a fee for furnishing the label. The language of this section makes no exception for this or like practices. For a significant period of time after the enactment of this bill confusion and unrest would reign.

Provisions which deny employees and organizations the opportunity to make voluntary provisions against illness and insecurity can only increase reliance upon the State. In the interest of sound governmental policy such dependence upon the State should be checked by encouraging the formulation and adoption, through voluntary agreement, of plans that will aid citizens during periods of misfortune or economic distress. Legal prohibitions against such arrangement increase the responsibility of the Federal Government to its citizens in periods of distress. The majority fails to appreciate the serious implications of their proposals and their invitation to unrestricted Government control of almost every aspect of normal life.

4. The closed shop and union security

The National Labor Relations Board, in section 8(3), permits an employer to enter into a closed-shop agreement with the recognized representative of a majority of the employees in an appropriate bargaining unit. This bill makes it an unfair labor practice for an employer to require membership in a union as a condition of employment. An attempt is made, however, to permit a mild form of union-security arrangement, severely limited in scope and surrounded by restrictions which would have the effect of curtailing and substantially diluting current practices and arrangements with respect to union security.

The bill povides in sections 8(d)(4) and 9(g) that employees may enter into an agreement with unions certified as bargaining representatives requiring employees to join the union within 30 days, provided that such agreement is not unlawful in the State in which the contract is to be executed, it has not been secured by means of a strike or other interference with the employer or threats thereof, and has been authorized by a majority vote of all the employees in the bargaining unit. The agreement would be lawful for a maximum of 2 years, and could not operate to deny employment to anyone who has offered to pay union dues and initiation fees, even if such person is denied membership in or expelled from the union for some other cause deemed justifiable by the union, such expulsion constituting an unfair labor practice by the union unless based on specified grounds listed in the bill.

The effect of these provisions would be to outlaw the closed-shop provisions in existing contracts covering millions of workers and would result in nullifying many of these contracts in their entirety.

The result would be chaos and confusion of industrial relations in vast and vital sectors of our economy. Union security agreements have a recognized function in industrial relations. Such agreements prevent nonunion workers from sharing in the benefits resulting from union activities without also sharing in the obligations. They are a manifestation of the democratic principle of majority rule and the sharing of the obligations by a minority in return for benefits received. They prevent the weakening of labor organizations by discrimination against union members, and eliminate the lowering of standards caused by competition with nonunion workers, and thereby promote higher efficiency and productivity. They give to labor organizations a sense of security from attack by rivals and thereby facilitate good relations with management. They also enable union leaders to devote more attention to administration of collective agreements and less to defending themselves against raiding.

If this bill were designed, among other things, to outlaw the closed-shop, closed-union arrangement only, and to permit union security arrangements that were not based on the closed-union practice, it has gone far beyond what was needed to achieve that purpose. An employee who offers to pay the required dues and initiation fee may not be deprived of or denied employment by the employer if the union refuses to grant or continue his membership. This, in effect, means that the union is shorn of its power to discipline its own members for good cause. A spy, a stool pigeon, an antiunionist, any individual whose sole purpose is to destroy the union or bring it into disrepute by slander, defamation, or undisciplined action, can continue his activities with impunity. If he pays his dues and initiation fee, or rather offers to pay them, expulsion from the union does not carry the penalty of loss of employment, and therefore deprives the union's disciplinary action of any element of sanction or of deterrent effect.

But even with respect to the permitted types of union security arrangements, unions have been completely hamstrung. An employer may refuse to bargain with the union concerning the granting of such an agreement, and his refusal does not constitute the unfair labor practice of refusing to bargain collectively. If the union seeks to compel him to grant the permitted form of union shop by means of a strike or strike threat, or other form of traditional union pressure, and as a result succeeds in getting him to sign such a contract, the agreement is not only invalid but the union's compulsive acts or threats in effecting it are unfair labor practices. In other words, union security arrangements can exist only by the paternalistic grace of the employer.

The entire argument against union security provisions is based on a misconception of the provisions of the present law. The National Labor Relations Act, in section 8(3), now provides that an agreement requiring union membership as a condition of employment shall not be unlawful under Federal law if (1) the contracting union represents a majority of the employees concerned and, (2) if the contracting union has not been assisted, established, or maintained by any conduct illegal under the act. Contrary to widespread belief, this provision does not legalize or extend the use of union security provisions. In fact, it limited their use by establishing the two requirements set forth above, which did not exist prior to the passage of the act, the national statute has left the State laws where it found them.

As Chairman Herzog of the National Labor Relations Board pointed out in his testimony before the committee, in administering the act, the National Labor Relations Board has consistently construed the section narrowly and has insisted that its condition be strictly complied with. Thus the Board has found the imposition of the requirement of union membership as a condition of employment to constitute an unfair labor practice where no agreement existed; where the agreement was with a company-dominated union; where the contracting union did not represent a majority of the employees at the time of the execution of the contract; where the contracting union was assisted by the employer; where the contract unit was inappropriate; and where the contract did not sufficiently define the obligation of the employer. In addition, where the parties have attempted to use union security clauses as a device for depriving employees of the full freedom of self-organization, the Board, with the approval of the courts, has found such abuse to be unlawful. The effect of these policies has been to discourage the abuse of union security provisions. The Board has declared it to be an unfair labor practice for an employer to discharge an employee following his expulsion from a union because he sought to select a new bargaining agent at a time reasonably close to the expiration of the contract, provided that the employer knew that was the reason for the expulsion.

Under present law union security is left entirely to voluntary agreement of an employer and his employees' representatives. It should remain so. Approximately 77 percent of all wage earners covered by collective agreements are covered by agreements containing union security provisions. It needs little comment to point out the dangers to industrial stability contained in the suggested language of the bill. Industrial unrest can only result should these acceptable, voluntarily executed agreements be reopened and constricted by mandate of this Congress.

5. Denial of collective bargaining

Section 8(a)(5) makes it an unfair labor practice for the employer to refuse to bargain collectively with representatives of his employees. In isolation the obligation appears to encourage the voluntary settlement of differences and the reaching of accord with employee organizations. However, when considered in connection with section 2(11), wherein the terms "bargain collectively" and "collective bargaining" are defined, it becomes clear that the authors of the bill have no such intent. As we have pointed out heretofore, the concept of bargaining under this statute merely imposes formalistic procedures before a strike or lock-out becomes legal. There is no genuine guaranty that either the employer or the employees' organization must meet in a free atmosphere with an unfettered desire to compose differences and reach accord. This section of the bill can only lead to a complete reversal of the desirable and encouraging trend of recent years that has resulted in a genuinely harmonious relationship in large areas of American industry. It is, again, an open invitation to industrial strife.

6. Coercion from any source

Section 8(b) prescribes unfair labor practices on the part of an employee, a bargaining representative, or officer of a representative.

Section 8(b)(1) would make it an unfair labor practice on the part of such persons "by intimidating practices to interfere with the exercise by employees of rights guaranteed in section 7(a)." As we have already pointed out, section 7(a) purports to guarantee to employees their right to self-organization and collective activity. It also needlessly purports to guarantee the "right to refrain" from such activity. Considered in connection with section 7(b), the provision of section 8(b)(1) is the oft-rejected prohibition against "coercion from any source." Such proposals are defended upon the alleged need to provide "equal treatment" of employers and labor unions. As a matter of logic, the provision will not operate as a truly "equalizing" amendment in practice. It makes unions and their agents liable twice for the same offense, once under State and once under Federal law. Employers run no such double risk for interfering with the employees' rights. True "equality" would require that improper conduct by unions and their leaders, now already subject to local criminal law and penalties, should hereafter result only in "cease and desist" orders by the Board as do employer unfair labor practices. But under this bill, for the slightest interference under the most provocative circumstances, the employee or the labor organization is denied protection against destruction.

The entire argument in support of such provisions rests upon a misconception of the need which gave rise to the protection of employee rights. Violence and intimidation by either employers or workers are adequately prevented by the common law and do not require such treatment. The proposed amendment, even if need were established, would not prove particularly useful either to employers or to the employees whom it purports to protect against conduct by unions and their agents. The effective remedy to such offenses must be a summary one: arrest, criminal trial, fine, or imprisonment upon conviction. An administrative hearing followed some months or years later by a cease-and-desist order or deprivations of all rights under the act would be useless. The remedy would not only be slow, but would seek to apply the administrative techniques of a remedial statute to offenses that call for a policeman.

We assert that the Congress should not consider the impractical suggestion that the Federal Government take over local police functions. Despite the apparent failure of State and local enforcement officials to act effectively to prevent such misconduct in a few instances that became conspicuous, we assert that there is a complete lack of compelling evidence that they are generally so incompetent in handling these matters as to warrant the Federal Government in intruding upon their jurisdiction at great expense to itself. These provisions would require that the Administrator under this bill maintain a tremendous staff to investigate the many charges of this character that would be filed either on an original basis or in the nature of countercharges for employer violations of existing law which are already the subject of investigation.

Section 8(b)(2) would make it an unfair labor practice for a certified or recognized labor organization to refuse to bargain collectively with the employer. Labor organizations exist for the purpose of collective bargaining, and it has not been demonstrated that they have so failed to bargain that Federal legislation is required.

7. Denial of right to strike

Section 8(b)(3) would make it an unfair labor practice for a labor organization or its representatives "to call, authorize, engage in, or assist any strike or other concerted interference with an employer's operations, an object of which" is to compel an employer to include in a bargaining agreement any provision not a proper subject of collective bargaining under section 2(11). Since section 2(11), as already pointed out, so modifies and restricts the scope of collective bargaining as to render it nugatory, this section has the practical effect of making any form of self-help an illusion, and this irrespective of the employer's attitude or conduct. We can imagine no more vicious restriction that could be imposed upon legitimate activities of labor organizations. This section of the bill resurrects the "objectives test" that characterized the unhappiest chapter in American industrial life. Under this test courts were quick to enter injunctions restricting every form of employee self-help. The provision accomplishes the return of the employees to the helpless state of complete reliance upon the employer's will.

8. Interference in union internal affairs

Section 8(c) prescribes a proposed code of conduct for the internal functioning of labor organizations. It would make a failure on the part of a labor organization to comply with certain rigorous standards an unfair labor practice, subject to the complaint of either employer or employee. The section proposes to make it an unfair labor practice for a labor organization to interfere with the rights guaranteed in section 7(b). This provision is the frequently rejected "coercion from any source" proposal and is commented on elsewhere in this report.

Sections 8 (c) (2), (3), (4), (5), (6), (8), and (10) are bottomed on the fallacious assumption that union members are incapable of exercising their membership rights to accomplish internal reforms desired by a majority. They provide the opportunity for the employer, the "agent provocateur", and malcontents constantly to harass a labor organization for any or no cause. Democratic trade-unionism finds its only real guaranty in the interest and activity of its members; it is not to be imposed by governmental fiat. To the extent that the bill weakens trade-unions, it strikes an effective blow at trade-union democracy and worker interest. It kills the spirit of democracy and retains shallow forms.

9. Denial of union security

Section 8 (c) (7) proposes drastic limitations on the right of organizations to bargain with the employer respecting union security. The quest on the part of labor unions for some form of organizational security initially was made necessary by the intransigent attitude of employers in their opposition to union activity. It is not exclusively born of necessity but represents also the logical development of trade-union activity.

10. Free speech

Section 8(d)(1) provides that it shall not constitute evidence of an unfair labor practice to express "any views, arguments, or opinions" in written, printed, or visual form if the expression by its own terms does not threaten force or economic reprisal.

The right to express an opinion is a constitutional one. In *N.L.R.B.* v. *Virginia Electric & Power Co.* (314 U.S. 469), and *N.L.R.B.* v. *American Tube Bending Co.* (134 F. 2d 993 (C.C.A.2), certiorari denied 320 U. S. 768), it was held that the first amendment protects an employer's expressions of noncoercive opinion to his employees respecting union organization.

These decisions have guided the present Board. In its own most recent case on the subject, *Matter of Bausch and Lomb Optical Company* (72 N.L.R.B. No. 21) the Board held that an employer's distribution to his employees of an extremely vigorous antiunion pamphlet, entitled "Let's Face the Facts," was not an unfair labor practice. The Board said:

> The pamphlet on its face contains no coercive statements, but consists essentially of statements disparaging unions and of expressions of opinion as to the disadvantages of labor organization—statements which standing alone, are protected by the constitutional guaranty of free speech. Nor are the statements coercive when evaluated in the context in which they were made.

But these provisions go far beyond mere protection of an admitted constitutional right. By saying that statements are not to be considered as evidence, they insist that the Board and the courts close their eyes to the plain implications of speech and disregard clear and probative evidence. In no field of the law are a man's statements excluded as evidence of an illegal intention. Here, again, a deep-seated intention to protect employers in the commission of unfair labor practices is evident. Here, again, the laudable purpose of protecting free speech cloaks an evil design to encourage unfair labor practices by employers.

11. Legalization of company unions

Section 8(d)(3) provides that if there is no union certified or recognized that it shall not be illegal for the employer to form and maintain a committee of employers to discuss wages, hours, and other working conditions. Such a committee could only be the nucleus for a company-dominated organization. It is the beginning of the imposition on employees of many employers' desire for a subservient labor organization. Since a condition precedent to the employer's freedom to organize a company union is that no organization be certified or recognized, the proposal is designed as a protection to those employers whose employees have not as yet begun organizational activities. It is aimed directly at current organizing drives and will resurrect and legitimatize those employee-representation plans so familiar prior to the passage of the National Labor Relations Act. Employers by this section are authorized to establish organizations which the Supreme Court has stated are "incapable of functioning as bargaining representatives of employees" (*N.L.R.B.* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261).

Section 8(d)(4), in connection with section 9(g), sets forth conditions under which limited forms of union security may be obtained. As heretofore indicated, a variety of restrictions against union security make such provisions meaningless.

REPRESENTATIVE CASES

Section 9(a) of the bill changes the language of the present act to give individual employees or groups of employees the right to settle

grievances with their employer "without the intervention of the bargaining representative if the settlement is not inconsistent with the terms of the collective-bargaining agreement then in effect." This provision makes readily available to employers a means of undermining the status of the duly chosen bargaining representative, by favoring antiunion on nonunion employees in the settlement of grievances without the intervention of the duly chosen majority representative. It can quickly be made clear to employees that their interests lie in deserting the union.

Sections 9 (c) and (d) of the bill set up substantially new procedures for the handling of representation cases. In brief, they allow petitions to be filed at any time by employee representatives, by employees, or by employers, which the Administrator is required to investigate. If he believes that "a question of representation affecting commerce exists," the application for an election is to be transmitted to the Board, which *shall* hold a hearing, and if it finds that "a question of representation affecting commerce exists," *shall* direct that a secret ballot be held.

With a few strokes, these provisions destroy much well-settled Board doctrine looking toward the maintenance of stability in collective-bargaining relationships. The present rule of the Board that elections will not be held during the life of a valid contract is discarded, as are all other rules designed to protect established collective-bargaining relationships. The only discretion left to the Administrator or the Board is to determine whether a question of representation affecting commerce exists; having found that fact, the Administrator must transfer the case to the Board and the Board must direct the handling of an election. About 80 percent of the election cases now filed with the Board are disposed of by consent election, withdrawal, or dismissal. Under the procedures here contemplated, this percentage would be substantially reduced.

Under section 9(c)(2) employees may at any time (as is confirmed by the language of sec. 9(c)(7)), present a petition claiming that the certified bargaining representative no longer represents a majority of employees. This provision is a deliberate effort to undermine the status of a collective-bargaining representative at any time after a cerification has been issued, contrary to the rule adopted by the Board and enforced by the courts that certifications are normally effective for a period of 1 year. Even during the life of a valid contract employees may thus undertake to repudiate their representative. No provision could more clearly serve to point up the dominant purpose of this legislation; to break up trade-unions as rapidly and with as few impediments as possible.

DENIAL OF INDUSTRY-WIDE BARGAINING

Section 9(f) precludes the Board from certifying a single union as the representative of employees of competing employers, subject to extremely minor exceptions. This is further designed to implement the provisions against industry-wide bargaining upon which we have already commented. The language of this section which makes such representation legal "if the collective bargaining, concerted activities, or terms of collective bargains or arrangements of such representatives are not subject, directly or indirectly, to common control or approval," makes it clear that the sponsors of this bill desire bargaining only on

an individual employer basis. Under the realities of modern industrial life, any such proposal is pure fantasy. It disregards the fact that employers compete with one another, both as to the price and quality of their product, and for labor. It is unthinkable, for example, that the large automobile manufacturers, all of whom compete for labor in the Detroit market, can pay appreciably different wages. Yet, this provision would necessarily mean that the wage levels of entire industries would be forced down to the lowest level which any substantial group of employees were inclined to, or could, accept.

Under this subsection of the bill a union that has been designated as collective-bargaining representative of the employees of any employer would be ineligible to be certified as the representative of the employees of any competing employer, unless the employees involved are less than 100 in number and the plants of the employers involved are less than 50 miles apart. A provision more inconsistent with the policy of the bill set out in section 1, to minimize industrial strife and to encourage peaceful settlement of labor disputes, could scarcely be imagined. Before assessing the probable effects that would follow from the enactment of such legislation, it might be well to consider the situation today with respect to industry-wide bargaining. Set forth below is a compilation recently made by the Bureau of Labor Statistics and presented by the Secretary of Labor in his appearance before this committee, entitled "Area of Bargaining With Associations and Groups of Employers," which shows the industries of importance which bargain on a national or industry-wide scale, those which bargain by geographic or regional areas, and those bargaining within a city, county, or metropolitan area.

Bargaining on a national or industrywide scale	Bargaining by geographic (regional) areas	Bargaining within a city, county, or metropolitan area
Elevator installation and repair	Dyeing and finishing textiles [1]	Beverages, nonalcoholic
Installation of automatic sprinklers	Fishing	Baking
Glass and glassware	Canning and preserving foods [1]	Clothing, men's [2]
Pottery and related products	Leather (tanned, curried, and finished) [1]	Book and job printing and publishing
Wallpaper	Hosiery	Building service and maintenance
Coal mining	Longshoring [1]	Clothing, women's [2]
Stoves	Maritime	Dairy products
	Lumber [1]	Confectionery products
	Metal mining	Construction
	Nonferrous metals and products, except jewelry and silverware [1]	Cotton textiles
	Shoes, cut stock and findings [1]	Hotels and restaurant
	Paper and pulp	Knit goods
		Furniture [2]
		Jewelry and silverware
		Laundry and cleaning and dyeing
		Leather products, other
		Paper products, except wallpaper
		Newspaper printing and publishing
		Malt liquors
		Meat packing
		Silk and rayon textiles
		Steel products, except stoves [2]
		Trade [2]
		Tobacco
		Trucking and warehousing [2]

[1] There also is some bargaining on a city, county, and metropolitan area basis.
[2] There also is some bargaining on a regional and industrywide basis.

Apparently the sponsors of this bill believe that if negotiations can be localized without interference from an industry organization of employers and an industry organization of employees, strikes would be prevented. This conclusion seems, in turn, to assume that the local union and local membership are less anxious to strike than the heads of the international organizations, and that the individual employer is less anxious to have a strike than an organized group of employers.

The experience of the Labor Department during the past year and a half have shown that this is not the case. On the contrary, conciliators have often found that when committees representing local unions have bogged down in their negotiations with their employers, representatives of the heads of the international unions who have been sent in to assist in the settlement of the disputes have succeeded in entering into agreements which the local committees were unable to reach. Many local committees are untrained or dominated by elements much more radical than those in the international organizations.

The impairment of industry-wide bargaining that might well follow from the enactment of this bill would upset existing collective-bargaining practices which have proved successful in many industries and made important contributions to industrial peace. As the table set out above indicates, industry-wide or multiemployer bargaining on a national, regional or local level now obtains in many of our vital industries. Employers as much as employees have benefited from this practice and have testified in favor of its continuance. Such widely varied groups as the men's clothing industry, the full-fashioned hosiery, shipbuilding, and the maritime industries have testified to the efficacy of industry-wide bargaining as a means of promoting stability and peace in industrial relations.

Experience has also shown that industry-wide bargaining has made a valuable contribution to the promotion and maintenance of fair standards in wages, hours, and working conditions, to the benefit not only of the living standards of the wage earners of this country but also the prosperity of the employers in the industry. For the stabilization of wage rates through industry-wide bargaining has helped to discourage unfair competition with respect to wage rates and has enabled the great majority of fair-minded employers to operate at the American level of fair play and decency. Any weakening of industry-wide bargaining which would tend to unstabilize wage rates and encourage competition in that field would be a step backward toward depressing wages, reducing purchasing power and contributing to a possible economic depression.

The weakening of industry-wide bargaining would also harm rather than serve the cause of industrial peace because of the effects it might have in seriously slowing the pace of collective-bargaining negotiations. Parties to such negotiations would naturally await the results between other employers and employees before coming to terms on such important matters as wages, hours, and working conditions.

Although the sponsors of this proposal undoubtedly did not intend it, one of the significant effects of any weakening of industry-wide bargaining would be to seriously impair the bargaining power of many employers. Unions would be aided in a policy of picking off employers one by one. Employers who sought to protect themselves against such tactics by organizing and bargaining as a unit would be hurt by a limitation on industry-wide bargaining. On the other hand, unscrupulous labor racketeers or radical elements would be free to follow a policy of divide and conquer. That is the reason why small employers, particularly, look to industry-wide bargaining as their only hope of gaining some approximation of equality with large and powerful unions.

Section 9(f) further requires the Board "to provide for a separate ballot for any craft, department, plant, trade, calling, professional or other distinguishable groups within a proposed bargaining unit."

Here again there is an obvious intent to reduce the bargaining group to the smallest ascertainable unit. There are in the steel industry approximately 50 different crafts. Instead of one set of negotiations for each major producer, 50 separate negotiations with 50 separate craft groups would be required. This Balkanization of units is only in the interest of industrial chaos; employers would react quite as violently against such enforced "splinter" bargaining as would trade-unions.

Section 9(f)(3) forbids the Board to be controlled, in determining the appropriate unit, by the extent to which employees have organized. This provision, too, is designed to preclude the establishment of collective bargaining. In many industries, notably insurance and similar far-flung enterprises covering many States, organization can proceed only piecemeal and to deny collective bargaining in those areas in which organization has been achieved is to deny it entirely.

Section 9(f)(4) requires the Board to place on its ballots organizations found to be company dominated which have been directed to be disestablished. This friendliness for unions which are the creature of the employer, rather than generally independent representatives of the employees, has been previously commented upon. We are sure that no person desiring honest representation for employees will rise to the defense of such sham organizations.

Section 9(f)(6) forbids the Board to certify any labor organization if one or more of its national or international officers, or one or more of the officers of the organization designated on the ballot, is a member of the Communist Party or by reason of active and consistent promotion of the policies, teachings, and doctrines of that party can reasonably be regarded as being a member of that party or affiliated with such party, or who is a member of any other subversive organization. No one abhors Communists or communism more than we. However, it is clear that this provision is designed to penalize not only members of the Communist Party or those affiliated with them, but equally to penalize, by denying their union the right to exist, those persons within the trade-union movement who have been most active in seeking to rid the trade-union movement of Communist influence. Its effect, by placing all members of the union under the same penalties as its Communist members or officers would be to strengthen rather than weaken Communist trade-union infiltration.

Section 9(g) requires the holding of elections to determine whether or not employees desire union security provisions in their contracts. It is dubious whether this provision would ever be invoked since employees may not strike or threaten a strike for union security provisions. Such an election is to be conducted only if the employer desires to grant such a provision and certifies that his agreement was not obtained by any concerted activity of the employees. At the present time some 40 percent of the 50,000 collective-bargaining agreements in effect in this country contain union security provisions. Such provisions have proved useful in achieving stability of collective-bargaining relationships and in enabling unions to devote their time to matters more useful than the preservation of their existence. Since the intent of the bill is to undermine stability of collective-bargaining agreements, it seems clear that this provision is admirably suited to the purposes of the legislation. It is notable that here again the majority is willing to increase bureaucratic interference with trade-union and

industrial matters, to extend the size of the Federal establishment necessary to handle labor problems, and to put further obstacles in the way of voluntary accommodations between employers and employees.

Section 9(h) provides that consent elections may still be conducted. The section seems superfluous, since the other provisions of the section provide so many conditions to the holding of an election, so complicate procedures, and place such effective obstacles in the way of collective bargaining, that the utility of consent elections will disappear if the other provisions of the bill become law. The premiums placed upon dilatory tactics make it seem improbable that employers or unions engaged in jurisdictional disputes would have any incentive to agree to such consent elections.

WEAKENING OF ENFORCEMENT PROVISIONS

Section 10(a) provides that the Board is empowered to adjudicate complaints of unfair labor practices and that such power shall be exclusive.

We assume that under this section the Board's power to adjudicate unfair labor practice complaints is exclusive and that the dropping of the clause contained in section 10(a) of the National Labor Relations Act "and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise" does not affect the exclusiveness of this power.

Section 10(b) prescribes generally the procedure to be followed upon the filing of an unfair labor practice charge. It would amend section 10(b) of the National Labor Relations Act to prevent the Administrator from issuing any complaint on a charge of unfair labor practices unless the practices occurred within 6 months prior to the filing of the charge. The Administrator is prohibited from issuing a complaint based upon a charge filed more than 6 months prior to the issuance of the complaint.

1. Limitations on filing charges

The effect of these provisions would be particularly harmful in cases where employers establish company unions or engage in surveillance, espionage, and similar misconduct. Activities such as these are usually carefully concealed and are not generally revealed until an outside union attempts to organize the plant. Under the National Labor Relations Act and the rules of the National Labor Relations Board employers are given adequate protection against untimely charges for the National Labor Relations Board will not proceed upon them unless good cause appears for the delay. Moreover, even in those cases in which the Board does proceed, it does not usually require the employer to pay back wages for the period of the delay to employees discharged discriminatorily. There is therefore no necessity for the proposed amendment.

Furthermore, the provisions would merely encourage employer unfair labor practices of a kind which cannot readily be detected. By establishing within the passage of the short space of 6 months, an absolute immunity against such malpractices, the bill would deprive employees in such cases of the benefits of genuine collective bargaining and encourage resort to strikes and other means of self-help.

2. Rules of evidence

Section 10(b) of the bill would amend section 10(b) of the National Labor Relations Act to provide that proceedings in unfair labor practice cases "shall, so far as practicable, be conducted in accordance with the rules of evidence" applicable in the United States district courts. This provision would replace the present rule in the National Labor Relations Act that "the rules of evidence prevailing in courts of law and equity * * * (are) not * * * controlling" in proceedings before the National Labor Relations Board.

Historically, the strict rules of evidence followed in the courts were evolved as a safeguard against erroneous decisions and improper influence upon juries. Such safeguards are unnecessary in proceedings before the National Labor Relations Board because there is no jury. Further, liberality in admitting evidence cannot of itself cause any prejudice. Where improper evidence so admitted is made the basis of a finding, a clear remedy is available to correct the error in the reviewing courts. Moreover, the Administrative Procedure Act of 1946 already prescribes adequate safeguards and the National Labor Relations Board is subject to its provisions. Finally, the effect of this proposal would be to encumber the administrative process with legalisms and retard or prevent the carrying out of congressional policy.

3. Weight of evidence

Section 10(c) of the bill would amend section 10(c) of the National Labor Relations Act to provide that the National Labor Relations Board's findings must be based on the "weight of the evidence."

If this proposed change means something more than a preponderance of evidence, it introduces an undesirable change in administrative procedure. The rule has uniformly been that an agency may rest its findings upon a preponderence of evidence. No proper reason exists to make an exception in the case of the National Labor Relations Board. The only effect of the proposal is to hinder the prevention of unfair labor practices by rendering the proof of such practices more difficult.

4. Limitation of relief

Section 10(c) of the bill would amend section 10(c) of the National Labor Relations Act to limit the granting of affirmative relief to that requested in the complaint.

This proposal constitutes another effort to circumscribe the National Labor Relations Board in the proper performance of its responsibilities. What relief should be granted is dependent upon what facts are developed. It may often happen that facts are elicited at a hearing which were unknown before. Furthermore, what the appropriate relief should be is a matter for the expert opinion of the agency. Appropriate remedial action should not be withheld because one of the parties fails or neglects through inadvertence or ignorance to ask for it. Courts of equity are not so restricted in granting relief. There is no reason why the National Labor Relations Board, an administrative agency whose orders are subject to judicial review, should be so limited.

5. Protection of company unions

The bill would amend the National Labor Relations Act to provide in section 9(f)(4) that no labor organization shall be disqualified from participation in an election to determine representatives solely by reason of any order of the National Labor Relations Board "that would not have issued in similar circumstances with respect to a labor organization national or international in scope or affiliated with such an organization." This provision is supplemented by a proposed amendment to section 10(c) of the National Labor Relations Act prohibiting the National Labor Relations Board from issuing any *order* requiring or forbidding "any action by an employer with respect to any labor organization that in similar circumstances would not be required or forbidden with respect to a labor organization national or international in scope or affiliated with such an organization."

These provisions, like the amendment of the National Labor Relations Act proposed in sections 8 (a) (2) and 8 (d) (3), would serve to provide the protection of the Federal Government to company-dominated unions. These proposals would require the National Labor Relations Board to place on ballots for the election of representatives independent unions which have been found by the Board to be company dominated and which have been ordered disestablished. They would open the way for the gradual displacement of legitimate unions by unions which are no more than the creatures of employers.

The free exercise of the right to self-organization may be obstructed by the existence of a labor organization under the dominance of an employer, just as genuine collective bargaining is frustrated where the employees, in the erroneous belief that the company-dominated organization affords a genuine agency for collective bargaining, choose such an organization which is in reality incapable of functioning in that capacity. Under these circumstances the employee's desire results from employer domination, and therefore is not free. In such situations, the employer finds himself conveniently placed on both sides of the bargaining table.

Unions affiliated with national labor organizations stand on a different footing. Assistance to a local union chartered by and subject to the constitution and bylaws of a national body cannot, in practice, extend to the point of constituting domination by the employer. From the very character of the affiliation, the local group cannot, at least for any extended period of time, be used as a mere instrument of an employer to deprive employees of the free exercise of the rights guaranteed by the act. Accordingly, it is ordinarily enough to require the withdrawal of recognition from the assisted affiliated union, whereas the company-dominated union will, as long as it exists, obstruct full freedom of choice and genuine collective bargaining. The difference in remedy merely reflects the difference in the facts and circumstances. These realistic differences are ignored by the bill.

It should be noted that disestablishment of a company-dominated union does not preclude the employees from subsequently selecting an unaffiliated union as their bargaining representative. Whether a union organized by the employees in a plant where an employer-dominated union once existed should be disestablished by the Board depends entirely on whether employer domination extends to the new organization.

6. Discriminatory discharges

The bill would amend section 10(c) of the National Labor Relations Act to provide that the Board may not order the reinstatement of any individual "unless the weight of the evidence shows that such individual was not suspended or discharged for cause."

This provision, like so many others in this bill, would shackle the National Labor Relations Board in the prevention of unfair labor practices. The Board, by its terms, would be required to find on "the weight of the evidence" not only that the discharge was in violation of the act but also that the discharge was not for cause. The effect of this provision is to permit an employer to escape liability for having discharged an employee for his union activities merely if grounds existed which would justify the employee's discharge. Since an employer can always find some reason for justifying the discharge, this proposal would render a nullity the protection afforded workers by the National Labor Relations Act against discrimination because of union activities. There is no reason why, if the proof shows that an employee has actually been discharged because of his legitimate union activities the employer should be allowed to escape the consequences of his unlawful conduct by pleading circumstances or conduct which he was perfectly willing to tolerate until the employee became active in a union.

The bill would further amend section 10 (c) of the National Labor Relations Act to provide that if no exceptions are filed within 20 days after service of a trial examiner's proposed report and recommended order "such recommended order shall become the order of the Board and become effective as therein prescribed."

This provision is objectionable because it in effect suspends the doctrine of exhaustion of administrative remedies and permits a dissatisfied litigant to sidestep the agency by direct resort to the courts. The agency may be thus called upon to defend a decision it had not made, or be reversed as to rulings which, if error therein had been called to its attention by appropriate appeal, it might have itself corrected. Moreover, the status of trial examiner's reports is already covered by the Administrative Procedure Act of 1946 [sections 8 and 10 (c)] and there is no need at this time for further legislation on the subject.

7. Noncompliance

Section 100 (e) of the National Labor Relations Act would be amended to require that in every proceeding to enforce a National Labor Relations Board order in the courts, the Administrator must establish noncompliance with or violation of the Board's order. While this provision possesses a superficial plausibility, it, in reality, furnishes a useful device for delay and nullification of Board orders. At the present time, the National Labor Relations Act does not require the Board to establish noncompliance or violation in order to obtain enforcement of its order. As a practical matter, the Board does not usually proceed to enforcement where there has been full compliance with its orders. The only effect of the proposal is to require the court at the enforcement stage to take testimony on the issues of noncompliance or violation, thus protracting the procedures necessary to obtain judicial sanctions for the enforcement of Board orders. In this connection, it should be noted that Board orders are non-self-enforcing. They must be reviewed and confirmed by the appropriate courts before they

carry any sanction. It is important that proceedings before the courts be expedited and delay be avoided. In view of this circumstance the significance of the proposed change becomes apparent.

8. Weight-of-evidence rule

Section 10 (e) of the bill would amend the National Labor Relations Act by substituting for the well-established and uniformly applied "substantial evidence" rule "the manifest weight of the evidence" rule.

This provision merely adds another device to the great number in the bill designed to increase litigation in labor-relations cases and to cause even greater delays in the final settlement of many labor disputes. Such delay and litigation can only operate to destroy labor unions and the collective-bargaining process. The provision is one part in the obvious pattern and design of this unconscionable legislation.

The proposal overlooks the fact that Congress, in the Administrative Procedure Act, only recently, after more than 10 years of intensive and well-informed study of the practices of administrative agencies, including the National Labor Relations Board, adopted the substantial-evidence rule as the correct rule to be applied, and deliberately rejected the weight-of-evidence rule. It disregards the basic principle of administrative law that fact determinations should rest with a body of trained and experienced specialists in the field subject to regulation, and not with the circuit courts of appeals, which deal almost exclusively with law questions.

9. Review of certifications

Section 10 (f) would amend the National Labor Relations Act to permit interlocutory review of Board certifications. If this proposal is enacted into law it would have serious adverse consequences on collective bargaining. It is conservatively estimated that 1 year would be the average time necessary to obtain court review of a Board certification. The same findings *would be reviewable twice:* First, under the proposed amendment and, second, through later or simultaneous section 8 (5) proceedings under the act if the employer refused to bargain. Delay would be piled upon delay, during which time collective bargaining would be suspended pending determination of the status of the bargaining agent. Such delays can only result in industrial strife.

The encouragement of litigation at the certification stage of Board proceedings would have a second serious objection. A large proportion of the National Labor Relations Board's elections are conducted by the consent of all parties. If review were made easier through intermediate proceedings parties who desired delay would be greatly stimulated to force the Board to conduct hearings.

10. Subpenas

Section 11 (c) of the bill would amend section 11 of the National Labor Relations Act so as to require the National Labor Relations Board, upon application of the Administrator or of any party to a proceedings, to issue any subpenas requested. In the case of subpenas *duces tecum*, however, the person who had possession of the subpenaed documents could petition the Board for an order revoking the subpena

upon a proper showing. This would change the present law and practice, embodied in the Rules and Regulations of the National Labor Relations Board and in the Administrative Procedure Act, of issuing subpenas to parties upon a simple statement of the general relevance and scope of the evidence sought to be adduced. Under the bill there would be no discretion in the Board with respect to granting subpenas and no requirement for any showing by parties of relevance or materiality in connection with obtaining subpenas.

This proposed change is highly objectionable because it leaves the Board no discretion to prevent harassment of private parties and abuse of the Board's processes by all kinds of improper subpenas and "fishing expeditions" on the mere demand of litigants.

ILLEGALITY OF STRIKES

Title I, section 12, would make unlawful a number of concerted activities by labor unions or their members. The sanctions against persons engaging in such activities—civil suit for damages, and injunctions—are not exclusive; for under title III, section 301, of this bill these activities would also be subject to the criminal and treble-damage sanctions of the antitrust laws. The great dangers inherent in the reintroduction of antitrust prosecutions against any concerted activity by labor unions which does not involve a conspiracy with employers to fix prices or allocate markets will be discussed below. It is first necessary to appreciate the extent to which this bill would restrict legitimate union activities, regardless of what sanctions are employed to enforce the prohibitions.

No one can deny that labor unions have engaged in some activities that are so clearly unjustifiable that this Congress can and should legislate against them immediately. These were covered by the President in his State of the Union Message when he urged legislation to prevent: (1) Jurisdictional strikes, (2) secondary boycotts when used to further jurisdictional strikes or to compel employers to violate the National Labor Relations Act, and (3) the use of economic force to decide issues arising out of the interpretation or application of existing agreements.

This bill goes far beyond these recommendations, and would outlaw many activities which have been recognized as justifiable efforts by workers peacefully to employ economic pressure to protect and advance their legitimate interests. In the guise of an effort to eliminate certain abuses it attacks many types of concerted labor activity where the objective is the betterment of wages, hours, and working conditions, and where the particular form of coercion employed affects the interests of third parties to no greater extent than the ordinary economic strike.

The provisions of section 12 read together with other sections of this bill are so drastic as to make virtually every strike illegal. Thus, even if a labor organization goes on strike because of disagreement as to the terms or conditions of employment, the strikers cease to be employees if, while they are engaged in such strike they are replaced, or receive unemployment compensation from any State. Since they would thereafter no longer be "employees", their strike becomes illegal.

For the union that called them out would no longer represent a majority of the "employees"; as it could no longer claim bargaining rights, its members would be striking for an illegal purpose from that moment forward. Not only would the bill make such strikes illegal but it would also outlaw all recognition strikes, strikes to remedy unfair labor practices, boycotts, sympathy strikes, jurisdictional strikes, so-called "monopolistic" strikes, and many other forms of concerted activity. The bill would, moreover, outlaw many activities which are primarily a concern of local authorities such as violence, mass picketing, and picketing of the homes of individuals, thus extending Federal police authority into areas where it has no business to be. While we do not condone strikes such as jurisdictional strikes, the provisions of this bill go so far beyond the evils which need remedial action that they prohibit many legitimate activities which are necessary for the protection of the welfare of the workers of this country.

Moreover, in addition to outlawing almost every conceivable type of strike, this bill would lead to shocking inequality of treatment as between employers who engage in certain undesirable practices, on the one hand, and employees who do so, on the other. Under the National Labor Relations Act, if the employer engages in an unfair labor practice, he is entitled to a full hearing, findings by the National Labor Relations Board, and review by the courts before the findings become legally compelling. Even then, the employer is subject only to a *remedial* order, and not to punishment. At most, he must merely "cease and desist" and restore the situation to what it was, or should have been, before he acted. Under this bill, however, employees who violate certain of its provisions, would expose themselves to criminal penalties, ex parte injunctions without a hearing, treble damages, loss of their jobs, and other penalties. Such disparate treatment undoubtedly would call forth charges of discrimination and inequality from unions and workers, and would result in demands that equally punitive measures be applied against employees, and would sharpen, rather than assuage, existing bitterness. The net effect would be to weaken the bargaining power of almost all the industrial workers in the Nation by putting such new risks in the collective quitting of work that none but the most audacious would ever dare use self-help to improve their working conditions or to voice a grievance.

The vicious antilabor character of this bill is strikingly revealed in these portions of the bill. By depriving workers of their right to strike, the bill would render them helpless in the face of the antiunion employer. The bill thus would permit the employer to dictate the terms of any collective-bargaining agreement, making a mockery of the collective-bargaining processes.

B. Federal Conciliation Service

Title II of the bill would wipe out the existing Conciliation Service in the Department of Labor and create an independent agency of the Federal Government to be called the Office of Conciliation, headed by a Director of Conciliation. All of the functions of the Secretary of Labor and the United States Conciliation Service as provided for under the Enabling Act of 1913, establishing the Department of Labor, are transferred to the new Office of Conciliation. Aside from the emergency procedures relating to public utilities, the new Office of Conciliation

tion would have no new or adidtional powers. There would seem to be no reason whatsoever for going through the hocus pocus of creating a new agency independent of the Secretary of Labor.

As President Truman stated in his veto message on the Case bill:

> This creates a new five-man Federal Mediation Board. All mediation and conciliation functions of the Secretary of Labor and the United States Conciliation Service are transferred to the Board. The Board, although technically within the Department of Labor, would not be under the control of the Secretary of Labor.
>
> I consider the establishment of this new agency to be inconsistent with the principles of good administration. As I have previously stated, it is my opinion that Government today demands reorganization along the lines which the Congress has set forth in the Reorganization Act of 1945, i.e., the organization of Government activity into the fewest number of Government agencies consistent with efficiency. Control of purely administrative matters should be grouped as much as possible under members of the Cabinet, who are in turn responsible to the President.
>
> The proposed Federal Mediation Board will have no quasi-judicial or quasi-legislative functions. It would be purely an administrative agency. Surely, functions of this kind should be concentrated in the Department of Labor.
>
> Since 1913 there has been within the Department of Labor and responsible to the Secretary of Labor a United States Conciliation Service formed with the very purpose of encouraging and settlement of labor disputes through mediation, conciliation, and other good offices. The record of that Service has been outstanding. During the period of 1 year, from May 1945 through April 1946, it settled under existing law 19,930 labor disputes. Included in this total were 3,152 strikes, almost 10 each day. The Conciliation Service has formed one of the principal divisions of the Department of Labor.
>
> The bill proposes to transfer that Service and its functions to the newly formed Federal Mediation Board. To me this is the equivalent of creating a separate and duplicate Department of Labor, depriving the Secretary of Labor of many of his principal responsibilities, and placing the conciliation and mediation functions in an independent body.
>
> In the eyes of Congress and of the public the President and the Secretary of Labor would remain responsible for the exercise of mediation and conciliation functions in labor disputes, while, in fact, those functions would be conducted by another body not fully responsible to either.
>
> As far back as September 6, 1945, I said in a message to Congress: "Meanwhile, plans for strengthening the Department of Labor, and bringing under it functions belonging to it, are going forward." The establishment of the proposed Federal Mediation Board is a backward step.

Everything that the President said with respect to a Mediation Board applies with equal strength to an independent Office of Conciliation.

Experience has shown that our great President was sound in his veto of the Case bill and that many of the people who a year ago clamored for an independent agency for the mediation of labor disputes have since changed their minds.

The proposed bill is certainly not based upon any evidence presented at the hearings before this committee. There has been no public clamor for an independent agency. On the contrary, the record of the hearings shows that representatives of organized management and labor oppose the separation of the conciliation facilities from the Department of Labor. The National Association of Manufacturers, the American Federation of Labor, the Congress of Industrial Organizations, the International Association of Machinists, and the National Federation of Telephone Workers are all on record as favoring the retention of the present Conciliation Service in the Department of Labor, and the Committee for Economic Development, which favored an independent Conciliation Service, at least went so far as to recommend that it be kept within the Department of Labor for housekeeping purposes.

When the President's National Labor-Management Conference on Industrial Relations, which was composed of representatives of the National Association of Manufacturers, Chamber of Commerce, American Federation of Labor, Railway Brotherhoods, Congress of Industrial Organizations and United Mine Workers, adjourned in November 1945, it had reached agreement on few points, but one principal point was "reorganization of the U.S. Conciliation Service to the end that it will be established as an effective and completely impartial agency within the Department." The conference went on to make certain specific recommendations for strengthening the Service (p. 48, Bull. No. 77, Department of Labor).

The thirteenth national conference on labor legislation of representatives of State labor commissions, held in December 1946, went on record as saying—

that the Federal Government continue to discharge its responsibility for mediation and conciliation of disputes through the Conciliation Service within the Unted States Department of Labor (p. 33, Bull. No. 85, Department of Labor).

The bill would in effect constitute a reorganization of an organization which has just recently been reorganized and is functioning well. The present Conciliation Service setled more than 13,000 cases last year. Its reorganization program has met the acclaim of both labor and management.

In little more than a year since the Conciliation Service began its reorganization program, it has made great strides in improving the Service. In the hearings before this committee, Secretary of Labor Schwellenbach set forth the steps taken by the Service. Since the majority, in its haste to report out the bill, is voting on it before the hearings have even been printed, we are unable to refer to the printed hearings and therefore quote a short summary from the Scretary's prepared text.

Since the unanimous recommendation of the President's Labor-Management Conference that the Conciliation Service be strengthened, the Director has taken numerous steps to extend the facilities of the Conciliation Service to assist labor and management in their collective-bargaining efforts. Pursuant to this recommendation certain basic measures were taken by the Director to achieve this purpose.

1. Establishment of a Labor-Management Advisory Committee from nominees recommended by the AFL, CIO, NAM, and Chamber of Commerce.
2. Establishment of regional advisory committees on the same basis.
3. Decentralization of the organization.
4. Reorganization of the Arbitration Division.
5. Reorganization of the Technical Division.
6. Establishment of a Program Division for training of new officers and keeping the staff up to date on current labor-relations problems and developing improved mediation techniques.
7. Appointment of special conciliators to supplement the activities of regular conciliators in key disputes.
8. Commencement of a program through the Philadelphia Assembly and Utility Conference for cooperation with local groups for settlement of labor disputes on the local and industry levels.
9. Establishment of procedures for tripartite mediation.
10. Fact finding.

We believe the record of the Conciliation Service, as described by the Secretary of Labor in his testimony befor the committee is a remarkable record. If we remember that this record was made during the most difficult period in our history, when we were reconverting from a war economy to a peace economy, that record is all

the more remarkable. The Conciliation Service during the past year has been successful in averting numerous major strikes, such as in the Pacific Gas & Electric Co., the west coast oil cases, the textile cases, the Virginia Electric Power cases, and the Campbell Soup case. In the Campbell Soup case the Conciliation Service, by averting the strike, saved the entire tomato crop for that year, resulting in savings to the company and to the farmers of many thousands of dollars.

The proposal of the majority to establish a new independent agency to replace a smooth-functioning Conciliation Service has no good reason to commend it, but even worse is the failure of the majority to provide for a transfer of the personnel from the present Conciliation Service to the new agency. This, we believe, is the height of irresponsibility. The majority would in effect throw out the 34 years' experience gained by the Conciliation Service since its establishment in 1913. It would fail to make use of the vast store of experience of the individual conciliators who have acquired a broad knowledge of labor relations during their many years with the Conciliation Service. We do not have the figures available as to the number of years' experience of the entire Conciliation Service, but we do have those figures for the top 31 members of the staff in the highest grades of the Service. Those 31 men have a total of 362 years of service in the Federal Government, 269 of which were in the Department of Labor. The majority is engaging in sheer recklessness in wiping out this vast reservoir of experience when the public is demanding that we provide for a strong Conciliation Service.

Perhaps the majority believes that there is an overabundance of trained conciliators available. Perhaps they feel they can find 400 Republicans who are "trained conciliators." Perhaps they do not realize that conciliators have come to the Conciliation Service from all walks of life, and that you cannot make a good conciliator out of a green man by the trial-and-error method. Perhaps they do not realize that during this difficult period of reconversion the country cannot afford to have its labor relations in the hands of inexperienced untried men. Perhaps the majority does not realize that a strong Conciliation Service as demanded by the people cannot be created merely by passing a law, but that it can be built only upon a strong foundation of experienced and highly qualified personnel.

The proposal of the majority to completely wipe out the old Conciliation Service is folly of the most reckless and partisan character. The proposed bill certainly is not based upon any testimony presented before the committee in its hearings. In fact, until this proposed bill was submitted to the committee as the final draft upon which the committee was to vote, not a single bill introduced into the House of Representatives or the Senate, providing for some new method for conciliating disputes, fails to provide for the transfer of the present Conciliation Service personnel to the new agency. Every single bill foundation of experienced personnel of the present Conciliation Servhad absolutely no chance of success unless it were to be built upon the foundation of experienced personnel of the present Concilation Service. We know of no other instance in recent history where a new agency has been created to perform similar functions performed by an existing agency where the personnel of the existing agency was not transferred to the new agency. For instance, when the functions of the old National Labor Board was transferred to the National Labor Relations

Board, its personnel was transferred to NLRB. Similiarly, the personnel of the National Defense Mediation Board was transferred to the National War Labor Board and the personnel of the National War Labor Board was transferred to the Wage Stabilization Board.

The majority proposal is not based upon any of the bills considered during the hearings. The proposal is just pulled out of the hat. The majority proposal fails to realize that the people of this country are not seeking mere partisan trickery. They are seeking industrial peace which will lead to an era of economic prosperity. If the experience of the people trained in conciliation is cast aside, the people will know that if a depression is caused by industrial instability, a major contribution to that instability may be found in the partisan trickery of this proposal. The people demand an impartial Conciliation Service. They demand a nonpartisan Conciliation Service .They now have that kind of Service. This proposal is apparently designed to create a Republican Conciliation Service. Neither a Republican nor a Democratic Conciliation Service is the kind of Conciliation Service that settled labor disputes. We believe that the present impartial nonpartisan Conciliation Service should not be tampered with.

This does not mean that we are against constructive proposals to strengthen and extend the facilities of the Conciliation Service. We believe that there are constructive steps that can be taken to extend the facilities of the present Conciliation Service. President Truman pointed the way to the kind of extended facilities that were required in his State of the Union Message when he said:

> **Point number two is the extension of the facilities within the Department of Labor for assisting collective bargaining. One of our difficulties in avoiding labor strife arises from a lack of order in the collective bargaining process. The parties often do not have a clear understanding of their responsibility for settling disputes through their own negotiations. We constantly see instances where labor or management resorts to economic force without exhausting the possibilities for agreement through the bargaining process. Neither the parties nor the Government have a definite yardstick for determining when and how Government assistance should be invoked. There is need for integrated governmental machinery to provide the successive steps of mediation, voluntary arbitration, and—ultimately in appropriate cases—ascertainment of the facts of the dispute and the reporting of them to the public. Such machinery would facilitate and expediate the settlement of disputes.**

We support the program of the President and we would support a bill containing the constructive proposals contained in his State of the Union Message. The majority, however, is unwilling to consider any such constructive proposals; but on the contrary met in its own caucus without consulting the minority and then presented the minority with a *fait accompli*. In their newly won power they seem to have forgotten that this country was founded upon a two-party system. By failing to meet with the minority party, they in effect have refused to consider the minority proposals. We believe that there are constructive steps that can and should be taken and they are the steps set forth in the President's State of the Union Message.

STRIKES IMPERILING PUBLIC HEALTH AND SAFETY

Sections 203 and 204 of the proposed bill would create a hodgepodge machinery for handling disputes in the public-utilities field. It provides that whenever the President finds a dispute has resulted in or

threatens to result in a substantial curtailment of public-utility functions essential to the public health, safety, or interest, the President shall direct the Attorney General to petition for an injunction. It grants the district courts authority to issue injunctions, thus taking away the long-standing benefits of labor's hard-won rights under the Norris-LaGuardia Act. It goes beyond that and gives the district court the right to include provisions in the order "to facilitate the voluntary settlement of disputes." This provision amounts to compulsory arbitration, for if the parties fail to comply with the provisions set forth by the court to facilitate the settlement of the dispute, they could be held in contempt of court. The Secretary of Labor, expressed his opposition to compulsory arbitration when he testified before this committee on March 11, 1947. At that time he said:

> Experience has shown * * * that compulsory arbitration as a means for accomplishing industrial peace has failed to achieve that goal. Other governments, Australia, Canada, and New Zealand most prominently, have had systems of compulsory arbitration of labor disputes for a period sufficiently long to provide a test of their effectiveness. The record demonstrates that in those countries no appreciable reduction in the number of work stoppages arising out of labor disputes has occurred. On the contrary, there are qualified authorities in the field of labor relations who believe that the inevitable decline in labor disputes arising from the growth in maturity and responsibility on the part of both labor and management, may have received a set-back in those countries due to the system of compulsory arbitration. The experience of the States of Kansas and Colorado, in which similar systems were experimented with, inspire no confidence that the results in those States would have been different.
>
> Federal experience bears out these conclusions. For war-emergency purposes, a species of compulsory arbitration was instituted by the Executive orders and statutes administered by the National War Labor Board. The result proved to be an almost complete atrophy of the voluntary collective-bargaining process. Any dispute, including many over trivial issues, was brought before the Board for settlement, and so large a backlog of work quickly developed that there was no reasonable possibility of expeditious action in the great proportion of pending cases. At the same time, strike notices filed under the provisions of the War Labor Disputes Act showed that an increasing proportion of "labor disputes" involved no issue between the employer and his employees, but a grievance on the part of one or both against the slowness of the governmental process. It cannot be maintained, furthermore, that either the notice and strike-ballot provisions of the War Labor Disputes Act or the compulsory-arbitration procedures of the War Labor Board were primary factors in reducing the incidence of strikes during the war to such a remarkable degree as was accomplished. The success of the Board was attributable to the fact that it was founded upon an agreement of labor and industry, the "no strike" pledge. The truth of this conclusion is shown by the fact that, almost immediately upon the cessation of the fighting, when the "no strike" pledge was no longer in effect, the number of strike notices filed under the War Labor Disputes Act rose so sharply that more notices were received in the course of every week than had been received in any ordinary month while the pledge was being observed.
>
> Compulsory arbitration is the antithesis of free collective bargaining. Labor and representative management are in complete agreement in their opposition to measures compelling arbitration. Both are aware that the existence of compulsory arbitration laws not only eliminates free collective bargaining in situations where the parties are genuinely at odds, but will frequently encourage one or both of the disputants to make only a pretense of bargaining in anticipation of a more favorable award from an arbitrator than would be realizable through their own efforts. The net result would be a weakening of free bargaining and an increasing reliance on the compulsory arbitration procedures, and it is obvious that with the growth of such an attitude, the use of conciliation and mediation procedures would decline concurrently. Conciliation and mediation are instruments of free collective bargaining, aids to the parties in arriving at voluntary and mutually acceptable settlements. Compulsory arbitration would discourage their use in the same degree that it would lessen the inclination to bargain freely in arriving at settlements in labor disputes.

If compulsory arbitration is to succeed in eliminating work stoppages, it is clear that it can do so only by abolishing or restricting the right to strike.

Compulsory arbitration simply means that the Government writes a contract for the parties. The proponents of the legislation seem to believe that such Government intervention would apply primarily to wages, perhaps even to hours, but not much beyond these two questions, because they hold that these are the most frequent matters of controversy. Many labor agreements, however, contain numerous detailed provisions concerning working conditions, safety measures, benefits, and grievance procedures. Disputes can and do arise concerning these matters. The arbitrator, if the dispute is to be settled must arrive at an equitable and just settlement. Those who are most determined in their opposition to Government control and planning have not been slow to point out the impossibility of Government effectively regulating the infinite details of economic activity. An arbitrator seeking to impose the terms and conditions of the employment relationship on unwilling parties simply has no guide or standard upon which to base his conclusions.

* * * If a free enterprise economy is to be preserved, respect to the terms of their agremeents should not be interfered with by government. This relationship is the most vital activity of an overwhelming majority of our adult population. Freedom to contract in the sense that parties are free to refrain from entering into contracts, even where public policy requires the setting of some of the terms, is essential to the preservation of a free society.

Labor and management are unanimous in their condemnation of compulsory arbitration. The National Association of Manufacturers, the Chamber of Commerce, the Committee for Economic Development, the American Federation of Labor, the Congress of Industrial Organizations, and the railroad brotherhoods have all publicly expressed their opposition to compulsory arbitration. Motivating them all is the conviction that compulsory arbitration would mean a significant and undesirable extension of Government control into an area where such controls are disastrous. Management justly fears that such extension may spread to traditional management functions of supervision, prices, and profits. Labor justly fears that compulsory arbitration means the cutting down of freedom of the working people. Compulsory arbitration and free enterprise are incompatible. A free enterprise system is founded upon a system of free collective bargaining.

The President would be required to direct the bringing of any such action "whenever a labor dispute has resulted in, or imminently threatens to result in, the cessation or substantial curtailment of interstate or foreign commerce" in any such essential service. At what stage in the negotiations of a labor dispute does it "imminently threaten" to curtail commerce? Is it while negotiations are proceeding, perhaps satisfactorily, but with some issues to be yet settled? Is it immediately upon the break-down of negotiations, before a strike has been called? Or is it after negotiations have broken down completely, and a strike has been called? Thus, though the section puts the President under a mandatory duty to take action to prevent strikes in essential services, in appropriate cases, it leaves room for wide controversy whether he should act or not act in any given case. Further, what is "substantial curtailment"? This term is not defined, and could conceivably be broadened to a point of being all-inclusive. There is no rule, or yardstick, provided for the President to guide him in his determination as to whether or not a "substantial curtailment" of interstate or foreign commerce has occurred or is about to occur. Neither is there any guide to determine whether this "substantial curtailment" refers to any particular plant, or any particular group of plants or the industry as a whole. The broad scope of these words and phrases

would undoubtedly add to the heat of controversies growing out of a decision by the President to act, or not to act, in any given case. Such controversies would tend to aggravate rather than to resolve labor disputes in essential services.

Sections 203 and 204 of the proposed bill provide further that after the injunction is issued, the parties shall be under obligation to bargain 30 days with the assistance of the Office of Conciliation and that at the end of the 30 days, the employees shall vote on the question of whether or not they wish to accept the last offer of the employer, and if they so desire what person or persons they desire to designate as their representative to embody the acceptance in a contract with the employer. This provision is an interesting example of the hasty hodgepodge manner in which this bill was thrown together. The bill as first presented to the minority members for consideration on Friday, April 11, provided that the parties should negotiate for 30 days with the assistance of the United States Conciliation Service of the Department of Labor and that the vote should be conducted by the National Labor Relations Board. This provision appears despite the fact that earlier sections of the bill had completely wiped out these two agencies. Perhaps it is appropriate that the majority provide for the performance of these functions by the ghostly remains of these two agencies over whose deaths they would like to preside. We are inclined to believe that the nonexistent agencies originally called upon to perform these functions under the original draft would perform the job as well as those created under this hodgepodge bill.

The hodge podge does not end there, however. There are still others that have to "get into the act" of handling disputes. It calls upon the chief justice of the United States circuit court of appeals to set up special boards to issue opinions as to the proper settlement of the dispute, but it sets no standards to be used by the Board. Nor does it concern itself with what would seem to be the rather important question of the labor-relations experience of the chief justice of the court of appeals or his designees. We have the highest respect for the present chief justice of the United States circuit court of appeals, but in all deference to him or such person that may succeed him, we believe that industrial relations has become a highly complex and technical subject requiring people well versed in the field. The proposed bill would in effect have what it considers to be the most important cases in the country going before a board composed of people with no background or experience in the field of industrial relations. The bill fails even to give this inexperienced Board the requisite assistance of defining the standards to be used by the Board in giving its opinion as to the proper settlement of the dispute, nor does it require that the Board publish the facts upon which its opinion is based.

Under sections 203 and 204 the President, the Attorney General, the district courts, the Secretary of Labor, the Office of Conciliation, the Administrator of the National Labor Relations Act, the circuit court of appeals, and special boards would all be concerned with the handling of the most vital disputes in the country affecting the national health and safety. Everybody seems to be "in the act" except Jimmy Durante. How the people of the country would ever fix the responsibility for mishandling of one of these critical labor disputes is the

real $64 question. Perhaps the majority prefers the responsibility not to be fixed; perhaps it prefers an irresponsible hodgepodge approach. We believe, however, that if one of these major cases is mishandled, the public will not be confused. The public would place the responsibility right back where it belongs, on the Congress which passed this "pass the buck" procedure.

While an exhaustive study of cases bearing on the question of whether it would be proper to delegate to the chief justice of the Circuit Court of Appeals for the District of Columbia the duties he would have to carry out under section 2(c) of the bill has not been possible in the limited time the bill has been available, there are cases which hold that these provisions may be of doubtful constitutionality.

In 16 C. J. S. 500 the general rule is stated that "generally the legislature may not confer exclusively nonjudicial powers on courts or judges."

The Supreme Court in *Keller* v. *Potomac Electric Co.* (261 U. S. 428), in an opinion written by Chief Justice Taft, held, that—

> The jurisdiction of this Court and of the inferior courts of the United States ordained and established by Congress under and by virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this court without real parties or a real case, or to administrative or legislative issues or controversies (*Hayburn's* case, 2 Dall. 410 notes; *United States* v. *Ferreira*, 13 How. 40; *Ex parte Siebold*, 100 U. S. 371, 398; *Gordon* v. *U. S.*, 117 U. S. 697; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 215 U. S. 216).

The Supreme Court of Louisiana, in *In re Southern Cotton Oil Co.* (86 So. 656), has held that a district court could not be required to determine the solvency of an employer in an action under the State Employers' Liability Act. The court discussed the propriety of conferring such duties on judges as follows:

> The respondent judges have replied that relator is not entitled to have the question of its solvency determined by them vel non in their capacity as judges of the twenty-eighth judicial district court, for the reason that article 96 of the constitution provides that no duties or functions shall ever be attached to the district court or to the several judges thereof, except such as are judicial; and respondents show that the determination of the solvency vel non or relator for the purpose of the administration of the Workmen's Compensation Act is an executive, and not a judicial, function; that it is beyond the province of the court to examine or verify the books, records, accounts, or statements of relator, and that the constitution and statutes of the State has not provided the courts with the necessary machinery or assistance for such work.
>
> They further answer that the act which the relator seeks to compel respondents to perform does not tend to determine what the law is and what the rights of the parties are with reference to transactions that have been had, and does not tend to determine any question of rights or obligations, and is not an exercise of the judicial power.

The issues involved in many labor disputes do not raise justiciable questions. They involve wages, hours, working conditions; not legal rights and duties. It is doubtful whether the courts are equipped by training or experience to handle these types of problems. Giving them functions which must be carried out with the utmost expedition even in the most complicated cases may well interfere seriously with the exercise of their normal judicial functions. It might well take them far from their normal field of operations, both physically and as to

judicial subject matter, and would increase the already substantial burden of the courts.

Subsection (f) of section 204 provides that "at the conclusion of all the proceedings hereinbefore required, or whenever an agreement is reached by the parties, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged." This subsection provides for the termination of the injunction. But, by this provision, if no agreement has been reached, the injunction is discharged, and it is then possible that a strike will take place. By virtue of this last provision, these sections would do nothing other than promote ill will when it is extremely necessary that the parties meet with open minds, and an honest intent to settle the issues as quickly and expeditiously as possible.

These sections would apply generally to labor disputes in the transportation, public utility, and communication fields. They would in effect, single out employees in those fields for special treatment.

For these employees, the right to strike would be seriously limited. The question may well be raised whether, in view of this, provision should not be made for special consideration to be given to the interests of such employees in any settlements proposed by officials of the Government and by the special advisory settlement boards. Precedent for such special consideration is contained in the identical bills introduced by Mr. Auchincloss (H.R. 17), Mr. Case of New Jersey (H.R. 34), Mr. Hale (H.R. 68), Mr. Heselton (H.R. 75), and Mr. Herter (H.R. 76). See section 7(c) of each of these bills.

This bill would give to the employers engaged in these fields an inordinate power over the employees with whom they deal. The threat of injunction would constantly be held over the unions. These provisions would allow the employers to refuse to bargain in good faith, and by subterfuge and clouding of the issues place the employees in an extremely untenable position. It is difficult to see how these provisions can promote harmony and good will between the parties to a dispute, or how they can promote in any manner the settlement of controversies in these important industries.

According to BLS figures, strikes in heat, light, and power utilities during an 11½-year period, January 1935 to June 1946, have been few, ranging from 3 to 17. The greatest number of workers involved in utility stoppages in any single year was 5,350 in 1944. These workers comprised 0.3 percent of all workers involved in strikes in that year. In 1935 and in 1944 time lost due to work stoppages in the utility field amounted to 0.4 percent of idleness resulting from all work stoppages. There would seem, then, to be:

Twenty-seven work stoppages were recorded by BLS between January 1945 and October 1946 in utility establishments providing heat, light, and power services. Most of the stoppages were of short duration. Eight were terminated within 24 hours and over half (17) were terminated within a 72-hour span. Six stoppages continued from 15 to 27 days each. In view of these figures, there would seem to be little need of such drastic legislation as is here contemplated against these workers.

The basic approach proposed for the handling of the public utility disputes is so unrealistic and irresponsible that we do not feel it necessary to dwell at great length on many of the details. However, we believe that a few of the details warrant attention.

1. The procedure for submitting to the employees a ballot on the question of whether or not they wish to accept the employer's last offer implies that the employees are always the adamant party in their refusal to accept the offer of the employer. This is far from the case. Many employers are large corporations. Through their tightly held minority control they are frequently the adamant parties. Perhaps equality of application should require a vote by the stockholders of the corporation on the question of acceptance or rejection of the union's last offer.

2. The procedure providing for choosing a new representative to sign the agreement other than the one which had been bargaining on behalf of the employees implies that the employees are never satisfied with their collective-bargaining representative. This procedure would seem to be designed for the sole purpose of undermining the existing collective-bargaining representative and would introduce into the negotiations a new factor of unrest caused by an election campaign for a new bargaining representative. The diverting of the energies of the bargaining representative to the struggle for continued existence would weaken its bargaining position immeasurably and it appears to be designed for the sole purpose of "busting the union" and strengthening the employers at the bargaining table.

3. Although section 205 of the act provides that sections 203 and 204 shall not apply to disputes subject to the Railway Labor Act, it is difficult to know what type of transportation cases provided for in section 203 would be covered by the elaborate machinery called for under that section. If the transportation tie-up is to curtail commerce in such a way as to affect the public health or safety, it most certainly would be a form of transportation coming under the Railway Labor Act. Either sections 203 or 204 amend the Railway Labor Act or they don't. Perhaps the majority prefers to go through the motion of passing a law but to say it shall have no effect under section 205; or perhaps they prefer to provide some work for the legal profession so that they can litigate which act applies while the country sits back and watches the spectacle of a legal barrage of argument instead of having constructive steps taken to settle the dispute.

4. A special board created under section 204 with the chief justice of the circuit court of appeals as presiding officer skirts upon the border of merit. However, it fails to have merit by failing to provide for finding of facts on which the opinion is to be issued and by failing to provide for experts in the field of industrial relations to engage in the fact-finding process. We believe as does the President that there are many types of disputes in which the fact-finding process can be usefully employed. We see no reason why that process should be limited to public utilities as provided for under this bill.

In brief summary, title II would set up a new agency to take the place of the present Conciliation Service. Its functions are identical with those of the present Conciliation Service and no constructive procedures are provided for the type of preventive conciliation work now being performed by the present Conciliation Service.

It would wipe out the vast store of experience of the present Conciliation Service and would create dual responsibility for handling industrial relations problems, since the public would still look to the Secretary of Labor together with the newly established agency as the parties responsible for the maintenance of industrial peace.

As a second part of the title, the bill creates a complicated "super-duper" machinery designed to settle public utility cases. The machinery is so complicated that the parties would be spending most of their time studying the act, determining what they should do next instead of devoting their time to settling the dispute. The machinery under the guise of settling disputes would deprive labor of its basic right to strike and would reintroduce the iniquitous injunction into labor disputes. This new machinery would provide for Government interference by numerous branches of the Government. If there is one thing clear that the people want, it is that they want less interference by Government in their domestic affairs. The people did not give a mandate to this Congress to pass antilabor laws. Their mandate was for less Government interference. The provisions of sections 203 and 204 instead of having less Government interference provide for more Government interference than ever before in our history.

C. Miscellaneous Provisions

1. Application of the antitrust laws

Section 301 of title II again subjects trade unions to criminal prosecution and treble damage suits under the antitrust laws regardless of whether they are legitimately seeking to preserve union wage rates and standards. Insofar as this section makes it a violation of the antitrust laws for labor to combine with nonlabor groups to fix prices, restrict production, or to control markets it is empletely unnecessary. The Supreme Court has repeatedly held that the antitrust laws apply to restraints imposed on commerce by the combination of a union with nonlabor groups. But subsection (b) of section 301 sweeps within the scope of criminal prosecution "any concerted activity declared to be unlawful in section 12 of the National Labor Relations Act as amended." Thus, for example, all boycotts as defined in section 2, including refusal to work on or install nonunion-made goods, or a refusal to work on jobs with which the nonunion employer is connected are subjected to criminal sanctions.

Section 301 would wipe out the gains achieved by labor over years of protracted struggle to protect legitimate activities from the sanctions of the Sherman Act. The history of his achievement in delimiting the appropriate area for concerted activities of organized labor is well known, In the Danbury Hatters case, the concerted efforts of a union to maintain adequate labor standards, implemented by a refusal to purchase from an employer refusing to adhere to such standards were visited by treble damages under the Sherman Act. In 1914, after considerable labor unrest resulting from judicial interpretation of the Sherman Act, Congress declared it to be the national policy in section 6 of the Clayton Act that "nothing contained in the antitrust laws shall be construed to forbid or restrain—members of [labor] organizations from lawfully carrying out the legitimate objects thereof." However, the ambiguities of section 6, which exempted only "lawful" means and "legitimate" end invited the Supreme Court in the Duplex case and the Bedford Cut Stone case to nullify the immunity against prosecution for engaging in self-help activities that labor believed it had won. Section 20 of the Clayton Act was held to protect only persons in a proximate relation of employer and employee.

In consequence of this restrictive interpretation of section 20 the Clayton Act accomplished nothing by way if immunizing organized labor from the Sherman Act. Instead, the courts were able to seize upon section 16 of the Clayton Act which extended the privilege of injunctive relief to private suitors alleging violation of the Sherman Act as authority for expanding the use of the injunction against labor's self-help activities.

From these court decisions there followed years of judicial abuse of the injunctive process, resulting in the sorriest chapters of our industrial history. In 1932 Congress finally passed the Norris-LaGuardia Act which expanded the definition of "labor dispute" and restricted the jurisdiction of Federal courts to issue injunctions in such disputes. The Supreme Court subsequently held that the Sherman Act must be read in the light of both section 20 of the Clayton Act and the provisions of the Norris-LaGuardia Act. The Court held that while labor unions do not possess any general immunity from the antitrust laws they should not be subject to criminal prosecution or treble damage suits in cases where national policy has found it necessary to protect unions from the injunction.

Section 301 would turn the clock back to the period before 1914 and would encourage new industrial strife. Once again the Danbury Hatters case and the Duplex and Bedford Stone case might become the prevailing law. The shackling of labor's legitimate activities as proposed in section 12 by opening the floodgates of the injunctive process, is further exacerbated by subjecting these activities to criminal prosecution under section 301. Even a peaceful effort to make known its dispute to the public may bring down criminal penalties. Likewise a peaceful effort to persuade the public or fellow laborers to withhold patronage from an employer who obstinately maintains substandard labor conditions is made a violation of the Sherman Act. The entire gamut of activities proscribed in section 12 is subject to the sanctions of the Sherman Act, including the potential depletion of the union treasury as a result of treble damage suits.

The unfortunate history of attempted applications of the antitrust laws to labor-management relationships is strong evidence that such laws are of little use in the promotion of harmonious labor-management relationships. The antitrust laws are useful in promoting trade and protecting consumers against the abuses of monopolistic business combinations. They are, however, ill-adapted as a means for maintaining stable labor-management relations or for policing union behavior.

2. Suits by and against unions in the Federal courts

Section 302 of title III has the dual purpose first of giving the Federal courts jurisdiction, without regard to the amount in controversy, to entertain actions involving violations of collective bargaining agreements affecting commerce or where the court otherwise has jurisdiction of the cause; and, second, of providing for suit against labor organizations whose activities affect commerce, with judgment enforceable only against the union assets. In any such suits the union would be bound by the acts of its agents and the courts would have the power to grant injunctive relief regardless of the provisions of the Norris-LaGuardia Act.

The question of amenability of unions to suit has been the subject of much misunderstanding. Unions have never been exempt from suit because they are labor unions. It has only been difficult to reach union assets because unions are unincorporated associations. And even here, these difficulties have been removed in the great majority of States. Actually, there are only 13 States where union funds cannot be easily reached under laws in effect permitting satisfaction of judgments from the central funds of the union. These States are Arkansas, Georgia, Illinois, Kentucky, Maine, Massachusetts, Missouri, Mississippi, New Hampshire, Oregon, Rhode Island, Tennessee, and West Virginia. Of the remaining 35 States, there are 10 which by statute permit the union assets to be reached by representative suits in any type of action and there are 25 which permit suits against unions in the common name of the union, in some cases with liability attaching not only to the union funds, but also to the assets of every individual member of the union.

This bill would seek to open the Federal courts generally to suits by and against labor organizations. Since the adoption of the Federal Rules of Civil Procedure, however, the Federal courts have already been authorized to entertain suits by and against labor organizations in the 35 States which already permit effective recovery against union funds. Rule 17 (b) of those rules provides in part as follows:

> * * * The capacity of an individual, other than one acting in a representative, to sue or be sued shall be determined by the law of his domicile. * * * In all other cases capacity to sue or be sued shall be determined by the law of the State in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such State, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.

It is concluded, therefore, that there now exists only a very narrow field for necessary Federal legislative action. There is perceived very little reason why the Federal courts should now be opened to so wide a degree, inviting litigation, when the rules presently in existence effectively permit suit and may, in the sound discretion of the United States Supreme Court, be broadened even further to permit suit regardless of State procedural laws and without the necessity of further legislation.

The question of conferring upon Federal courts broad power to entertain suits for violation of union agreements regardless of the amount involved and apparently in complete disregard of the constitutional requirement of diversity of citizenship is fraught with grave issues of policy and legality. It would appear particularly unwise to abandon in this field the present requirement of the $3,000 amount in controversy as a prerequisite to Federal jurisdiction. It is feared that the result would be to involve the Federal courts, already overburdened, with a great mass of petty litigation over amounts less than $3,000, easily capable of being adjudicated effectively by the more numerous State courts. This type of action would undoubtedly invite the return of conditions in the Federal Courts during prohibition days, when they bogged down in litigation ordinarily handled by the average police court.

As to legality, the bill would apparently give the Federal courts jurisdiction of disputes over union agreements affecting commerce

regardless of diversity of citizenship of the parties. The Constitution limits suits in the Federal courts to cases arising under the Constitution and laws of the United States or involving diversity of citizenship. (Constitution, art. 3, sec. 2). The bill apparently attempts to found jurisdiction upon the Constitution and laws of the United States by the use of the words "if such agreement affects commerce". There would be involved here, however, no substantive right under the laws of the United States or under the Constitution. Actually substantive legal questions as to a contract dispute would be decided in accordance with applicable State law. The United States Supreme Court has held that the fact that the circumstances involve engaging in interstate commerce will not permit the Federal ship (*In Re Metropolitan Railway Receivership*, 208 U.S. 90, 28 courts to assume jurisdiction where there is no diversity of citizen- S. Ct. 219, 52 L. Ed. 403). It is therefore concluded that this aspect of the bill constitutes an approach which is of doubtful legality and certainly is both hasty and unwise.

It is noted that the bill makes an effort to secure union responsibility for the acts of its agents. Very general language is used. It is submitted, however, that, instead, care should be used in determining what are acts of duly authorized agents acting within the scope of their authority. The question was fully discussed, studied, and argued by the Congress at the time of the passage of the Norris-LaGuardia Act and the language there used limited the liability of the organization to those "unlawful acts of individual officers, members, or agents" where there is "clear proof of actual participation in or actual authorization of such acts or of ratification of such acts after actual knowledge thereof." This is a precise and fair definition of agency and it is believed that the bill should follow the language of the Norris-LaGuardia Act in this respect.

The effort of the bill to open up the Federal courts to petitions for injunction in disputes involving violations of union agreements despite the present provisions of the Norris-LaGuardia Act banning injunctions in labor disputes, except after a full hearing and upon certain findings, has been specially considered elsewhere and the complete inadvisability of such action is apparent from that consideration.

3. Registration of unions and financial reports

Section 303 of the bill requires annual reports to the Secretary of Labor from labor organizations whose members are employed in industries engaged in commerce. These reports would include information dealing with union receipts and disbursements, names and addresses of employers with whom collective-bargaining relations are maintained, policies and procedures concerning admission to and expulsion from membership, bylaws, constitution, officers, etc. In addition, the bill requires the report to be mailed to each member of the union and provides criminal penalties for violations of any of the provisions of section 303.

Immediately questions arise as to whether such legislation is necessary in view of the fact that most unions already publish such material or whether it is fair to impose these requirements upon labor organizations but not on other types of voluntary associations. Publicity concerning union finances is not undesirable. All the international unions in the A. F. of L. furnish regular financial reports

either directly to their members or to the public generally. The same is true of the unions comprising the CIO. Section 117 of the Revenue Act of 1943 compels labor organizations to file detailed financial returns with the Bureau of Internal Revenue. Amending the Revenue Act to require publication of such reports would achieve the objective of assuring adequate publicity to the financial affairs and activities of unions. Furthermore, this would obviate the necessity for setting up a new bureau in the Department of Labor, which this bill would necessitate, to collect and compile figures and documents at an unjustifiable added expense to the Government.

Thus it can be seen that the provisions in sections 7, 8, and 303 of this bill single out the labor organization for special and restrictive treatment, but impose no limitations at all upon the existence, structure, or internal activities of other forms of voluntary associations. The net effect of these measures, when viewed in conjunction with the other provisions of this bill, is to deprive labor organizations of the right to manage their own affairs, to subject them to an inferior status in the eyes of the law, and to create the impression that millions of adult Americans are untrustworthy, unreliable, addicted to racketeering and corruption, incapable of honest and decent association for the purposes of economic self-protection, and incapable of managing their own affairs justly and democratically. These very same Americans as members of lodges, clubs, fraternal orders, cooperatives, and other types of voluntary associations, to numerous to mention here, have demonstrated their ability to achieve the objects for which they constantly associate, honestly, decently, justly, democratically, and with an absolute minimum of governmental regulation and control.

4. Restrictions on political contributions

Section 304 of this bill would place all corporations and labor organizations within the provisions of the Federal Corrupt Practices Act forbidding contributions in connection with any election of the President, Vice President, Representative, or Senator.

This provision poses a serious policy issue as to the desirability of placing this restriction on political liberties in the absence of a clear showing of opportunity for corruption. Furthermore, the restriction is one-sided. While it includes corporations, along with the labor organizations, it does not include officers in either. Thus, in view of the tremendous sums paid to officials of large corporations, it would seem that they are able to contribute to an election fund as individuals, while officials of labor organizations, because of their moderate salaries, would not be able to do so.

Further, it is well to note that the essential purposes of the two types of organizations are not parallel. A corporation of the type in mind here, is an organization for production of goods or rendering of services, organized for profit. The stockholders have a reasonable right to profits and notification of company disbursements. A labor organization is a voluntary organization for the well-being of the individual worker. If he contributes directly to a political party, or if he contributes through a voluntary organization, to facilitate the handling of such sums, the result is the same. Consequently, there seems to be nothing reprehensible in contributions by a union when it is a lump sum made up of small voluntary contributions by individuals. It is not derived from any profits, such as is corporation contributions.

It would seem to be a dangerous precedent to make unlawful a contribution by a voluntary organization to an election fund. It might well be that if such precedent is followed, in time all organizations of whatever kind or nature, might be prohibited from such contributions. It is difficult to see the advisability of setting a precedent for a future pattern that could conceivably encompass organizations which are purely charitable, or religious, or fraternal in their nature and aims. Such a restriction upon a voluntary association, a labor organization, composed of individuals of modest means, who by their very association with a labor organization demonstrate their inability to contribute large sums to an election fund has little or no merit.

Conclusion

This bill is aimed at the heart of American industrial democracy. If it is permitted to hit that target, the working people of this country will not soon recover their status as free men. The Fascists and Communists learned early that a strong trade-union movement was inconsistent with their objectives and an obstacle to the achievement of those objectives. As a means of securing power, the Fascists and the Communists destroyed the labor movement in other countries, because they recognized that trade-unions were a citadel of democracy which they must batter down in order to achieve their evil purposes.

Surely the Congress of the United States ought not to be blind to this lesson of recent history. Surely the Congress can find better things to do in this year, when the powers of world reconstruction are in danger of being outrun by the dark forces of chaos, than to throw its energies into a program that can only serve to weaken the weak and strengthen the strong.

We at least will have no part in pressing down this crown of thorns upon the brow of labor. We call upon our colleagues of both parties to join us in this battle against restrictive, undemocratic, and unnecessary legislation.

Mr. Kennedy concurs with the minority report with reservations as hereinafter set forth in his supplemental report.

All of which is respectfully submitted by the undersigned minority members of the Committee on Education and Labor:

John Lesinski.
Augustine B. Kelley.
Adam Clayton Powell, Jr.
Ray J. Madden.
Arthur G. Klein.
John F. Kennedy.

SUPPLEMENTARY MINORITY REPORT BY HON. JOHN F. KENNEDY

I concur in the minority report but have filed this separate opinion because the minority report leaves unexpressed certain views I strongly hold.

The testimony of the representatives of management and labor before the Committee on Education and Labor, and the reporting of this bill to the House by the committee do not augur well for the future of America. I had thought that management, labor, and the Government would sense their high responsibilities to the Nation in this critical hour. The simple truth is that management, labor, and Government—insofar as it is represented by the majority of the Committee on Education and Labor—have failed their responsibilities. The nature of the case presented by management and labor and this bill of the committee stand as evidence that selfishness and irresponsibility still characterize labor-management relations and the efforts of the Government to deal with them. Management has been selfish. Labor has been selfish. And the majority of this committee has succumbed completely to the old and deeply rooted antilabor prejudices which delayed for decades the development of a forthright and constructive labor policy in America.

I reaffirm my basic faith in the system of private enterprise under which this Nation has flourished and successfully carried the burden of two great wars. But if this system is to work in our complex economic society, there must be a recognition by management and labor that the welfare of each is dependent ultimately upon the welfare of the other. If repressive and vindictive labor legislation is enacted at the behest of management, a tide of left-wing reaction will develop which may well destroy our existing business system. At the same time if labor continues to insist on special privilege and unfair advantage in its relations with management, I have grave doubts as to the future of the trade-union movement.

Legislation is needed. But legislation alone will not supply the whole answer because we cannot legislate responsibility. Responsibility entails self-restraint in the exercise of power, and a will to cooperate for the common good. This is the ideal of a free competitive system in a democratic state. Nothing which this Congress can do will solve the labor-management problem unless this recognition of responsibility, so lacking in the past, is forthcoming in the future.

There are several simple truths which must guide us in our approach to the labor-management problem. The closed shop, the union shop, industry-wide bargaining, free and unrestricted collective bargaining without unfair advantage on either side—all of these I consider fundamental rights of labor.

Equally fundamental is the right of each individual union member to a square deal from his union. On this score, there have been serious abuses in the past. I favor democratizing union election procedures and administration. Some of the provisions of this bill are designed to achieve these objectives, and insofar as they do so without seriously hampering the internal operation of the union, I approve of them.

Certainly, as the bill provides, officers of unions should be elected by secret ballot; strike decisions should be made by secret ballot;

members should not be expelled for the mere expression of views critical of union leadership; and, finally, unions should not be permitted to impose arbitrary and excessive initiation fees and dues. In addition, the bill must provide that no member of a union can be expelled for any cause whatsoever without full opportunity for a fair hearing on specific charges brought against him.

The bill is seriously defective in that it fails to make a distinction between the various types of jurisdictional and sympathy strikes and secondary boycotts. The bill in broad terms condemns all of these as unlawful concerted activities. This blanket approach wholly ignores economic realities. There are some sympathy strikes, secondary boycotts, and even jurisdictional strikes which promote a legitimate economic objective of a union. There are others which are completely indefensible and which injure innocent parties without any direct connection with the legitimate objectives of the individual union involved.

I feel that the provisions of the bill dealing with unfair labor practices and unlawful concerted activities must be rewritten to condemn what is truly objectionable in union activities and to preserve those methods of action which are essential to the preservation of strong unions, able to bargain equally with management.

There should be a readjustment of the collective-bargaining processes so that collective bargaining will be really free and equal and in good faith on both sides. To this end, employers must be guaranteed the same rights of freedom of expression now given to unions. With the enactment of the new Administrative Procedure Act, I see no need at this time for a reorganization of the National Labor Relations Board. The Conciliation Service should be strongly implemented and remain with the Department of Labor.

If unions are to retain the closed shop and the right to bargain collectively on an industrywide basis and if, as I feel, the antitrust laws should not be resurrected to harass unions with criminal and severe civil penalties, some method must be worked out to deal with strikes which cripple the Nation's industrial power.

In attempting to solve this most critical problem in the field of labor-management relations the bill is completely inept. In using the traditional public utility test the approach is too narrow. The word "interest" is weak and indefinite. The procedure set up for handling these strikes is cumbersome and unworkable. But fundamentally the bill is defective in that after a period of time elapses a strike imperiling the national health or safety is free to continue. Whenever a strike imperils the public health or safety it becomes illegal and should continue to be illegal as long as the emergency exists.

I propose to submit to the Congress an amendment which I hope will achieve this goal in a simple and direct fashion. This amendment will provide that whenever a strike imperils the public health or safety, the Attorney General, at the direction of the President and in behalf of the United States, will be authorized to bring suit for an injunction against the striking union directly in the Supreme Court. This eliminates the serious objections to the bill's placing the finding of the fact that a strike imperils the public health or safety in the hands of a single United States district judge. If the Supreme Court, as a fact-finding body, finds that a strike imperils the public health or safety, an injunction will issue.

To the extent necessary to implement this procedure, the existing anti-injunctions statutes of the United States will be suspended. The Supreme Court may then use its traditional equity powers to enforce the injunction. This amendment is in complete keeping with fundamental democratic processes in the United States. It observes strictly the rights and prerogatives of our tripartite Government. The legislative branch passes a law forbidding strikes against national health or safety. The executive branch institutes suit when it feels that this law is being violated. The judicial branch exercises its interpretive and fact-finding powers to determine whether the law has been broken.

This is a critical time in the development of America as a strong and free industrial democracy. We are in the second year of a post-war period full of trial and difficulty. If internal cleavages are to split the Nation, it will mean unrest at home and weakness and indecision in dealing with problems abroad. If, on the other hand, there is full cooperation between labor and management and a recognition of mutual responsibilities, America can look forward to a prosperous future at home and a real capacity to fulfill its obligations abroad.

Respectfully submitted.

JOHN F. KENNEDY.

24. (80th Congress, First Session, Senate, Report No. 105)

FEDERAL LABOR RELATIONS ACT OF 1947

APRIL 17 (legislative day, MARCH 24), 1947.—Ordered to be printed

Mr. TAFT, from the U.S. Congress, Senate Committee on Labor and Public Welfare, submitted the following

REPORT

[To accompany S. 1126]

Together with the individual views of Mr. Thomas of Utah, and the supplemental views of Mr. Taft, Mr. Ball, Mr. Donnel, and Mr. Jenner, and the concurring views, with reservations of Mr. Smith, therein

The Committee on Labor and Public Welfare report an original bill (S. 1126) to amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes, and recommends that the bill do pass.

The problem of the inadequacy of existing laws on industrial relations is one of grave national concern. The basic Federal law on this subject is contained in two statutes—the Norris-LaGuardia Act of 1932 and the National Labor Relations Act of 1935. Enacted at the time when millions of persons were unemployed and labor organizations were relatively weak and ineffective, these statutes, despite their experimental character, have not been changed in any respect since their original enactment.

While the committee does not believe that social gains which industrial employees have received by reason of these statutes should be impaired in any degree, we do feel that to the extent that such statutes, together with the regulations issued under them, and decisions regarding them, have produced specific types of injustice, or clear inequities between employers and employees. Congress should remedy the situation by precise and carefully drawn legislation.

The need for congressional action has become particularly acute as a result of increased industrial strife. In 1945 this occasioned the loss of approximately 38,000,000 man-days of labor through strikes. This total was trebled in 1946 when there were 116,000,000 man-days lost and the number of strikes reached the unprecedented figure of 4,985.

This bill, formulated by the committee, in an attempt to solve some of the more pressing difficulties with which the Nation is confronted, represents the results of numerous hearings before the committee extending over a period of more than 5 weeks. The committee heard 83 witnesses representing not only management, labor organizations, and the Government but also the general public. The actual drafting of the bill was done in executive sessions of the committee during the

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last 4 weeks, in which almost daily meetings were held. As an indication of the interest in the subject matter, the entire membership of the committee was present at the meetings in which the draft was perfected. Virtually every Senator on the committee made an important contribution to its provisions.

The committee bill is predicated upon our belief that a fair and equitable labor policy can best be achieved by equalizing existing laws in a manner which will encourage free collective bargaining. Government decisions should not be substituted for free agreement but both sides—management and organized labor—must recognize that the rights of the general public are paramount.

The need for such legislation is urgent. Supreme Court interpretations of the Norris-LaGuardia Anti-injunction Act and the Clayton Act seem to have placed union activities, no matter how destructive to the rights of the individual workers and employers who are conforming to the National Labor Relations Act, beyond the pale of Federal law. Moreover, the administration of the National Labor Relations Act itself has tended to destroy the equality of bargaining power necessary to maintain industrial peace. This is due in part to the one-sided character of the act itself, which, while affording relief to employees and labor organizations for certain undesirable practices on the part of management, denies to management any redress for equally undesirable actions on the part of labor organizations. Moreover, as a result of certain administrative practices which developed in the early period of the act, the Board has acquired a reputation for partisanship, which the committee bill seeks to overcome, by insisting upon certain procedural reforms.

In the course of its deliberations, the committee considered many other proposals, such as restricting alleged monopolistic practices by unions, the formulation of a code of rights for individual members of trade unions, and a clarification of the problem of union-welfare funds. In excluding these matters from the purview of the bill, the majority of the committee should not be understood as regarding such proposals as unsound or unworkable, but rather that the problems involved should receive more extended study by a special joint congressional committee for which the committee bill specifically provides. In other words, the committee in this bill attempted to embody reforms which are long overdue and with respect to which the record of the hearings revealed widespread agreement on the part of informed and impartial persons.

The bill is divided into four titles: Title I amends the National Labor Relations Act to achieve the purposes to which reference has been made. Title II creates a new Federal Mediation Service, which transfers the functions of the Department of Labor in the field of conciliation, along with the property and personnel of the present Service. It also provides special procedures for the Attorney General and the President to utilize in national emergencies. Title III gives labor unions the right to sue and be sued as legal entities for breach of contract in the Federal courts. Title IV establishes a joint Committee of the Congress to make a long-range study of certain aspects of labor relations, concerning which further information was thought desirable by the committee. Title V contains definitions.

The major changes which the bill would make in the National Labor Relations Act may be summarized as follows:

1. It eliminates the genuine supervisor from the coverage of the act as an employee and makes it clear that he should be deemed a part of management.

2. It abolishes the closed shop but permits voluntary agreements for requiring such forms of compulsory membership as the union shop or maintenance of membership, provided that a majority of the employees authorize their representatives to make such contracts. It also protects employees against discharge, if unions deny or terminate their membership for capricious reasons.

3. It gives employers and individual employees rights to invoke the processes of the Board against unions which engaged in certain enumerated unfair labor practices, including secondary boycotts and jurisdictional strikes, which may result in the Board itself applying for restraining orders in certain cases.

4. It reorganizes the central structure of the National Labor Relations Board not only by providing for the addition of four new members to the present Board of three, but by placing upon the members individual responsibility in performing their judicial functions. This would be accomplished by eliminating the review section of the legal staff and the reviewing personnel of the Trial Examining Division.

5. In the interests of assuring complete freedom of choice to employees who do not wish to be represented collectively as well as those who do, it requires the Board to enlarge the rights of petition in representation cases and to give greater attention to the special problems of craftsmen and professional employees in the determination of bargaining units.

6. It prevents the Board from continuing to accord affiliated unions special advantages at the expense of independent labor organizations, by requiring that, under identical circumstances, the Board in complaint cases refrain from any disparity of treatment.

SUPERVISORY PERSONNEL

A recent development which probably more than any other single factor has upset any real balance of power in the collective-bargaining process has been the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise. It was not until 1945, after several changes in position, that the National Labor Relations Board itself by divided vote finally decided that supervisory employees were covered by the National Labor Relations Act. This construction was recently upheld in the Supreme Court in the *Packard Motor Car case* (decided March 10, 1947). It should be noted that the majority of the Court in this case did not approve the policy of the Board's doctrine but, in the absence of any specific limitation upon the word "employee" in the Wagner Act, merely held that the Board had power to reach such a conclusion. This means, as Mr. Justice Douglas pointed out in his dissenting opinion—and as Board counsel conceded in argument—that unless Congress amends the act in this respect its processes can be used to unionize even vice presidents since they are not specifically exempted from the category of "employees."

The Board has placed the issue squarely up to the Congress by stating in one of its recent decisions:

> So long as the Congress of the United States imposes no limitation on their choice, it is not for us to do so (*Jones & Laughlin Steel Corp.*, 71 N. L. R. B. 1261).

The folly of permitting a continuation of this policy is dramatically illustrated by what has happened in the captive mines of the Jones & Laughlin Steel Corp. since supervisory employees were organized by the United Mine Workers under the protection of the act. Disciplinary slips issued by the underground supervisors in these mines have fallen off by two-thirds and the accident rate in each mine has doubled. (See testimony of H. Parker Sharp, hearings on S. 55 and S. J. Res. 22, vol. 1, p. 339, *Re Jones and Laughlin Steel Corp.*, 71 N. L. R. B. 1261.)

In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action. In other words the committee has adopted the test which the Board itself has made in numerous cases when it has permitted certain categories of supervisory employees to be included in the same bargaining unit with the rank and file. (*Bethlehem Steel Company, Sparrows Point Division*, 65 N. L. R. B. 284 (expediters); *Pittsburgh Equitable Meter Company*, 61 N. L. R. B. 880 (group leaders with authority to give instructions and to lay out the work); *Richards Chemical Works*, 65 N. L. R. B. 14 (supervisors who are mere conduits for transmitting orders); *Endicott-Johnson*, 67 N. L. R. B. 1342, 1347 (person having the title of foreman and assistant foreman but with no authority other than to keep production moving).)

Before formulating this definition, the committee considered a proposal, occasionally advanced, which would have limited the protection of foremen to joining or organizing unions whose membership was confined to supervisory personnel and not affiliated with either of the major labor federations. After considerable discussion, the committee decided that any such compromise would be completely unrealistic. There is nothing in the record developed before this committee to justify the conclusion that there is such a thing as a really independent foremen's organization.

It is true that the Foremen's Association of America is nominally independent, but its president admitted in testifying before us that it was the practice of his union to confer with representatives of various CIO and AFL unions to work out a common policy in the event of a strike. (See testimony of Robert H. Keys, id., vol. 3, pp. 232–233.) A number of Board cases are studded with evidence showing collaboration both in the organizing stage and in concerted activity between the Foremen's Association and affiliated unions. (See *Re Chrysler Corp.*, 69 N. L. R. B. 182; *Re B. F. Goodrich*, 65 N. L. R. B. 294; and *Re L. A. Young Spring Wire*, 65 N. L. R B 298.) It also appeared that the only major company in mass-production industry which has had a collective agreement with the Foremen's Association is the Ford Motor Co. Although this was cited by the Foremen's Association

as refuting industry's fears that productivity would suffer if it entered into collective relations with supervisors, it is significant that within the past week this very company has served notice of its termination of its agreement with the association. The termination was accompanied with a statement of the company that—

> After 3 years' experience * * * the results have been the opposite of what we have hoped for. Rather than exerting its efforts to bring foremen into closer relationship with management, your association has worked in the opposite direction.

It is natural to expect that unless this Congrss takes action, management will be deprived of the undivided loyalty of its foremen. There is an inherent tendency to subordinate their interests wherever they conflict with those of the rank and file. As one witness put it, "Two groups of people working on parallel lines eventually find a parallel interest." (See testimony of James D. Francis, id., vol. 1, p. 239.)

In recommending the adoption of this amendment, the committee is trying to make clear what Congress attempted to demonstrate last year when it adopted the Case bill. By drawing a more definite line between management and labor we believe the proposed language has fully met some of the technical criticisms to the corresponding section referred to in the President's veto of that bill. It should be noted that all that the bill does is to leave foremen in the same position in which they were until the Labor Board reversed the position it had originally taken in 1943 in the *Maryland Drydock case* (49 N. L. R. B. 733). In other words, the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. It merely relieves employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees.

Compulsory Union Membership

A controversial issue to which the committee has devoted the most mature deliberation has been the problem posed by compulsory union membership. It should be noted that when the railway workers were given the protection of the Railway Labor Act, Congress thought that the provisions which prevented discrimination against union membership and provided for the certification of bargaining representatives obviated the justification for closed-shop or union-shop arrangements. That statute specifically forbids any kind of compulsory unionism.

The argument has often been advanced that Congress is inconsistent in not applying this same principle to the National Labor Relations Act. Under that statute a proviso to section 8(3) permits voluntary agreements for compulsory union membership provided they are made with an unassisted labor organization representing a majority of the employees at the time the contract is made. When the committees of the Congress in 1935 reported the bill which became the present National Labor Relations Act, they made clear that the proviso in section 8(3) was not intended to override State laws regulating the closed shop. The Senate commitee stated that "the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal" (S. Rept. No. 573, 74th Cong., 1st sess., p. 11; see also H. Rept.

No. 1147, 74th Cong., 1st sess., pp. 19–20). Until the beginning of the war only a relatively small minority of employees (less than 20 percent) were affected by contracts containing any compulsory features. According to the Secretary of Labor, however, within the last 5 years over 75 percent now contain some form of compulsion. But with this trend, abuses of compulsory membership have become so numerous there has been great public feeling against such arrangements. This has been reflected by the fact that in 12 States such agreements have been made illegal either by legislative act or constitutional amendment, and in 14 other States proposals for abolishing such contracts are now pending. Although these regulatory measures have not received authoritative interpretation by the Supreme Court (see *A.F. of L.* v. *Watson*, 327 U.S. 582), it is obvious that they pose important questions of accommodating Federal and State legislation touching labor relations in industries affecting commerce (*Hill* v. *Florida*, 325 U.S. 538; see also, *Bethlehem Steel Co.* v. *N.Y. Labor Board*, decided by the Supreme Court April 7, 1947). In testifying before this committee, however, leaders of organized labor have stressed the fact that in the absence of such provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.

The committee has taken into consideration these arguments in reaching what it considers a solution of the problem which does justice to both points of view. We have felt that on the record before us the abuses of the system have become too serious and numerous to justify permitting present law to remain unchanged. It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated. In the maritime industry and to a large extent in the construction industry union hiring halls now provide the only method of securing employment. This not only permits unions holding such monopolies over jobs to exact excessive fees but it deprives management of any real choice of the men it hires. Extension of this principle to licensed deck and engine officers has created the greatest problems in connection with the safety of American vessels at sea. (See testimony of Almon E. Roth, id., vol. 2, p. 612.)

Numerous examples were presented to the committee of the way union leaders have used closed-shop devices as a method of depriving employees of their jobs, and in some cases a means of securing a livelihood in their trade or calling, for purely capricious reasons. In one instance a union member was subpenaed to appear in court, having witnessed an assault upon his foreman by a fellow employee. Because he told the truth upon the witness stand, the union leadership brought about his expulsion with a consequent loss of his job since his employer was subject to a close-shop contract. (See testimony of William L. McGrath, id., vol. 4, p. 1982.)

Numerous examples of equally glaring disregard for the rights of minority members of unions are contained in the exhibits received in evidence by the committee. (See testimony of Cecil B. DeMille, id., vol. 2, p. 797; see also, id., vol. 4, pp. 2063–2071.) If trade-unions were purely fraternal or social organizations, such instances would not be a matter of congressional concern, but since membership in such organizations in many trades or callings is essential to earning a living, Congress cannot ignore the existence of such power.

Under the amendments which the committee recommends, employers would still be permitted to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired if a majority of such employees have shown their intent by secret ballot to confer authority to negotiate such an agreement upon their representatives. But in order to safeguard the rights of employees after such a contract has been entered into, three additional safeguards are provided: (1) Membership in the union must be available to an employee on the same terms and conditions generally applicable to other members; (2) expulsion from the union cannot be a ground of compulsory discharge if the worker is not delinquent in paying his initiation fee or dues; (3) if a worker is denied membership or expelled from the union because he exercises the right conferred on him by the act to work for the change of a bargaining representative at an appropriate time he cannot be discharged.

It seems to us that these amendments remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promoted stability by eliminating "free riders" the right to continue such arrangements.

Unfair Practices by Unions

During the public hearings, testimony was presented relating to practices by labor organizations and their agents, which have seriously interfered with commerce and unduly impinged upon the rights of individual employees, employers, and the public. It was made abundantly clear that the Government, under existing legislation and court decisions, is unable to cope with union practices that injure the national well-being. The committee believes that such practices must be corrected if stable and orderly labor relations are to be achieved. Many and diverse proposals designed to define and correct those union practices which are properly the subject of Federal control, have been presented to the committee, by witnesses who appeared before us as well as by members of the committee. Both witnesses and committee members were in substantial accord that many union practices, especially secondary boycotts, jurisdictional disputes, violations of collective-bargaining contracts, and strikes and boycotts against certifications of the National Labor Relations Board, should be subject to Federal regulation. With respect to other aspects of labor-management relations, there has been a considerable divergence of opinion as to the necessity for Federal regulation. Moreover, witnesses and committee members have made numerous suggestions as to the form in which legislative action to remedy unfair practices by unions should be cast.

After a careful consideration of the evidence and proposals before us, the committee has concluded that five specific practices by labor organizations and their agents, affecting commerce, should be defined as unfair labor practices. Because of the nature of certain of these practices, especially jurisdictional disputes, and secondary boycotts and strikes for specifically defined objectives, the committee is convinced that additional procedures must be made available under the National Labor Relations Act in order adequately to protect the public welfare which is inextricably involved in labor disputes.

Time is usually of the essence in these matters, and consequently the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives—the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining. Hence we have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices. In addition, we have provided that the Board shall be authorized to appoint arbitrators to hear and determine jurisdictional disputes concerning work tasks, if the parties fail to adjust the disputes within 10 days. Pursuant to this authorization, arbitration awards are to have the same force as final orders of the Board.

Reorganization of the Board

The committee believes that certain changes in the structure and procedures of the National Labor Relations Board are necessary to meet widespread and justifiable criticism. There is no field in which time is more important, yet the Board is from 12 to 18 months behind in its docket. While this condition is due in part to the fact that limited appropriations have made it necessary to curtail the size of the staff in the face of a phenomenal postwar case load, this is not the entire explanation. Much of this delay stems from the fact that the three Board members are so overburdened with the duty of deciding contested cases that they have little or no time to give to problems of internal administration. The result is that the duties of supervision have had to be delegated to subordinate officers who are inured to following a groove of traditional methods. The expansion of the Board from three to seven members, which this bill proposes, would permit it to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage, and to leave the remaining member, not presently assigned to either panel, to deal with problems of administration, personnel, expenditures, and the preparation of the budget.

One of the major criticisms of the Board's performance of its judicial duties has been that the members themselves, except on the most important cases, have fallen into the habit of delegating the reviewing of the transcripts of the hearings and findings of trial examiners to a unit of the general counsel's office called the Review Section. This means that after exceptions are filed and oral argument is scheduled, the Board members rely for their knowledge of the cases upon a memorandum submitted by one of the review attorneys. The memorandum sent to each member is identical and has been already reviewed and revised by the supervisory employees of this Section, even though they have not seen the transcripts or familiarized themselves with the briefs and bills of exception. Unless the final memorandum, therefore, differs from the trial examiner's report in major respects, the attention of the Board members may not be focused upon the sharpest issues in the case.

After the Board has voted, it has also been the practice to assign to the Review Section the duty of preparing a draft opinion. Consequently, unless there is a dissent which one of the majority members sees fit to answer, both the decision and the form in which it appears are virtually a product of the corporate personality of this legal section. In other words, the Board, instead of acting like an appellate court where the divergent views of the different justices may be reflected in each decision, tends to dispose of cases in an institutional fashion. To that extent, the congressional purpose in having the act administered by a Board of several members rather than a single administrator has been frustrated.

Since it is the belief of the committee that Congress intended the Board to function like a court, this bill eliminates the Review Section. In its place each Board member may have as many legal assistants of his own as is necessary to review transcripts and assist him in the drafting of the opinions on cases to which he is assigned. Since the Board's function is largely a judicial one, conformance with the practices of appellate courts in this respect should make for decisions which will truly represent the considered opinions of the Board members.

A corollary to this reform relates to the Trial Examining Division. Tremendous responsibility rests upon the judgment of the individual trial examiner who is sent by the Board to the field to hear contested cases, appraise the credibility of the witnesses, resolve conflicts in testimony, make findings of fact and recommendations for Board decision. Under current practice, before a trial examiner issues his report to the parties, its contents are reviewed and frequently changed or influenced by the supervisory employees in the Trial Examining Division. Yet, since the report is signed only by the trial examiner, the Board holds him out as the sole person who has made a judgment on the evidence developed at the hearing. In the first *Morgan* case (298 U.S. 468, at 480–481), one of the leading decisions on administrative law, the Supreme Court enunciated the following principle:

> If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given * * *. The one who decides must hear.
>
> This necessary rule does not preclude * * * obtaining the aid of assistants.

It would be difficult to think of a practice which does greater violence to this principle. Consequently, the committee bill prohibits any of the staff from influencing or reviewing the trial examiner's report in advance of publication, thereby obviating the need for reviewing personnel in the Trial Examining Division.

Another questionable practice which the committee has considered has been the attendance of trial examiners at executive sessions of the Board when cases are being decided. Under its rules, the Board gives the parties adversely affected by the trial examiner's report an opportunity to appear by counsel before the Board to argue exceptions. The rules also permit opposing counsel to appear to defend findings in a trial examiner's report which represent his position in the case. It is therefore unfair to the parties to permit a trial examiner, after his findings have alternately been assailed and defended at public hearing, to make a final defense of his published determination behind the scenes. It would seem unnecessary to legislate in this matter at all (since the Board has it in its own power to correct these practices) if it were not for the fact that even the present Board has persisted in adhering to such unjudicial practices.

Reform in Representation Proceedings

In recent years, the number of cases involving disputes with respect to the choice of bargaining representatives in the units which they should represent have become the major business of the National Labor Relations Board. Cases of this character for the last 4 years have been more than double the number of complaints cases. In view of the tremendous number of such cases, therefore, it is of utmost importance that the regulations and rules of decision by which they are governed be drawn so as to insure to employees the fullest freedom of choice.

The present act contains virtually no directions as to how representation proceedings are to be conducted nor does it furnish any guide to the Board as to the kind of bargaining unit to be established. It gives the Board latitude to select among craft, plant, and employer units or subdivisions thereof. The only standard which the present act contains is that the unit decided upon must—

> insure to employees the full benefit of their right to self-organization and to collective bargaining and otherwise to effectuate the policies of the act.

Many of the current procedures developed administratively are properly subject to the criticism that the Board has made collective bargaining "a one-way street." Despite the absence of discriminatory language in the act, the Board refuses to entertain petitions filed by employees who wish to demonstrate that the current or asserted bargaining representative is not the choice of the majority. The only relief for employees suffering from representation by a radical or racketeering union is to file a petition designating another union as their representative. This, of course, puts a premium upon raiding and jurisdictional rivalries. The committee bill would make it necessary for the Board to entertain petitions from employees irrespective of the kind of relief sought. It does not change the Board's rules of decision with respect to requirements of substantiality in order to obtain a hearing or the rules which militate against a change in bargaining representatives while a lawful collective agreement is in effect.

The present Board rules also discriminate against employers who have reasonable grounds for believing that labor organizations claiming to represent their employees are really not the choice of the majority. It is true that where an employer is confronted with conflicting claims by two or more labor organizations, he may file a petition. But where only one union is in the picture, the Board denies him this right. Consequently, even though a union which has the right to petition and be certified as the majority representative, if it is really such, may strike for recognition, an employer has no recourse to the Board for settlement of such disputes by the peaceful procedures provided for by the act. The one-sided character of the Board's rules has been defended on the ground that if an employer could petition at any time, he could effectively frustrate the desire of his employees to organize by asking for an election on the first day that a union organizer distributed leaflets at his plant. It should be noted that this may be a valid argument for placing some limitation upon an employer's right to petition, but it is no justification for denying it entirely. The comittee has recognized this argument insofar as it has point, by giving employers a right to file a petition but not until

a union has actually claimed a majority or demanded exclusive recognition. It should be observed that this amendment, like the amendment doing away with disparity of treatment on employee petitions, does not impair the Board's discretion to dismiss petitions by employers where the existence of an outstanding collective agreement or some other special condition makes an election at that time inappropriate.

The committee bill also contains certain standards to guide the Board in unit determinations, thereby meeting some of the valid objections voiced to certain rules of decision. When Congress passed the National Labor Relations Act, it recognized that the community of interests among members of a skilled craft might be quite different from those of unskiled employees in mass-production industry. Although there has been a trend in recent years for manufacturing corporations to employ many profesional persons, including architects, engineers, scientists, lawyers, and nurses, no corresponding recognition was given by Congress to their special problems. Nevertheless such employees have a great community of interest in maintaining certain professional standards. At the hearings, representatives of various professional associations appeared before the committee to protest against the occasional practice of the Board of covering professional personnel into general units of production and maintenance employees or general units of office and clerical employees, despite the fact that their interests in common with such groups was extremely limited. (See testimony of representatives of the American Society of Civil Engineers, American Chemical Association, American Nurses Association, and the American Institute of Architects, hearings, vol. 3, pp. 1702–1715.) Since their numbers is always small in comparison with production or clerical employees, collective agreements seldom reflect their desires. Under the committee bill, the Board is required to afford such groups an opportunity to vote in a separate unit to ascertain whether or not they wish to have a bargaining representative of their own.

Somewhat similar treatment is provided for members of genuine craft unions. Generally speaking, in plants which have not been organized, the Board has provided an opportunity for craftsmen to vote in a separate unit and thus secure representation of their own if the vote reflects that desire (*Globe Machine and Stamping Company*, 3 N. L. R. B. 294). Where a company has already been organized, however, the Board does not apply this doctrine unless it is consistent with prior bargaining history. Since the decision in the *American Can case* (13 N. L. R. B. 1252), where the Board refused to permit craft units to be "carved out" from a broader bargaining unit already established, the Board, except under unusual circumstances, has virtually compelled skilled artisans to remain parts of a comprehensive plant unit. The committee regards the application of this doctrine as inequitable. Our bill still leaves to the Board discretion to review all the facts in determining the appropriate unit, but it may not decide that any craft unit is inappropriate on the ground that a different unit has been established by a prior Board determination.

Another important procedural change relates to the rules on run-off elections. Under present regulations, if two or more unions are on the ballot and none of the choices receives a plurality in the first elections, the regional directors are authorized to conduct a run-off. Unless the

vote for "neither" or "none" is a plurality, however, the employees are limited in the run-off to a choice between two unions, even though one of these unions might have run in third place. The bill proposes to correct this inequity by requiring that, on the run-off, the ballot give the employees an option between the two highest choices. This would make representation proceedings conform more closely to public elections. In order to impress upon employees the solemnity of their choice, when the Government goes to the expense of conducting a secret ballot, the bill also provides that elections in any given unit may not be held more frequently than once a year.

Equality of Treatment for Independent Unions

Another problem to which the committee gave considerable thought was the extent to which independent unions have a real grievance under current policies and practices of the Board. It has been the contention of leaders of the independents for many years that the Board had one rule for independent unions and another one for organizations affiliated with the A. F. of L. or the CIO. There is no doubt that since the passage of the National Labor Relations Act independent unions have dwindled greatly in number. To the extent that this change has come about through the provisions of section 8(2), which forbids employers to dominate or contribute financial or other support to labor organizations, the committee has not seen fit to make any changes in the present act. It believes that employers should not be permitted to take a hand in the internal affairs of labor organizations, whether affiliated or unaffiliated, or to extend financial assistance to them. In one respect, however, the independent unions do have just cause for complaint under current administrative practice of the Board. If an unaffiliated union gains a foothold in a plant through employer encouragement or support, or if some of the supervisory employees join it—*Brown Company* (65 N. L. R. B. 208)—the Board's practice is to issue a complaint under section 8(2) and if it finds the allegations to be supported by the evidence, to order the company forever to refrain from recognizing such an organization. (See *Tappan Stove Company*, 66 N.L.R.B. 759, and *Brown Company* (supra).) This is called an order of disestablishment. An organization affected by such an order, no matter if its members and officers purge themselves of the taint of employer domination or interference, is never thereafter permitted recognition. Moreover, neither such an organization nor any successor, no matter how free of employer influence, is subsequently permitted a place on the ballot in a representation case even though, in fact, it may represent the overwhelming choice of the employees.

The Board's policy with respect to affiliated unions is much more lenient. An affiliated union may obtain a collusive contract without representing any of the employees, it may have been organized by supervisors, or it may be receiving a subsidy from an employer. It is true that the Board recognizes that such unions are the beneficiaries of unfair labor practices. Under such circumstances, however, the Board will frame its complaints under subsection 8 (1) and its order will be limited to directing the offending employer to break off relations with the labor organization until such time as it has been certified by the Board. Under current practice, if an employer complies with

such an order, an affiliated organization is then permitted to file an election petition 60 days after such a determination. (See *Ohio Valley Bus Co.*, 38 N.L.R.B. 838; *Ace Sample Card Co.*, 46 N.L.R.B. 129; and *Pennsylvania Handbag Company*, 41 N.L.R.B. 1454.) The Board's defense of this disparate practice is that unions affiliated with national organizations stand on a different footing and that a local union chartererd by a national body cannot "at least for an extended period of time, be used as a utensil of an employer to deprive employees of free exercise of the rights guaranteed by the act." (See testimony of Chairman Paul M. Herzog, vol. 4, p. 1912.) While this may be true as a general proposition, it is also possible, from the very nature of employee organizational activities, that an independent union which has received employer encouragement may ultimately free itself completely from his control. This is particularly true in view of the fact that what the Board calls domination in independent union cases may merely amount to the mildest kind of support. (See *Brown Company, supra.*) In any event, this is certainly a justifiable issue which should be decided in accordance with the facts of each case and not upon the basis of the a priori reasoning of the Board in 1936. The committee has, therefore, proposed an amendment to section 10 of the act which will assure the application of a fair and uniform rule of decision to both independent and affiliated unions in complaint and representation proceedings.

Settlement of Labor Disputes

In dealing with the problem of the direct settlement of labor disputes the committee has considered a great variety of the proposals ranging from compulsory arbitration, the establishment of fact-finding boards, creation of an over-all mediation tribunal, and the imposition of specified waiting periods. In our judgment, while none of the suggestions is completely devoid of merit, the experience of the Federal Government with such devices has been such that we do not feel warranted in recommending that any such plans become permanent legislation.

Under the exigencies of war the Nation did utilize what amounted to compulsory arbitration through the instrumentality of the War Labor Board. This system, however, tended to emphasize unduly the role of the Government, and under it employers and labor organizations tended to avoid solving their difficulties by free collective bargaining. It is difficult to see how such a system could be operated indefinitely without compelling the Government to make decisions on economic issues which in normal times should be solved by the free play of economic forces. Moreover, the wartime experiment of the 30-day waiting period under the War Labor Disputes Act was not a happy one, since it was too frequently used as a device for bringing to a rapid crisis disputes which might have been solved by patient negotiation. For similar reasons except in dire emergencies the establishment of fact-finding boards or over-all mediation tribunals also cause dubious results. Recommendations of such bodies tend to set patterns of wage settlements for the entire country which are frequently inappropriate to the peculiar circumstances of certain industries and certain classes of employment.

It is our conclusion that by modifying some of the practices under the Wagner Act which tend to destroy the balance of power in collective-bargaining negotiations by restraining one party to a dispute without restraining the other, Congress would go a long way toward making collective bargaining the most effective method of solving the industrial relations difficulties.

The mediation title emphasizes the importance of adjusting disputes through conferences between employers and labor organizations with the Federal Government making available to the parties in the event of an impasse the services of trained mediators. The bill provides for a Federal Mediation Service under a single Director to be appointed by the President with the advice and consent of the Senate. The personnel and functions of the present Conciliation Service in the Department of Labor are transferred to the new Service, thereby relieving the Secretary of Labor of the burdens incident to the administration of such an agency. In taking this step the committee did not overlook the fact that the prestige of the Secretary, as an adviser to the President, is often an important factor in bringing about the settlement of a dispute of national magnitude. Accordingly, the bill should not be understood as prohibiting the Director of the new Federal Mediation Service from calling upon the Secretary of Labor for assistance in major crisis.

While the committee is of the opinion that in most labor disputes the role of the Federal Government should be limited to mediation, we recognize that the repercussions from stoppages in certain industries are occasionally so grave that the national health and safety is imperiled. An example is the recent coal strike in which defiance of the President by the United Mine Workers Union compelled the Attorney General to resort to injunctive relief in the courts. The committee believes that only in national emergencies of this character should the Federal Government be armed with such power. But it also feels that this power should be available if the need arises. It should be remembered that the Supreme Court decision in *U. S.* v. *United Mine Workers* (decided March 6, 1947), did not hold in broad terms that the Government was exempted from the Norris-LaGuardia Act. The majority of the court relied in part upon the fact that the Government had previously seized the mines under the War Labor Disputes Act and that the calling of the strike by the officers of the United Mine Workers was undoubtedly a breach of the criminal provisions contained in that statute. This act, however, is only temporary legislation and expires June 30, 1947.

We concluded, therefore, that the permanent code of laws of the United States should make it clear that the Attorney General should have the power to intervene and secure judicial relief when a threatened strike or lock-out is conducted on a scale imperiling the national health or safety. Recognizing that the right to secure injunctive relief is subject to abuses, this bill is carefully drawn to guard against excessive resort to the courts. It provides that the Attorney General should not petition a Federal court for such relief until he has convened a special board of inquiry to advise him on the matter. It also requires a finding by the court that such drastic measures are necessary as a prerequisite to obtaining a temporary restraining order or other injunctive relief. It makes interlocutory orders subject to

appellate review and further provides for the board of inquiry being reconvened during the period in which the Federal Mediation Service is seeking to assist the disputants in reaching a settlement.

Should all such measures prove unavailing after 60 days have elapsed, the National Labor Relations Board is directed by the bill to poll the employees affected on the question of whether or not they wish to accept or reject the last offer of their employer. When results of such ballot are certified, the Attorney General must then ask the court to vacate the injunction. Under these provisions, any temporary restraining order or injunction would not remain in effect for more than 80 days. In most instances the force of public opinion should make itself sufficiently felt in this 80-day period to bring about a peaceful termination of the controversy. Should this expectation fail, the bill provides for the President laying the matter before Congress for whatever legislation seems necessary to preserve the health and safety of the Nation in the crisis.

Enforcement of Contract Responsibilities

The committee bill makes collective-bargaining contracts equally binding and enforceable on both parties. In the judgment of the committee, breaches of collective agreement have become so numerous that it is not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur (as the bill proposes to do in title I). We feel that the aggrieved party should also have a right of action in the Federal courts. Such a policy is completely in accord with the purpose of the Wagner Act which the Supreme Court declared was "to compel employers to bargain collectively with their employees to the end that an employment contract, binding on both parties, should be made" (*H.J. Heinz & Co.*, 311 U.S. 514).

The laws of many States make it difficult to sue effectively and to recover a judgment against an unincoprorated labor union. It is difficult to reach the funds of a union to satisfy a judgment against it. In some States it is necessary to serve all the members before an action can be maintained against the union. This is an almost impossible process. Despite these practical difficulties in the collection of a judgment against a union, the National Labor Relations Board has held it an unfair labor practice for an employer to insist that a union incorporate or post a bond to establish some sort of legal responsibility under a collective agreement.

President Truman, in opening the management-labor conference in November 1945, took cognizance of this condition. He said very plainly that collective agreements should be mutually binding on both parties to the contract:

> We shall have to find methods not only of peaceful negotiations of labor contracts, but also of insuring industrial peace for the lifetime of such contracts. Contracts once made must be lived up to and should be changed only in the manner agreed upon by the parties. If we expect confidence in agreements made, there must be responsibility and integrity on both sides in carrying them out.

If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace.

The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce.

The amendment specifically provides that only the assets of the union can be attached to satisfy a money judgment against it; the property of the individual members of the organization would not be subject to any liability under such a judgment. Thus the members of the union would secure all the advantages of limited liability without incorporation of the union.

The initial obstacle in enforcing the terms of a collective agreement against a union which has breached its provisions is the difficulty of subjecting the union to process. The great majority of labor unions are unincorporated associations. At common law voluntary associations are not suable as such (*Wilson* v. *Airline Coal Company*, 215 Iowa 855; *Iron Molders' Union* v. *Allis-Chalmers Company*, C. C. A. 7, 166 F. 45). As a consequence the rule in most jurisdictions, in the absence of statute, is that unincorporated labor unions cannot be sued in their common name (*Grant* v. *Carpenters' District Council*, 322 Pa. St. 62). Accordingly, the difficulty or impossibility of enforcing the terms of a collective agreement in a suit at law against a union arises from the fact that each individual member of the union must be named and made a party to the suit.

Some States have enacted statutes which subject unincorporated associations to the jurisdiction of law courts. These statutes are by no means uniform; some pertain to fraternal societies, welfare organizations, associations doing business, etc., and in some States the courts have excluded labor unions from their application.

On the other hand, some States, including California and Montana, have construed statutes permitting common name suits against associations doing business to apply to labor unions (*Armstrong* v. *Superior Court*, 173 Calif. 341; *Vance* v. *McGinley*, 39 Mont. 46). Similarly, but more restrictive, in a considerable number of States the action is permitted against the union or representatives in proceedings in which the plaintiff could have maintained such an action against all the associates. Such States include Alabama, California, Connecticut, Delaware, Maryland, Montana, Nevada, New Jersey, New York, Rhode Island, South Carolina, and Vermont.

In at least one jurisdiction, the District of Columbia, the liberal view is held that unincorporated labor unions may be sued as legal entities, even in the absence of statute (*Busby* v. *Elec. Util. Emp. Union*, U. S. Court of Appeals for the District of Columbia, No. 8548, Jan. 22, 1945).

In the Federal courts, whether an unincorporated union can be sued depends upon the procedural rules of the State in which the

action is brought (*Busby* v. *Elec. Util. Empl. Union*, U. S. Supreme Court, 89 Law. Adv. Op. 108, Dec. 4, 1944).

The Norris-LaGuardia Act has insulated labor unions, in the field of injunctions, against liability for breach of contract. It has been held by a Federal court that strikes, picketing, or boycotting, when carried on in breach of a collective agreement, involve a "labor dispute" under the act so as to make the activity not enjoyable without a showing of the requirements which condition the issuance of an injunction under the act (*Wilson & Co.* v. *Birlin*, 105 F. (2d) 948, C. C. A. 3).

A great number of States have enacted anti-injunction statutes modeled after the Norris-LaGuardia Act, and the courts of many of these jurisdictions have held that a strike in violation of a collective agreement is a "labor dispute" and cannot be enjoined (*Nevins* v. *Kasmach*, 279 N. Y. 323; *Bulkin* v. *Sacks*, 31 Pa., D and C 501).

There are no Federal laws giving either an employer or even the Government itself any right of action against a union for any breach of contract. Thus there is no "substantive right" to enforce, in order to make the union suable as such in Federal courts.

Even where unions are suable, the union funds may not be reached for payment of damages and any judgments or decrees rendered against the association as an entity may be unenforceable. (See *Aalco Laundry Co.* v. *Laundry Linen Union*, 115 S. W. 2d 89 Mo. App.) However, only where statutes provide for recognition of the legal status of associations do association funds become subjct to judgments (*Deeney* v. *Hotel & Apt. Clerks' Union*, 134 P. 2d 328 (1943), California).

Financial statutory liability of associations is provided for by some States, among which are Alabama, California, Colorado, Connecticut, Delaware, New Jersey, North Dakota, and South Carolina. Even in these States, however, whether labor unions are included within the definition of "association" is a matter of local judicial interpretation.

It is apparent that until all jurisdictions, and particularly the Federal Government, authorize actions against labor unions as legal entities, there will not be the mutual responsibility necessary to vitalize collective-bargaining agreements. The Congress has protected the right of workers to organize. It has passed laws to encourage and promote collective bargaining.

Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.

It has been argued that the result of making collective agreements enforceable against unions would be that they would no longer consent to the inclusion of a no-strike clause in a contract.

This argument is not supported by the record in the few States which have enacted their own laws in an effort to secure some measure of union responsibility for breaches of contract. Four States—Minnesota, Colorado, Wisconsin, and California—have thus far enacted such laws and, so far as can be learned, no-strike clauses have been continued about as before.

In any event, it is certainly a point to be bargained over and any union with the status of "representative" under the NLRA which has bargained in good faith with an employer should have no reluctance in

including a no-strike clause if it intends to live up to the terms of the contract. The improvement that would result in the stability of industrial relations is, of course, obvious.

Joint Study Committee on Labor Relations

The analysis infra sets forth the objectives and proposed functions of this committee.

A detailed analysis of the provisions seriatim, follows:

TITLE I—AMENDMENTS OF NATIONAL LABOR RELATIONS ACT

The changes proposed by this title in the present Wagner Act may be summarized as follows:

Section 1: The only substantial change to this section is the insertion of a new paragraph before the final one. Amendments to section 8 creating remedies for unfair labor practices by labor organizations made necessary the broadening of the general statement of policy.

DEFINITIONS

Section 2: This section in the present act defines 11 terms. In the committee bill seven of such definitions remain unchanged. Only those definitions which have been modified or added are considered below.

(1) "Person": The meaning of this term has been amended to make it clear that it includes labor organizations and their agents. Because of the inclusion of unfair labor practices by unions in section 8, as amended, and the use of the word "person" in section 10, this definition required clarification.

(2) "Employer": The meaning of this term has been amended by the insertion of language which makes it clear that the Board may deem an employer association to be an employer, provided the individual employers in such an association have voluntarily delegated their authority to bargain collectively with their employees to such an organization. Under current decisions of the National Labor Relations Board the Board itself has reached such a construction, relying on the phase in the existing statute "acting in the interest of an employer." Although this interpretation has been challenged (see *Matter of Ship Owners Association*, 7 N.L.R.B. 1002; 103 F. (2d) 993; 308 U.S. 401) the Supreme Court has never passed squarely on the question. Consequently, this amendment merely approves of those Board interpretations. By the inclusion of the word "voluntarily," however, the bill makes it clear that the Board cannot treat an employer association as an employer insofar as any individual employer has failed to delegate the association to act as his bargaining representative or has withdrawn authority from it to act in that capacity.

(3) "Employee": The changes in the definition of this term are as follows:

(A) The exemption of agricultural laborers is clarified by making the term conform to that in the Fair Labor Standards Act. This definition should be read in conjunction with the proposed subsection 2(13), which subsection is taken verbatim from the Fair Labor Standards Act. This change would write into the act an exemption

which already exists by virtue of a rider to the current Labor-Federal Security Appropriation Act.

(B) The objectives of the committee in the inclusion of any individual employed as a supervisor have been considered at some length above. The definition of supervisor appears in subsection 2 (11) below.

(C) The exemption of employees of employers subject to the Railway Labor Act is to make it perfectly clear that in providing remedies for unfair labor practices of unions and their agents it was not intended to include such employees.

(11) "Old Board": Since this definition has become obsolete it has been stricken in the committee bill.

(11) "Supervisor": In framing this definition the committee exercised great care, desiring that the employees herein excluded from the coverage of the act be truly supervisory. The language in the proposed amendment is patterned after that contained in the Ellender amendment to last year's Case bill which was adopted by a majority vote of the Senate and concurred in by the House. It differs from it in three respects by eliminating (1) the requirement that the supervisor must have five employees in his charge, (2) the exemption with respect to supervisors covered by collective agreement in 1935, and (3) timekeepers and inspectors, thereby leaving them under the act. It will be noted, however, that this amendment does not mean that employers cannot still bargain with such supervisors and include them, if they see fit, in collective-bargaining contracts. All that the proposal does is to prevent employers being compelled to accord supervisors the anomalous status of employees for purposes of the Wagner Act.

(12) "Professional employee": The significance of this amendment appears in section 9 which is amended by the committee bill to require separate voting units of professional employees. Here again the committee was careful in framing a definition to cover only strictly professional groups such as engineers, chemists, scientists, architects, and nurses.

(13) "Agriculture": This term was considered with the definition of employee in (3) above. As stated, it was taken verbatim from the Fair Labor Standards Act.

NATIONAL LABOR RELATIONS BOARD

Section 3 (a): This section amends the act by providing for the appointment of four additional members to the present three-man Board. By a new subsection (b) the Board is authorized to sit in panels of three or more members.

Section 4: This section has been amended as follows:

(A) The salaries of Board members have been increased from $10,000 to $12,000 per year.

(B) Language limiting the Board in the selection of its personnel by the classification act and other statutes has been deleted as obsolete since all positions have been covered into the competitive classified civil service pursuant to the Ramspeck Act.

(C) By the proviso, prohibiting the Board from employing "attorneys for the purpose of reviewing transcripts of hearings and preparing drafts of opinions" except by legal assistants assigned separately to each Board member, the existing Review

Section is abolished. The committee objectives in recommending this action have been discussed above. Nothing contained in the amendment would prevent the Board members from selecting the attorneys now in such section as their legal assistants, if they cared to do so.

(D) The committee's belief that a trial examiner's report should represent his own findings and recommendations rather than a revision by his supervisors is expressed in the limitation on review of such reports. It is contemplated that review before publication even by Board members or assistants shall be limited to those situations where exception has been taken to a special ruling of the trial examiner and review by the Board is sought by one of the parties.

(E) The Board's current practice of permitting a trial examiner to appear and argue before it in support of his findings, rulings, or recommendations after exceptions have been taken or oral argument heard is also prohibited.

Section 6: The only amendment to this section is that requiring the Board to publish its rules and regulations in the Federal Register. This is in accordance with the requirements of the Administrative Procedure Act.

Section 8(a)(3): The proviso to this section has been redrafted to abolish what is narrowly termed the "closed shop." An employer is permitted to make agreements requiring membership in a union as a condition of employment applicable to employees in a given bargaining unit 30 days after an employee is hired providing the agreement was first authorized by an election conducted by the Board in which at least a majority of the employees in the unit (as distinguished from a majority of those voting) voted in favor of such agreement. Under another proviso of this subsection, it becomes an unfair labor practice for an employer to discharge an employee under a compulsory-membership clause if he has reasonable grounds for believing (A) that membership was not available to the employee on equal terms with other members, (B) that membership in the union was terminated for reasons other than nonpayment of regular dues and initiation fees, or (C) that membership was denied or terminated because the employee was active on behalf of another union at a time when a question concerning representation might appropriately be raised. The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. But the committee did wish to protect the employee in his job if unreasonably expelled or denied membership. The tests provided by the amendment are based upon facts readily ascertainable and do not require the employer to inquire into the internal affairs of the union.

Section 8(a)(6): This amendment makes it an unfair labor practice for an employer to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration. Similar conduct on the part of a union is made an unfair labor practice in section 8(b)(5). While title III of the committee bill treats this subject by giving both parties rights to sue in the United States district court, the committee believes that such acion should also be available before an administrative body. It is contemplated that the Board would devise regulations and pursue a

policy which would minimize the number of contract violation cases accepted under this proposal. It would become the duty of the Board to determine whether the parties have exhausted their remedies under their own contract.

Section 8(b) is entirely a new subsection, consisting of a list of unfair labor practices by labor organizations or their agents. The term "agents" is intended to include all union officials acting in their capacity as union representatives, and is not limited to those officials who have been expressly authorized to commit the act which is alleged to constitute an unfair labor practice. (cf. *United Brotherhood of Carpenters and Joiners of America* v. *U.S.*, decided by the Supreme Court, March 10, 1947).

Section 8(b)(1): This proscribes unions and their agents from interfering with, restraining, or coercing employers in the selection of their representatives for the purposes of collective bargaining or the settlement of grievances. Thus, a union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members; also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances.

Section 8(b)(2): This is designed to protect individual employees from discrimination in employment induced by a labor organization which has a union-shop contract with an employer, entered into pursuant to the provisions of section 9(e) and in compliance with the conditions in section 8(a)(3). The labor organization may not persuade or attempt to persuade the employer to discriminate against an employee except for two reasons: First, that the employee has lost his union membership by failing to tender the dues or initiation fees uniformly required as a condition of membership; second, that the employee, at a time when the Board would not entertain a petition to determine representation pursuant to section 9(c)(1)(A), has engaged in activity on behalf of another labor organization or in activity having as its objective the termination of the exclusive representative status of the union. It is to be observed that unions are free to adopt whatever membership provisions they desire, but that they may not rely upon action taken pursuant to those provisions in effecting the discharge of, or other job discrimination against, an employee except in the two situations described. Thus, an employee, even though he loses his union membership for reasons other than those set forth, may not be deprived of his job because of a contract requiring membership as a condition of employment. Discrimination is permitted only if he has failed to tender dues and initiation fees or has engaged in "dual union" activity or activity designed to oust the incumbent union as exclusive representative, at an inappropriate time. The purpose of this latter provision is to insure greater stability to the contractual relations between unions and employers and to prevent dissident groups of employees from undermining the contractual relations between the employer and the union, but at the same time to insure freedom of choice to employees. The clause "at a time when a question concerning representation may appropriately be raised," is

intended to describe that period, normally near the end of the contract term, during which the employees are free to exercise the right to change representatives. It would not encourage stability in labor relations if employees could engage with impunity in rival union activities from the very inception of the contract. The Board's present policy, as enunciated in the *Rutland Court case* (44 N. L. R. B. 587, 46 N. L. R. B. 1040) and other cases applying that principle, is thus enacted into law. Moreover, this principle is extended to protect activity designed to oust the incumbent union and restore a condition of individual bargaining, in conformity with the right granted employees in section 9(c)(1) to petition for a determination that "the bargaining representative is no longer a representative as defined in section 9(a)", i.e., has lost its executive representative status.

Section 8(b)(3): It is made an unfair labor practice for a union, if it is the exclusive representative of employees in an appropriate bargaining unit, to refuse to bargain collectively with the employer. The obligation placed upon unions by this provision is the same as that imposed upon employers by section 8(a)(5).

Section 8(b)(4): In this section it is made an unfair labor practice for a labor organization or its agents—

to engage in, or induce or encourage the employees of any employer to engage in, a strike or a concerted refusal to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services in the course of their employment—

if the purpose is to force the doing of certain things. The proscribed purposes or objectives of a strike or boycott are described in paragraphs (A), (B), (C), and (D) of this subsection.

Under paragraph (A) strikes or boycotts, or attempts to induce or encourage such action, are made violations of the act if the purpose is to force an employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. Thus, it would not be lawful for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute). This paragraph also makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by local No. 3 of the IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organizations other than local No. 3. (See testimony of R. S. Edwards, vol. 1, p. 176 et seq.; *Allen Bradley Co.* v. *Local Union No. 3, I. B. E. W.*, 325 U.S. 797.)

Paragraph (B) is intended to reach strikes and boycotts conducted for the purpose of forcing another employer to recognize or bargain with a labor organization that has not been certified as the exclusive representative. It is to be observed that the primary strike for recognition (without a Board certification) is not proscribed. Moreover, strikes and boycotts fo recognition are not made illegal if the union has been certified as the exclusive representative.

Strikes and boycotts having as their purpose forcing any employer to disregard his obligation to recognize and bargain with a certified

union and in lieu thereof to bargain with or recognize another union, are made unfair labor practices by paragraph (C).

Paragraph (D) deals with strikes or boycotts having as their purpose forcing any employer to assign work tasks to members of one union when he has assigned them to members of another union. However, if the employer against whom the strike or boycott is directed is failing to conform to a determination of the Board fixing the representation of the employees performing the work tasks, then the strike or boycott is not an unfair labor practice.

Attached to section 8(b)(4) is a proviso clause, which makes it clear that it shall not be unlawful for any person to refuse to enter upon the premises of any employer (other than his own), if the employees of that employer are engaged in a strike authorized by a union entitled to exclusive recognition. In other words, refusing to cross a picket line or otherwise refusing to engage in strikebreaking activities would not be deemed an unfair labor practice unless the strike is a "wildcat" strike by a minority group.

Section 8(b)(5): The fifth unfair labor practice on the part of labor organizations and their agents covers violations of collective-bargaining agreements or agreements to submit disputes to arbitration. However, the Board may dismiss such charges if the employer has violated the agreement or has not complied with an order of the Board. The committee wishes to make it clear that by this provision and the parallel provision making contract violations by employers unfair labor practices, it is not intended that the National Labor Relations Board shall undertake to adjudicate all disputes alleging breach of labor agreements. Any such course would be inimical to the development by the parties themselves of adequate grievance-handling and voluntary arbitration machinery. It is the purpose of this bill to encourage free-collective bargaining; it would not be conducive to that objective if the Board became the forum for trying day-to-day grievances or if in the guise of unfair labor practice cases it entertained damage actions arising out of breach of contract. Hence the committee anticipates that the Board will develop by rules and regulations a policy of entertaining under these provisions only such cases alleging violation of contract as cannot be settled by resort to the machinery established by the contract itself, voluntary arbitration, or if necessary by litigation in court. Any other course would engulf the Board with a vast number of petty cases that could best be settled by other means. In short, the intention of the committee in this regard is that cases of contract violation be entertained on a highly selective basis, when it is demonstrated to the Board that alternative methods of settling the dispute have been exhausted or are not available.

Section 8(c): Another amendment to this section would insure both to employers and labor organizations full freedom to express their views to employees on labor matters, refrain from threats of violence, intimation of economic reprisal, or offers of benefit. The Supreme Court in *Thomas v. Collins* (323 U.S. 516) held, contrary to some earlier decisions of the Labor Board, that the Constitution guarantees freedom of speech on either side in labor controversies and approved the doctrine of the *American Tube Bending case* (134 F. (2d) 993). The Board has placed a limited construction upon these decisions by holding such speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable

or unrelated (*Monumental Life Insurance*, 69 N.L.R.B. 947) or if the speech was made in the plant on working time (*Clark Brothers*, 70 N.L.R.B. 60). The committee believes these decisions to be too restrictive and, in this section, provides that if, under all the circumstances, there is neither an expressed or implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement. The Board, of course, will not be precluded from considering such statements as evidence.

Section 8(d) contains a definition of the duty to bargain collectively and, consequently, relates both to the duties of employers to bargain and labor organizations to bargain under sections 8(a)(5) and 8(b)(3), respectively. The definition makes it clear that the duty to bargain collectively does not require either party to agree to a particular demand or to make a concession. It should be noted that the word "concession" was used rather than "counterproposal" to meet an objection raised by the Chairman of the Board to a corresponding provision in one of the early drafts of the bill.

Another substantive feature of this subsection is a provision which relates to employers and labor organizations which are parties to collective agreements. Most agreements have an expiration date, with an automatic renewal clause in the absence of advance notice by either side of a desire to terminate or modify. Under this section, parties to collective agreements in the future would be required to give 60 days' notice in advance of the terminal date, if they desire to terminate or amend. Should the parties fail to agree on a new contract in the next 30 days, the party taking the lead in refusing the old contract has the duty to notify the new Federal Mediation Service of the impasse. Should the notice not be given on time, irrespective of the presence or absence of a 60-day clause in the collective agreement, it becomes an unfair labor practice for an employer to change any of the terms or conditions specified in the contract for 60 days or to lock out his employees. Similarly, it is an unfair labor practice by a union to strike before the expiration of the 60-day period. Any employee who engages in a strike during the 60-day period would lose any rights under sections 8, 9, and 10 of the Wagner Act, unless and until he is reemployed. It should be noted that this section does not render inoperative the obligation to conform to notice provisions for longer periods, if the collective agreement so provides. Failure to give such notice, however, does not become an unfair labor practice if the 60-day provision is complied with.

Section 9(a): The revisions of section 9 relating to representation cases make a number of important changes in existing law. An amendment contained in the revised proviso for section 9(a) clarifies the right of individual employees or groups of employees to present grievances. The Board has not given full effect to this right as defined in the present statute since it has adopted a doctrine that if there is a bargaining representative he must be consulted at every stage of the grievance procedure, even though the individual employee might prefer to exercise his right to confer with his employer alone. The current Board practice received some support from the courts in the *Hughes Tool case* (147 F. (2d) 756), a decision which seems inconsistent with another circuit court's reversal of the Board in *NLRB* v. *North American Aviation Company* (136 F. (2d) 898). The revised language would make it clear that the employee's right to present

grievances exists independently of the rights of the bargaining representative, if the bargaining representative has been given an opportunity to be present at the adjustment, unless the adjustment is contrary to the terms of the collective-bargaining agreement then in effect.

Section 9(b): The several amendments to this subsection propose to limit the Board's discretion in determining the kind of unit appropriate for collective bargaining: (1) The Board is prohibited from including professional employees in units with other employees unless they first vote in favor of such inclusion. (2) In determining whether members of a craft may be separated from a larger unit the Board may not dismiss a craft petition on the ground that a different unit has been established by a prior determination. This overrules the *American Can* rule (supra).

Section 9(c)(1): This permits employees to file petitions for elections to certify a collective-bargaining representative or to deprive of exclusive representative status one currently recognized by their employer or certified as their representative. Employers are also given the right of petition after a union has actually claimed a majority or demanded exclusive recognition. Neither of these amendments affects the present Board's rules of decisions with respect to dismissal of petitions by reason of an inadequate showing of representation or the existence of an outstanding collective agreement as a bar to an election. In other words, the Board could still dismiss an employee or employer petition if a valid contract were still in effect.

One further change in current Board practice is required by this subsection. Regional office personnel now sit as hearing officers in representation cases and make a comprehensive report and recommendation to the Board at the close of such hearing. By the amendment, such hearing officer's duties are confined to presiding at the hearing.

Section 9(c)(2): The committee's desire that independent and affiliated unions be accorded similar treatment is reflected here and in the proviso to section 10(c).

Section 9(c)(3): This amendment prevents the Board from holding elections more often that once a year in any given bargaining unit unless the results of the first election are inconclusive by reason of none of the competing unions having received a majority. At present, if the union loses, it may on presentation of additional membership cards secure another election within a short time, but if it wins its majority cannot be challenged for a year.

When elections are conducted during a strike, situations frequently arise wherein the employer has continued to operate his business with replacement workers. If such strike is an economic one and not caused by unfair labor practices of the employer, strikers permanently replaced have no right to reinstatement (*NLRB* v. *Mackay Radio*, 304 U. S. 333). It appears clear that a striker having no right to replacement should not have a voice in the selection of a bargaining representative, and the committee bill so provides.

Under the Board's present rules, if there are two or more unions in the election, the employees in the run-off election do not have an opportunity to cast a negative vote in the run-off, unless the "neither" choice received a plurality of the votes cast in the first election. An amendment doing away with this inequity in the regulations requires the two highest choices to be placed upon the run-off ballot.

Section 9(c)(4): This amendment makes it clear that consent elections in the noncontested cases may still be conducted in the field. A further amendment would give statutory authority to the Board's present practice of conducting elections prior to hearing in minor cases, where no real issues are involved, if the Board finds no substantial objection to such a procedure.

Section 9(e): This provides the mechanics of the vote to authorize a compulsory-membership agreement discussed under section 8(a)(3) above. It should be noted that provision is made for an opportunity to the employees to rescind the authority previously given, and that the number of referenda, either to authorize or rescind such authority, is limited to one per year.

Section 9(f): This requires labor organizations to file certain information and financial reports with the Secretary of Labor in order to be eligible for certification or have charges processed in their behalf. A further provision requires that copies of the financial report be furnished to all members of the labor organization. Provision is made that such information be kept current by annual reports. The committee considered and rejected a suggestion that such information be open for public inspection.

Section 10(a): The proviso which has been added to this subsection permits the National Board to allow State labor-relations boards to take final jurisdiction of cases in border-line industries (i.e., border line insofar as interstate commerce is concerned), provided the State statute conforms to national policy.

Section 10(b): The principal substantive change in this section is a provision for a 6-month period of limitations upon the filing of charges. The Board itself by adopting a doctrine of laches has to some extent discouraged dilatory filing of charges, and a rider to the current appropriations bill (which if this amendment was adopted would not longer be necessary) contains a 3-month period of limitations with respect to certain kinds of unfair labor practices.

Section 10(c): This subsection is amended by the proviso in two respects: (1) Back pay may be required of either the employer or the labor organization, depending upon which is responsible for the discrimination suffered by the employee. (2) The Board is required to apply the same policy to both affiliated and independent labor organizations in issuing complaints and in framing its remedies for unfair labor practices.

Section 10(d) makes no changes in existing law.

Sections 10(e) and 10(f), relating to enforcement and review in the various circuit courts of appeal and in the Supreme Court, contain no changes in existing law, except with regard to the weight given to findings of the Board by the reviewing tribunal. Under the present act, the Board's findings of fact, if supported by evidence, are deemed to be conclusive. This has been construed by the Supreme Court as meaning "substantial evidence." Nevertheless, there has been some dissatisfaction with what has been viewed as too great a tendency on the part of the courts not to disturb Board findings, even though they may be based on questions of mixed law and fact (*N. L. R. B.* v. *Hearst Publications*, 322 U.S. 111; 102 F. (2d) 658), or inferences based on facts which are not in the record (*Republic Aviation* v. *N. L. R. B.*, 324 U. S. 793, and *Letourneau Company* v. *N. L. R. B.*, 324 U. S. 793). Although considerable sentiment was expressed in committee for a rule

which requires the courts to support Board orders, unless contrary to the weight of the evidence, it was finally decided to conform to the statute to the corresponding section of the Administrative Procedure Act where the substantial evidence test prevails. In order to clarify any ambiguity in that statute, however, the committee inserted the words "questions of fact, if supported by substantial evidence *on the record considered as a whole* * * *." [Emphasis supplied.]

Sections 10 (g), (h), and (i) make no changes in existing law.

Sections 10 (j), (k), and (l): These subsections are additions to section 10.

Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearings and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. Under the present act the Board is empowered to seek interim relief only after it has filed in the appropriate circuit court of appeals its order and the record on which it is based. Since the Board's orders are not self-enforcing, it has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation.

In subsections (j) and (l) to section 10 the Board is given additional authority to seek injunctive relief. By section 10(j), the Board is authorized after it has issued a complaint alleging the commission of unfair labor practices by either an employer or a labor organization or its agent, to petition the appropriate district court for temporary relief or restraining order. Thus the Board need not wait, if the circumstances call for such relief, until it has held a hearing, issued its order, and petitioned for enforcement of its order.

Section 10(l) makes it mandatory upon the Board to petition for injunctive relief in the case of strikes or boycotts that are alleged to constitute unfair labor practices within the meaning of paragraphs (A), (B), and (C) of section 8(b)(4). Moreover, cases of this type are to be given priority, and when the Board agent charged with the investigation has reasonable cause to believe that the charge is true and that a complaint should be issued, he is required to petition the district court for appropriate injunctive relief pending final adjudication by the Board. In the case of strikes and boycotts involving jurisdictional disputes, the same procedure may be used if appropriate; injunctive relief in such cases is made discretionary because it is anticipated that the separate machinery provided in section 10(k) for settling such disputes will generally suffice.

Jurisdictional disputes that constitute unfair labor practices within the meaning of section 8(b)(4)(D) may be heard by the Board or an arbitrator unless within 10 days the parties satisfy the Board that they have adjusted the dispute or agreed to methods for adjusting it. If the parties comply with the determination of the Board or the arbitrator appointed by it, or voluntarily adjust the dispute, the Board shall dismiss the charge. Finally, the award of the arbitrator is given the same status and force as a final order of the Board, a provision which will avoid the necessity of the Board hearing the dispute if it has designated an arbitrator for that purpose and also will permit the Board to seek enforcement of the award without further proceedings

Section 11, relating to attendance of witnesses and production of testimony, contains no changes in existing law.

Section 12 also leaves existing law unchanged.

Section 13 has been amended in two respects: (1) By a clause which makes clear that the Wagner Act has diminished the right to strike only to the extent specifically provided by the new amendments to the act; (2) by the addition of the words "to affect the limitations or qualifications on that right."

It should be noted that the Board has construed the present act as denying any remedy to employees striking for illegal objectives. (See *American News Co.*, 55 N.L.R.B. 1302, and *Thompson Products*, 72 N.L.R.B. 150.) The Supreme Court has interpreted the statute as not conferring protection upon employees who strike in breach of contract (*N.L.R.B.* v. *Sands Manufacturing Company*, 306 U.S. 332); or in breach of some other Federal law (*Southern Steamship Company*, v. *N.L.R.B.*, 316 U.S. 31); or who engage in illegal acts while on strike (*Fansteel Metalurgical Corp.* v. *N.L.R.B.*, 306 U.S. 240).

This bill is not intended to change in any respect existing law as construed in these administrative and judicial decisions

Section 14: This is a new section which makes it clear that the amendments to the act do not prohibit supervisors from joining unions, but that it is contrary to national policy for other Federal or State agencies to compel employers who are subject to the National Board to treat supervisors as employees for the purpose of collective bargaining or organizational activity.

Section 15 amends existing law merely by deletion of reference to certain acts which are no longer law.

Section 16 contains the same separability clause.

Section 17 gives the act a new short title.

Section 102 states the effect to be given violations of the act prior to the effective date of the proposed amendments. This section of the bill relieves an employer or a union from any liability arising out of action taken under a compulsory membership agreement, which meets the standards of section 8(3) of the present Wagner Act even though it falls short of the conditions proposed by these amendments. In other words, these amendments would not apply unless the contract, pleaded in justification for what would otherwise be an act of discrimination, was renewed or extended subsequent to the effective date of the amendments.

Section 103 states the effect to be given to existing certifications or unit determinations made prior to enactment of the proposed amendments.

TITLE II—FEDERAL MEDIATION SERVICE

This title contemplates not only a reorganization of the existing Federal machinery for the mediation and conciliation of labor disputes but also prescribes a procedure for the guidance of the Service and the parties to disputes. The theory of this section is that it is not desirable in an economy such as ours for the Federal Government to play a partisan role with respect to disputes between management and labor and that compulsory arbitration is not an effective or desirable method to be employed. The major provisions of this title may be summarized as follows:

Section 201 contains a statement of policy.

Section 202: This section creates an independent agency to be known as the Federal Mediation Service. It is to be operated by a single official, called the Director, to be appointed by the President with the advice and consent of the Senate. The section transfers to him the duties now imposed upon the Secretary of Labor under section 8 of the organic act creating the Labor Department. The personnel and records of the present Conciliation Service of the Department of Labor are also transferred to the new Mediation Service.

Section 203: This section describes the functions of the Mediation Service and emphasizes the duty of the Service to intervene only where a dispute threatens to cause a substantial interruption of interstate commerce. It provides that if the parties cannot be brought to direct settlement by conciliation of mediation, the Service may request the parties to submit to voluntary arbitration. In such an event, the Secretary may assist in the arbitration proceedings by helping to formulate the submission, selecting the arbitrator, and paying the cost of the proceedings, provided this does not exceed $500 in any single case.

Section 204 states that it is the duty of employers and employees to exert every reasonable effort to settle their differences by collective bargaining, and if this fails, to utilize the assistance of the Mediation Service.

Section 205 creates an advisory committee for the Mediation Service, composed of management and labor representatives. This group which is called by this section a "national labor-management panel," differs somewhat from the present advisory board created by the Secretary of Labor for the Conciliation Service, in that this group consists of 12 persons, all of whom are to be appointed by the President.

Section 206 authorizes the Attorney General whenever he deems a threatened or actual strike or lock-out of such magnitude that the national health or safety is imperiled, to appoint a Special Board of Inquiry to make a public report to him.

Section 207 describes the composition of such special boards; the rate of compensation and confers on such boards authority to administer oaths and issue subpenas.

Section 208 authorizes the Attorney General to petition a United States district court for an injunction upon receiving a report from such a board and makes any orders issued by the courts reviewable in the Circuit Court of Appeals and the Supreme Court.

Section 209(a) requires the parties to the dispute giving rise to such an order to exert every effort to adjust their differences with the assistance of the Federal Mediation Service.

Section 209(b) provides that, in the event that the dispute has not been settled 60 days after the temporary restraining order or injunction has been issued, the Board of Inquiry shall submit another report with regard to the respective positions of the parties and the efforts made for settlement. Such report is to be made public. Within the next 15 days the National Labor Relations Board is to take a secret ballot to ascertain whether the employees involved will accept the last offer made by their employer.

Section 210 provides for the discharge of the injunction after the results of the strike ballot have been certified. Should the emergency

still exist the President is directed to transmit a report of the proceedings to Congress together with his recommendations for consideration and appropriate action.

Section 211 requires the Bureau of Labor Statistics to maintain a file containing copies of collective agreements and arbitration awards which shall be made available to the public unless it involves information received in confidence.

Section 212 contains a savings clause with respect to the Railway Labor Act.

TITLE III.—SUITS BY AND AGAINST LABOR ORGANIZATIONS

Section 301 is the only section contained in this title. It relates to suits by and against labor organizations for breach of collective bargaining agreements and should be read in connection with the provisions of section 8 of title I also dealing with breach of contracts. The legal effect of this section has been described at some length in the main body of the report, supra.

TITLE IV.—CREATION OF JOINT COMMITTEE TO STUDY AND REPORT ON BASIC PROBLEMS AFFECTING FRIENDLY LABOR RELATIONS AND PRODUCTIVITY

Section 401 establishes a joint congressional committee. It will consist of seven Members of the Senate to be appointed by the President pro tempore and seven Members of the House to be appointed by the Speaker.

Section 402 directs this committee to conduct a survey of the entire field of labor-management relations with particular emphasis upon the eight subjects listed.

Section 403 directs the joint committee to file its report and recommendations not later than February 15, 1948.

Section 404 authorizes the joint committee to hire technical and clerical personnel and to request details of personnel from Federal and State agencies.

Section 405 vests the committee with subpena power and authority to conduct its hearings either during our congressional sessions or while the Eightieth Congress is in recess.

Section 406 relates to travel and subsistence expenses.

Section 407 authorized the special appropriation of $150,000 for the joint committee.

TITLE V.—DEFINITIONS

Section 501 defines certain terms which are used generally throughout the bill.

Section 502 contains a saving clause making it clear that no provision of the act is to be construed as compelling an employee to render forced labor without his consent or to work under abnormally hazardous conditions.

Section 503 contains a conventional separability provision.

Section 504 gives the bill a short title, namely, "The Federal Relations Act of 1947."

Changes in Existing Law

Existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman.

National Labor Relations Act

FINDINGS AND POLICIES

Section 1. The denial by *some* employers of the right of employees to organize and the refusal by *some* employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collective safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

Sec. 2. When used in this Act—

(1) The term "person" includes one or more individuals, *labor organizations, their officers, and employees or members*, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization: *Provided, That for the purposes of section 9(b) hereof, the term "employer" shall not include a group of employers except where such employers have voluntarily associated themselves together for the purposes of collective bargaining.*

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed [as an agricultural laborer] *in agriculture*, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse *or any individual employed as a supervisor, or any employee employed by an employer subject to the Railway Labor Act, as amended from time to time.*

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board created by section 3 of this Act.

[(11) The term "old Board" means the National Labor Relations Board established by Executive Order Numbered 6763 of the President on June 29, 1934, pursuant to Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), and reestablished and continued by Executive Order Numbered 7074 of the President of June 15, 1935, pursuant to title I of the National Industrial Recovery Act (48 Stat. 195), as amended, and continued by S.J. Res. 133 approved June 14, 1935.]

(11) The term "supervisor" means any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical process; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) The term "agriculture" means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

NATIONAL LABOR RELATIONS BOARD

SEC. 3. (a) There is hereby created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be composed of [three] *seven* members. [One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed.] *Of the four additional members, whose positions on the Board are established by this amendment, two shall be appointed for terms of five years, and the other two for terms of two years. Their successors, and the successors of the other members, including those presently serving as members shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed.* The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

[(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.]

(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and four members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

SEC. 4. (a) Each member of the Board shall receive a salary of [$10,000] *$12,000* a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint [without regard for the provisions of the civil service laws but subject to the Classification Act of 1923, as amended,] an executive secretary, and such attorneys, examiners, and regional directors, and such other employees [with regard to existing laws applicable to the employment and compensation of officers and employees of the United States] as it may from time to time find necessary for the proper performance of its duties [duties and as may be from time to time appropriated for by Congress]: *Provided, That the Board may not employ any attorneys for the purpose of reviewing transcripts of hearings and preparing drafts of opinions except that any legal assistants assigned separately to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board, with respect to exceptions taken to his findings, rulings, or recommendations.* The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation [(or for statistical work), where such service may be obtained from the Department of Labor], *or for economic analysis.*

[(b) Upon the appointment of the three original members of the Board and the designation of its chairman, the old Board shall cease to exist. All employees of the old Board shall be transferred to and become employees of the Board with salaries under the Classification Act of 1923, as amended, without acquiring by such transfer a permanent or civil service status. All records, papers, and property of the old Board shall become records, papers, and property of the Board, and all unexpended funds and appropriations for the use and maintenance of the old Board shall become funds and appropriations available to be expended by the Board in the exercise of the powers, authority, and duties conferred on it by this Act.]

[(c)] (b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers, therefor approved by the Board or by any individual it designates for that purpose.

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. [(a)] The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the [manner which the Board shall prescribe] Federal Register.

RIGHTS OF EMPLOYEES *AND EMPLOYERS*

SEC. 7. Employees shall have 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.

SEC. 8. (*a*) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, [(a)] an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) 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: *Provided*, That nothing in this Act, [the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder] or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in *section 8(a) of* this Act as an unfair labor practice) to require as a condition of employment membership therein *on or after the thirtieth day following the beginning of such employment*, (*i*) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made: *and* (*ii*) *if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization* (*A*) *if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or* (*B*) *if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the dues and initiation fees uniformly required as a condition of acquiring or retaining membership, or* (*C*) *if he*

has reasonable grounds for believing that membership was denied or terminated because of activity designed to secure a determination pursuant to section 9(c)(1)(A), at a time when a question concerning representation may appropriately be raised;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a);

(6) to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration: Provided, That the Board may dismiss any charge made pursuant to this paragraph if the labor organization has violated the terms of such agreement or has failed to comply with an order of the Board.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to interfere with, restrain, or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to persuade or attempt to persuade an employer to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the dues and initiation fees uniformly required as a condition of acquiring or retaining membership or because he engaged in activity designed to secure a determination pursuant to section 9(c)(1)(A) at a time when a question concerning representation may appropriately be raised;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services in the course of their employment (A) for the purpose of forcing or requiring any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) for the purpose of forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9(a); (C) for the purpose of forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9(a); (D) for the purpose of forcing or requiring any employer to assign to members of a particular labor organization work tasks assigned by an employer to members of some other labor organization unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work tasks: Provided, that nothing contained in section 8(b)(4) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

(5) to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration: Provided, That the Board may dismiss any charge made pursuant to this paragraph if the employer has violated the terms of such agreement or has failed to comply with an order of the Board.

(c) The Board shall not base any finding of unfair labor practice upon any statement of views or arguments, either written or oral, if such statement contains under all the circumstances no threat, express or implied, of reprisal or force, or offer, express or implied, of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or the settlement of any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party but such obligation does not compel either party to agree to a proposal or require the

making of a concession: Provided, That where there is in effect a collective-bargaining contract, covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation Service within thirty days after such notice of the existence of a dispute, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

Provided further, That any employee who engages in a strike prior to the expiration of the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purpose 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: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer *and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.*

(b) The Board shall decide in each case whether, in order to [insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act] *assure to employees the fullest freedom in exercising the rights guaranteed by this Act*, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation.*

[(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, 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.]

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative is no longer a representative as defined iln section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any report or recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decisions shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought.

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote unless such strike involves an unfair labor practice on the part of the employer. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the Board from conducting elections prior to hearing where the Board finds no substantial objection to such proceeding is being made or the waiving of hearings by stipulation for the purpose of a consent election in conformity with the regulations and rules of decision of the Board.

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e)(1) Upon the filing with the Board by a labor organization which is the representative of employees as provided in section 9(a), of a petition alleging that a substantial number of the employees within a unit appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, the Board shall take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

(2) Upon the filing with the Board a substantial number of the employees of an employer of a petition alleging that the labor organization, which is the representative of such employees as provided in section 9(a), is authorized in accordance with provisions of section 8(a)(3)(ii) to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment, and that a substantial number of the employees within a unit appropriate for such purposes desire to rescind such authority, the Board shall take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

(3) No election shall be conducted pursuant to subsection (e) in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and

the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it has complied with its obligation under this subsection.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall [be exclusive and shall] not be affected by any other means of adjustment or prevention that has been or may be established by agreement, [code,] law, or otherwise: *Provided, That the Board is empowered by agreement with any agency of any State or Territoy to concede to such agency jurisdiction over any cases in any industry, other than mining, manufacturing, communications, and transportation, except where predominately local in character even though such cases may involve labor disputes affecting commerce, provided the State agency conforms to national policy, as herein defined, in the determination of such disputes.*

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.* Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then

the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue under section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope.* Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the *United States* Court of Appeals [of] *for* the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the [Supreme] *District* Court of the *United States for the* District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board [as to the facts] *with respect to questions* of fact if supported by *substantial* evidence *on the record considered as a whole* shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which *findings with respect to questions of fact* if supported by *substantial* evidence *on the record considered as a whole* shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the *United States* Court of Appeals [of] *for* the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such

petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Biard; the findings of the Board [as to the facts] *with respect to questions of fact* if supported by *substantial* evidence *on the record considered as a whole* shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order on the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U.S. C., Supp. VII, title 29, secs. 101–115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen or to appoint an arbitrator to hear and determine such dispute, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or the arbitrator appointed by the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed. The award of an arbitrator shall be deemed a final order of the Board.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4 (A), (B), and (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided fur-

ther, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D).

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpenas requiring the attendance and testimony to witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possessions, or the [Supreme] *District* Court of the *United States for the* District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(4) Complaints, orders and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers and information in their possession relating to any matter before the Board.

SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

LIMITATIONS

SEC. 13. Nothing in this Act *except as specifically provided for herein* shall be construed so as *either* to interfere with or impede or diminish in any way the right to strike, *or to affect the limitations or qualifications on that right.*

SEC. 14. Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

SEC. [14] 15. Wherever the application of the provisions of section [7(a) of the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, sec. 707(a)) as amended from time to time, or of section 77 B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an] *272 of chapter 10 of the* Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, and Acts amendatory thereof and supplementary thereto [48 Stat. 922, pars. (l) and (m), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183),] *U.S.C., title 10, sec. 672),* conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided,* That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

SEC. [15] 16. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. [16] 17. This Act may be cited as the "National Labor Relations Act *of 1937*".

SEC. 102. No provisions of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto and the provisions of section 8(a)(3) of this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act if the performance of such obligation would not have constituted an unfair labor practice under section 8(3) prior to the passage of this title, unless such agreement was renewed or extended subsequent thereto.

SEC. 103. No provisions of this title shall affect any certification of representatives or any determination as to appropriate collective-bargaining unit, which was made under section 9 prior to the enactment of this title until one year after the date of such certification or if in respect of which a collective-bargaining contract was entered into prior to the date of the enactment of this title, until the end of the contract period or until one year after the date of its enactment, whichever first occurs.

TITLE II

MEDIATION AND EMERGENCIES

FINDINGS AND POLICY

SEC. 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and

working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

SEC. 202. (a) There is hereby created an independent agency to be known as the Federal Mediation Service (herein referred to as the "Service"). The Service shall be under the direction of a Federal Mediation Director (hereinafter referred to as the "Director"), who shall be appointed by the President by and with the advice and consent of the Senate. The Director shall receive compensation at the rate of $12,000 per annum, together with necessary traveling and subsistence expenses, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while away from the principal office of the Service on official business. The Director shall not engage in any other business, vocation, or employment.

(b) The Director is authorized, subject to the civil-service laws, to appoint such clerical and other personnel as may be necessary for the execution of the functions of the Service, and shall fix their compensation in accordance with the Classification Act of 1923, as amended, and may, without regard to the provision of the civil-service laws and the Classification Act of 1923, as amended, appoint and fix the compensation of such conciliators and mediators as may be necessary to carry out the functions of the Service. The Director is authorized to make such expenditures for supplies, facilities, and services as he deems necessary. Such expenditures shall be allowed and paid upon presentation of itemized vouchers therefor approved by the Director or by any employee designated by him for that purpose.

(c) The principal office of the Service shall be in the District of Columbia, but the Director may establish regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this Act to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies.

(d) All mediation and conciliation functions of the Secretary of Labor or the United States Conciliation Service under section 8 of the Act entitled "An Act to create a Department of Labor", approved March 4, 1913 (U.S.C., title 29, sec. 51), and all functions of the United States Conciliation Service under any other law are hereby transferred to the Federal Mediation Service, together with the personnel, records, and unobligated balances of appropriations, allocations, or other funds of the United States Conciliation Service. Such transfer shall take effect upon the sixtieth day after the date of enactment of this Act. Such transfer shall not affect any proceedings pending before the United States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or by the Secretary of Labor. The Director and the Service shall not be subject in any way to the jurisdiction or authority of the Secretary of Labor or any official or division of the Department of Labor.

FUNCTIONS OF MEDIATION SERVICE

SEC. 203. (a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are

available to the parties. Whenever the Service does proffer its services in any dispute it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Service is not able to bring the parties to agreement by mediation or conciliation within a reasonable time, it shall seek to induce the parties voluntarily to submit the controversy to arbitration: *Provided*, That the failure or refusal of either party to agree to arbitration shall not be deemed to be a violation of any duty or obligation imposed by this Act. Upon the request of the parties to the dispute the Service shall cooperate with the parties in formulating an agreement for the arbitration of the dispute, in selecting an arbitrator of arbitrators, and in making such other arrangements and in taking such other action as may be necessary to provide for the voluntary arbitration of the dispute. When any labor dispute in an industry affecting commerce is submitted to arbitration pursuant to the suggestion of the Service upon this subsection, the Service, upon the request of the parties to the arbitration proceeding, shall pay so much of the compensation of the arbitrator or arbitrators and of the cost of reporting and preparing the transcript of the proceedings as does not exceed $500 in the aggregate in any one case. Any officer or employee of the Service designated by the Director is authorized to take acknowledgments of agreements to arbitrate. If arbitration at the suggestion of the Service is refused by one or both parties, the Director shall at once notify the President and both parties to the controversy, in writing, that its efforts at mediation and conciliation have failed.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases. Accordingly, whenever the Service, in its discretion, proffers its services in such a grievance dispute, the Service shall emphasize to the parties involved their obligation under this Act to provide in their agreements for the final adjustment of such grievance disputes, and shall, before attempting other methods of settlement, endeavor to induce the parties to agree to submit such dispute to an umpire or adjustment board or other agency empowered to make a decision final and binding upon both parties.

SEC. 204. (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements and provision for the final adjustment of questions regarding the application or interpretation of such agreements;

(2) whenever a dispute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, cooperate fully and promptly in such procedures as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute.

SEC. 205. (a) There is hereby created a National Labor-Management Panel which shall be composed of twelve members appointed by the President, six of whom shall be selected from among persons outstanding in the field of management and six of whom shall be selected from among persons outstanding in the field of labor. Each member shall hold office for a term of three years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and the terms of office of the members first taking office shall expire, as deisgnated by the President at the time of appointment, four at the end of the first year, four at the end of the second year, and four at the end of the third year after the date of appointment. Members of the panel, when serving on business of the panel, shall be paid compensation at the rate of $25 per day, and shall also be entitled to receive an allowance for actual and necessary travel and subsistence expenses while so serving away from their places of residence.

(b) It shall be the duty of the panel, at the request of the Director, to advise in the avoidance of idustrial controversies and the manner in which mediation and voluntary arbitration shall be administered particularly with reference to controversies affecting general welfare of the country.

NATIONAL EMERGENCIES

SEC. 206. Whenever in the opinion of the Attorney General of the United States, a threatened or actual strike or lock-out affecting substantially an entire industry engaged in trade, commerce, transportation, transmission, or communication among the several States, or with foreign nations or engaged in the production of goods for commerce will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including the respective positions of the parties but shall not contain any recommendations. The Attorney General shall file a copy of such report with the Federal Mediation Service and shall make its contents available to the public.

SEC. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the Attorney General shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) Members of a board of inquiry shall receive compensation at the rate of $50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U.S.C. 19, title 15, secs. 49, 50, as amended), and hereby made applicable to the powers and duties of such board.

SEC. 208. (a) Upon receiving a report from a board of inquiry, the Attorney General may, in the name of the United States, petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out, or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects substantially an entire industry engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate circuit court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 29, secs. 346 and 347).

SEC. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Federal Mediation Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Mediation Service.

(b) Upon the issuance of such order, the Attorney General shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the Attorney General the current position of the parties to the dispute and the efforts which have been made for settlement. The Attorney General shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made

by their employer and shall certify the results thereof to the Attorney General within five days thereafter.

SEC. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the Attorney General shall submit to the President a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board. The President shall transmit such report together with such recommendations as he may see fit to take, to the Congress for consideration and appropriate action.

SEC. 211. (a) For the guidance and information of interested representatives of employers, employees, and the general public, the Bureau of Labor Statistics of the Department of Labor shall maintain a file of copies of (1) all available agreements reached as a result of mediation, conciliation, and arbitration of labor disputes; (2) all available arbitration agreements and awards in labor disputes; and (3) any other available collective-bargaining agreements between employers and employees. Such file shall be open to inspection under appropriate conditions prescribed by the Secretary of Labor, except that no specific information submitted in confidence shall be disclosed.

(b) The Bureau of Labor Statistics in the Department of Labor is authorized to furnish upon request of the Service, or employers, employees, or their representatives, all available data and factual information which may aid in the settlement of any labor dispute, except that no specific information submitted in confidence shall be disclosed.

EXEMPTION OF RAILWAY LABOR ACT

SEC. 212. The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts concluded as the result of collective bargaining between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act may sue or be sued in its common name in the courts of the United States: *Provided*, That any money judgment against such labor organization shall be enforceable only against the organizations as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of this section district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duty authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization, and make such organization a party to the suit.

TITLE IV

CREATION OF JOINT COMMITTEE TO STUDY AND REPORT ON BASIC PROBLEMS AFFECTING FRIENDLY LABOR RELATIONS AND PRODUCTIVITY

SEC. 401. There is hereby established a joint congressional committee to be known as the Joint Committee on Labor Management Relations (hereafter referred to as the committee), and to be composed of seven Members of the Senate Committee on Labor and Public Welfare, to be appointed by the President pro tempore of the Senate, and seven Members of the House of Representatives Committee on Education and Labor, to be appointed by the Speaker of the House of Representatives. A vacancy in membership of the committee shall not affect the powers of the remaining members to execute the functions of the committee, and shall be filled in the same manner as the original selection. The committee shall select a chairman and a vice chairman from among its members.

SEC. 402. The committee, acting as a whole or by subcommittee, shall conduct a thorough study and investigation of the entire field of labor-management relations, including but, not limited to—

(1) the means by which permanent friendly cooperation between employers and employees and stability of labor relations may be secured throughout the United States;

(2) the means by which the individual employee may achieve a greater productivity and higher wages, including plans for guaranteed annual wages, incentive profit-sharing and bonus systems;

(3) the internal organization and administration of labor unions, with special attention to the impact on individuals of collective agreements requiring membership in unions as a condition of employment;

(4) the labor relations policies and practices of employers and associations of employers;

(5) the desirability of welfare funds for the benefit of employees and their relation to the social-security system;

(6) the methods and procedures for best carrying out the collective-bargaining processes, with special attention to the effects of industry-wide or regional bargaining upon the national economy;

(7) the administration and operation of existing Federal laws relating to labor relations; and

(8) such other problems and subjects in the field of labor-management relations as the committee deems appropriate.

SEC. 403. The committee shall report to the Senate and the House of Representatives not later than February 15, 1948, the results of its study and investigation, together with such recommendations as to necessary legislation and such other recommendations as it may deem advisable.

SEC. 404. The committee shall have the power, without regard to the civil-service laws and the Classification Act of 1923, as amended, to employ and fix the compensation of such officers, experts, and employees as it deems necessary for the performance of its duties, including consultants who shall receive compensation at a rate not to exceed $35 for each day actually spent by them in the work of the committee, together with their necessary travel and subsistence expenses. The committee is further authorized, with the consent of the head of the department or agency concerned to utilize the services, information, facilities, and personnel of all agencies in the executive branch of the Government and may request the governments of the several States, representatives of business industry, finance, and labor, and such other persons, agencies, organizations, and instrumentalities as it deems appropriate to attend its hearings and to give and present information, advice, and recommendations.

SEC. 405. The committee, or any subcommittee thereof, is authorized to hold such hearings; to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Eightieth Congress; to require by subpena or otherwise the attendance of such witnesses and the production of such books, papers, and documents; to administer oaths; to take such testimony; to have such printing and binding done; and to make such expenditures within the amount appropriated therefor; as it deems advisable. The cost of stenographic services in reporting such hearings shall not be in excess of 25 cents per one hundred words. Subpenas shall be issued under the signature of the chairman or vice chairman of the committee and shall be served by any person designated by them.

SEC. 406. The members of the committee shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the committee, other than expenses in connection with meetings of the committee held in the District of Columbia during such times as the Congress is in session.

SEC. 407. There is hereby authorized to be appropriated the sum of $150,000, or so much thereof as may be necessary, to carry out the provisions of this title, to be disbursed by the Secretary of the Senate on vouchers signed by the chairman.

TITLE V

DEFINITIONS

SEC. 501. When used in this Act—

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

(3) The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "person", and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

SAVING PROVISION

SEC. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

SEPARABILITY

SEC. 503. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to other persons or circumstances than those to which it is held shall not be affected thereby.

SHORT TITLE

SEC. 504. This Act may be cited as the "Federal Labor Relations Act of 1947".

SEPARATE REPORT OF SENATOR ELBERT D. THOMAS OF UTAH

The remaining field to conquer in labor relations is that there be no enemies among Americans. Under laissez faire, a reduction of perpetual siege by oppressor against oppressed was impossible. Under the National Labor Relations Acts, and other acts which I helped to create, industry and labor began to consider their relations. For the first time, in many instances, the individual person began to count for something; management and labor came to regard one another as human beings having feelings, ambitions, and aims in life, rather than as masters and servants. Malice was rife, then, years ago. Today in the course of our hearings there was but one isolated example of seemingly incurable ill feeling.

Such dislocations as we have had came, not because the pendulum had swung too far, but because that great universal destroyer of everything, war, wielded its cold saber across the face of our American life, laying waste to old budgets, economies, savings, and surpluses. So bad was the distortion that the exodus of armies of teachers from their schoolrooms, not to return, though it may be the best known, is not the only example. Perplexed, farmers speak against their natural friends—the laborers. It is not difficult to stir up ill feeling. The war is over, products and services are high and scarce, the interest on the war debt is a dead horse that must be paid for but never enjoyed, and people are restless.

Some otherwise good people have worked themselves up even into a state of mental civil war.

It was natural that the fierce dislocations, of war brought about a succession of labor demands. Some attempt at equalizing had to follow such a serious deflection. It is only when segments of our national

life, in trying to retain their meager standards, have to be conspicuous about it and cause inconvenience to numbers of their fellow Americans, that they are unfortunate. For in such circumstances an opportunists' heaven is created.

Fortunately, however, in this committee's deliberations there was little if any emotionalism, and no desire to punish. Some of us, knowing that authors had gone far afield even admittedly so in some instances simply to have something before us, set about in earnest to salvage all that we could. We softened some of the harsh proposals, and when a composite bill, as toned down, was presented to us for further consideration, we then operated on that one too, and reduced its restrictions to a wholesome degree.

It is not difficult to account for such success as was achieved within the committee. The subject was in relatively good hands. Few men who understand labor's eternal struggle and who appreciate the meaning of labor law can, in conscience, join in a reckless or irresponsible movement to blacken labor in a stroke. The personnel of this committee are experienced in their field. To this happy fact much is owed.

This individual report is required to make the record clear on one point. In announcing that I would report the bill out I reserved the right to oppose the bill on the floor. The good fight must continue, on the floor and in conference.

It would make better sense not to lump unrelated subjects into one omnibus bill. When it was made manifiest, however, that it was the desire of those now in the majority in both Houses of Congress, thus to mass labor bills, I did not oppose giving them this responsibility.

I believe the majority party acted unwisely in not following my suggestion of several bills for several subjects. But this committee went to, and stayed at, work. As a result certainly not the whole good but much good has been done. When we had finished, and all possible concessions had been made, and the work was done, a work in which we all had participated, there was only one thing to do, and that was to place the product on the calendar, because the whole Senate has the right and the duty to consider the subject.

ELBERT D. THOMAS.

SUPPLEMENTAL VIEWS ON S. 1128

The undersigned members of the Committee on Labor and Public Welfare support the provisions of S. 1126 as reported by the committee and believe that it represents a substantial improvement in the legislation dealing with labor relations and the problem of strikes. We do this even though in many instances we prefer the stronger and clearer language which was modified by the committee by a closely divided vote. A typical instance is the language now in the bill establishing the standard for review by the courts of findings of fact amendments on many of these issues, because we believe it is desirable that Senate consideration be concentrated on a few major changes which we believe to be essential.

The bill as reported is a substantial step forward in correcting many injustices, imposing responsibilities on unions, improving procedures in mediation and collective bargaining, and placing relations between employers and employees on a more equal bases. However, we feel that

certain definite evils are not covered at all, or covered inadequately, because the committee eliminated several important provisions from the draft bill, usually by a vote of 7 to 6. Two of these provisions were contained in the Case bill and approved by the Senate last year. In order to correct these deficiencies, it is our intention either to offer or support on the Senate floor four amendments to S. 1126, as follows:

1. Coercion by Unions

An amendment to make it an unfair labor practice for employees or unions "to interfere with, or coerce, employees in the exercise of the rights guaranteed in section 7" of the National Labor Relations Act. It is now an unfair labor practice for employers to so interfere with, restrain, or coerce. Since this bill establishes the principle of unfair labor practices on the part of unions, we can see no reason whatever why they should not be subject to the same rules as the employers. The committee heard many instances of union coercion of employees such as that brought about by threats of reprisal against employees and their families in the course of organizing campaigns; also direct interference by mass picketing and other violence. Some of these acts are illegal under State law, but we see no reason why they should not also constitute unfair labor practices to be investigated by the National Labor Relations Board, and at least deprive the violators of any protection furnished by the Wagner Act. We believe that the freedom of the individual workman should be protected from duress by the union as well as from duress by the employer.

Text of this amendment follows:

On page 14, line 6, after the word "coerce", insert the following "(A) employees in the exercise of the rights guaranteed in section 7; or (B)"

2. More Autonomy for Local Unions

An amendment in three parts to restore to union locals autonomy in the exercise of their bargaining rights, and thus check the trend toward Nation-wide bargaining which threatens the public welfare by making possible the stoppage of an entire industry. These amendments require the Board to certify as bargaining agent unions containing only the employees of a single employer, or of different employers in the same metropolitan district or country, thus preventing the certification of a national or international union. Of course, the union certified may be affiliated with such a national or international union. The amendment further prevents the NLRB from treating industry-wide associations of employers as a single employer, and the employer unit becomes the largest unit permitted for collective bargaining purposes. The amendment further makes it an unfair labor practice for a national or international union to coerce any local union to sign or not to sign a proposed collective-bargaining agreement.

The amendment does not outlaw industry-wide or area-wide bargaining as does the House bill. It merely carries out the original intent of the Wagner Act and gives the employees of each employer the right to settle with their own employer. Thus Nation-wide bargaining may be authorized by the unions, say, in the coal fields, but if any local becomes dissatisfied it may withdraw and sign up with its

own employer just as employers today may withdraw from an employers' association and sign up with their own employees. It seems essential to us that the trend toward Nation-wide bargaining be checked and that local employees be given some freedom from the arbitrary dictates of the leaders of national unions.

The committee in particular heard testimony with regard to the United Steel Workers, in which field it has been customary to certify the international union as bargaining agent. Hundreds of unnecessary strikes were called last year because the international union officers forbade any settlement at less than $2 a day increase until the union settled with the United States Steel Co. Strikes had to be called in many plants where the men were prepared to reach an agreement with their employers, even in industries far removed from the steel industry. We believe such an amendment is essential to restore to employees the collective bargaining-rights guaranteed to them by the National Labor Relations Act, which, in too many instances, have been abrogated by the complete concentration of union power in the international union officers.

Text of this amendment follows:

On page 4, line 16, after the word "employers" where it appears the second time in such line, insert the following: "in the same metropolitan district or county".

On page 5 strike out lines 8 and 9 and insert in lieu thereof the following:

(4) The term "representatives" whether used in the singular or plural means any individual or a labor organization irrespective of whether or not it is a constituent unit of or an affiliate of an organization, national or international in scope, composed solely of employees of one employer, or of employees employed in the same metropolitan district or county by different employers.

On page 16, between lines 15 and 16, insert the following:

(6) to coerce or compel or attempt to coerce or compel (irrespective of whether or not such coercion or compulsion is authorized by any provision in its constitution or bylaws) a labor organization which is a constituent unit or an affiliate of such labor organization, or any other labor organization, which acts as the representative of employees for collective-bargaining purposes, to include or omit or to seek the inclusion or omission in any collective-bargaining agreement of any particular terms or provisions relating to wages, hours of work, or other conditions of employment.

3. Limitation on Abuse of Welfare Funds

An amendment reinserting in the bill a provision regarding so-called welfare funds similar to the section in the Case bill approved by the Senate at the last session. It does not prohibit welfare funds but merely requires that, if agreed upon, such funds be jointly administered—be, in fact, trust funds for the employees, with definite benefits specified, to which employees are clearly entitled, and to obtain which they have a clear legal remedy. The amendment proceeds on the theory that union leaders should not be permitted, without reference to the employees, to divert funds paid by the company, in consideration of the services of employees, to the union treasury or the union officers, except under the process of strict accountability.

Thus the amendment makes extortion illegal and also prevents the check-off of union dues unless authorized in writing by the individual employee. Such authorization may be irrevocable for the period of contract, which is the usual form of check-off today.

The necessity for the amendment was made clear by the demand made last year on the part of the United Mine Workers that a tax of 10 cents a ton on coal be paid to the Mine Workers Union for indiscriminate use for so-called welfare purposes. It seemed essential to the Senate at that time, and today, that if any such huge sums were to be paid, representing as they do the value of the services of the union members, which could otherwise be paid to the union members in wages, the use of such funds be strictly safeguarded.

There is a serious question whether welfare funds of this character should be permitted at all unless the employees are willing to join such funds voluntarily and have their earnings diverted thereto. However, a number of such funds have been established, and we have no desire to interfere with their operation. One of the subjects for study by the joint committee proposed in S. 1126 is this matter of welfare funds and their relation to social security. In some way they should be integrated with social security, and the national assistance should not be broken up into a series of industry agreements. Pending that study, however, we believe it is imperative that where such funds are in existence or are agreed upon by collective bargaining, they should not be subject to racketeering or arbitrary dispensation by union officers. Without such restraints, employees would have no more rights in the funds supposedly established for their benefit than their union leaders choose to allow them. They may well become a mere tool to increase the power of the union leaders over their men, and even be open to racketeering practices.

Text of this amendment follows:

On page 54, between lines 4 and 5, insert the following:

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

SEC. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or in compromise, adjustment, settlement, or release of any claim in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents), provided (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, or life insurance,

disability and sickness insurance, or accident insurance; and (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," approved October 15, 1914, as amended (U.S.C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U.S.C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., title 29, secs. 101–115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) For the purposes of this section, the term "representative" means any labor organization which, or any individual who, is authorized or purports to be authorized to deal with an employer, on behalf of two or more of his employees, concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work; and for the purposes of section 301 includes any other organization or fund of which some of the officers are representatives or are members of a labor organization or are elected or appointed by a representative.

4. Direct Action Against Secondary Boycotts and Jurisdictional Strikes

An amendment reinserting in the bill a section making secondary boycotts and jurisdictional strike unlawful and providing for direct suits in the courts by any injured party. The committee bill admits that such boycotts and strikes are improper, but it only proposes to make them unfair labor practices. This means that appeal must be made by the Board to the National Labor Relations Board. The bill does provide that, on petition of the NLRB regional attorney, the Board may obtain a temporary injunction from a court while it is conducting a hearing on the question whether the strike is an unfair labor practice or not. If it finds that it is, it then may issue a cease and desist order against such a strike and later ask to have this enforced by the court. In our opinion, this is a weak and uncertain remedy for those injured by clearly illegal strikes. It depends upon the decision of the National Labor Relations Board as to whether any action shall be taken, and the conduct of the proceedings will be entirely in the hands of the NLRB attorneys instead of attorneys of the injured party. The facts in such cases are easily ascertainable by

any court and do not require the expertness supposed to be one of the virtues of the administrative law procedure. In addition to that, the best estimate of the time lag between the filing charges with the NLRB and its obtaining of a temporary injunction is not less than 2 weeks to a month.

There appears to be virtually no disagreement as to the complete injustice of secondary boycotts and jurisdictional strikes or as to the necessity of giving injured third parties a remedy against their operation. For the most part, it is the small employer, often with less than 50 employees, and the farmer or farm trucker who are the main victims of this type of racketeering union activity. To a small storekeeper, or machine shop, picketed out of business by unions intervening between him and his employees, or to the farmer prevented from unloading his perishable produce, the remedy of dealing with the NLRB is a weak reed. There will only be a satisfactory remedy if he can go to his local court and obtain an injunction, first temporary and then permanent, against interference of this kind.

In the field of labor relations the large companies can generally look after themselves, but the power of labor unions is being used indiscriminately against the small businessman, and he is quickly forced to capitulate by danger of bankruptcy.

The amendment proposes that he be entitled to file a suit for damages and obtain a temporary injunction while that suit is being heard.

We do not desire to put the Federal courts into every strike, and therefore we do not propose injunctions against mass picketing or other features which may be alleged in any strike for better wages and working conditions. But we do feel that in this limited type of admittedly illegal strikes where the entire strike can be enjoined by the court, there is no reason why the same remedy should not be available against labor unions as is available against every other wrongdoer. Furthermore, we feel that instead of continuous supervision and contempt charges involved in the injunctive processes in strikes legal in purposes, the injunction in these cases would be completely effective and would bring an end altogether to this type of racketeering.

The amendment, furthermore, removes the protection of the Clayton Act from monopoly agreements to fix prices, allocate customers, restrict production, distribution, or competition, or impose restrictions or conditions on the purchase, sale, or use of material, machines, or equipment. While the existence of the union should not be a combination in restraint of trade, we see no reason why unions should not be subject in this field to the same restriction as are competing employers. Text of this amendment follows:

On page 54, between lines 4 and 5, insert the following:

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

SEC. 303. (a) It shall be unlawful, in an industry or activity affecting commerce, for any person to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services in the course of their employment—

(1) for the purpose of forcing or requiring any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products

of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) for the purpose of forcing or requiring any employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9(a) of the National Labor Relations Act;

(3) for the purpose of forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9(a) of the National Labor Relations Act;

(4) for the purpose of forcing or requiring any employer to assign to a particular labor organization work tasks assigned by an employer to some other labor organization unless such employer is failing to conform to an order of certification of the National Labor Relations Board determining the bargaining representative for employees performing such work tasks.

Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) The district courts of the United States shall have jurisdiction in proceedings instituted by or on behalf of the United States, or by any party suffering loss or damage or threatened with loss or damage by reason of any violation of subsection (a), to prevent and restrain violations of such subsection. It shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings to prevent and restrain violations of such subsection.

(c) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

(d) The provisions of sections 6 and 20 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and the provisions (except section 7, exclusive of clauses (c) and (e) and sections 11 and 12) of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932, shall not be applicable in respect of violations of subsection (a) or in respect of any contract, combination, or conspiracy, in restraint of commerce, to which a labor organization is a party, if one of the purposes of such contract, combination, or conspiracy is to fix prices, allocate customers, restrict production, distribution, or competition, or impose restrictions or conditions upon the purchase, sale, or use of any material, machines, or equipment.

Conclusion

We see no reason why any one of these four amendments should be regarded as punitive or restictive of the legitimate rights of labor unions. They do not go beyond the general principles accepted in the committee bill, but they do fill up gaps which we feel are serious. With the amendments, we believe that most of the clear injustices which have developed in labor relations will be corrected and the field left open for the more fundamental studies proposed for the new joint committee.

Robert A. Taft.
Joseph H. Ball.
Forrest C. Donnell.
W. E. Jenner.

I concur with my colleagues in the foregoing supplemental views, with the following reservations:

Amendment No. 2.—I approve this amendment because it leaves the issue of industry-wide bargaining to the voluntary agreement of individual employers and their employees. The amendment does not actually prohibit industry-wide bargaining. I am opposed at this time to any blanket prohibition of industry-wide bargaining because I feel the matter needs substantially more study before we adopt a national policy. This is a proper matter for the joint committee proposed in the bill to explore fully.

Amendment No. 4.—I am opposed to this amendment. While I am in entire accord that there can be no defense of secondary boycotts and jurisdictional strikes, I feel that the reported bill treating these matters as unfair labor practices is the preferable way to deal with them—putting the responsibility on the NLRB. Furthermore, I do not favor the opening up of the Norris-LaGuardia Antiinjunction Act except on petition of the Government. By treating these evils as unfair labor practices, the use of the injunction is given to the NLRB and is not open to abuse by individual employers. At least we should experiment with this procedure before adopting the more severe remedies.

H. Alexander Smith.

(80th Congress, 1st Session, Senate Report 105, Part 2)

FEDERAL LABOR RELATIONS ACT OF 1947

April 22 (legislative day, April 21), 1947.—Ordered to be printed

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Mr. Thomas of Utah, from the U.S. Congress, Senate Committee on Labor and Public Welfare, submitted the following

MINORITY VIEWS

[To accompany S. 1126]

Introductory

This bill is designed to weaken the effective program of labor legislation which has been, with great pains, built up over the years. It would be destructive of much that is valuable in the prevention of labor-management conflicts. It contains many barriers, traps, and pitfalls that can only make more difficult the settlement of disputes. Its principal results would be to create misunderstanding and conflict, and to aggravate the imbalance between wages, prices, and profits which already endangers our prosperity.

The President in his state of the Union message of January 6, 1947, recommended:

> We should enact legislation to correct certain abuses and to provide additional governmental assistance in bargaining. But we should also concern ourselves with the basic causes of labor-management difficulties.

The President outlined certain immediate steps to be taken: (*a*) Legislation to prevent jurisdictional strikes intended to compel employers to bargain with a minority union instead of the majority

union in their plants; (*b*) legislation to provide for peaceful and binding determinations of jurisdictional disputes over which union is entitled to perform a particular work task; (*c*) legislation to prohibit secondary boycotts when used to further jurisdictional disputes or to compel employers to violate the National Labor Relations Act; and (*d*) legislation to provide for final and binding arbitration of disputes concerning the interpretation of the terms of collective-bargaining agreements.

We would support legislation carrying out these recommendations. We are opposed, however, to legislation which goes beyond these recommendations and undermines the foundation laid by the Administration for the promotion of free collective bargaining. We are opposed to legislation such as is included in the committee majority bill which fails to distinguish between justifiable and unjustifiable secondary boycotts and proscribes all boycotts indiscriminately as unfair labor practices. We are also opposed to those provisions of this bill which instead of merely providing machinery for the binding determination of questions concerning the meaning of contract terms, opens the Federal courts wide to suits for breach of contract without regard to the ordinary prerequisites of Federal jurisdiction.

The President in his State of the Union message recommended as a second point in his program for dealing with labor-management controversies, the strengthening of facilities within the Department of Labor for assisting the processes of free and voluntary collective bargaining. As he stated in his message:

> * * * There is a need for integrated governmental machinery to provide the successive steps of mediation, voluntary arbitration, and—ultimately in appropriate cases—ascertainment of the facts of the dispute and the reporting of them to the public. Such machinery would facilitate and expedite the settlement of disputes.

The majority bill does not strengthen the facilities of the United States Conciliation Service in the Department of Labor as recommended by the President. On the contrary, it removes the Service from the Department of Labor and establishes a new Federal Mediation Service. This proposal violates sound principles of administration by adding to the already numerous existing agencies handling labor disputes and will promote disorder and confusion in the conduct of the Federal Government's conciliation and mediation activities.

The President also called in his message, as part of his program for dealing with labor disputes, for broadening Federal programs of social legislation to alleviate the causes of workers' insecurity. The President pointed out:

> On June 11, 1946, in my message vetoing the Case bill, I made a comprehensive statement of my views concerning labor-management relations. I said then, and I repeat now, that the solution of labor-management difficulties is to be found not only in legislation dealing directly with labor relations but also in a program designed to remove the causes of insecurity felt by many workers in our industrial society. In this connection, for example, the Congress should consider the extension and broadening of our social-security system, better housing, a comprehensive national health program, and provision for a fair minimum wage.

The problems involved in attempting to deal with the difficult and complicated labor controversies of this time are not merely matters of governmental machinery. We cannot approach these problems solely on the basis of prohibitions and restrictions on the activities of private

citizens whether they be employers, labor organizations or their members. The causes of labor-management controversy lie deep in the complex industrial and financial structure.

Without attention to the problems to which the President directed attention in his message on the State of the Union such legislation as the Congress may enact may well take on unwittingly the character of "vindictive," "punitive" legislation against which the Congress has frequently been warned. Measures to extend and broaden the social security system, to provide for better housing, to establish a comprehensive national health program and to raise the minimum wage under the Fair Labor Standards Act to a level commensurate with present-day conditions are pending before the Congress. In the absence of action on these measures by this Congress, the proposal of the majority may well promote instead of resolve the industrial discord and strife which they, like we, wish to avoid.

The proposal of the committee majority for the formation of a joint congressional commitee to study labor-management relations departs in two important respects from the recommendations of the President with respect to such a study. He proposed the establishment of a temporary joint commission composed not only of Members of Congress but of representative of the public, labor, and management. In so recommending the President had in mind, as he said, that—

> We must not, however, adopt punitive legislation. We must not, in order to punish a few labor leaders, pass vindictive laws which will restrict the proper rights of the rank and file of labor. We must not, under the stress of emotion, endanger our American freedoms by taking ill-considered action which will lead to results not anticiuated or desire.
>
> We must remember, in reviewing the record of disputes in 1946, that management shares with labor the responsibility for failure to reach agreements which would have averted strikes. For that reason we must realize that industrial peace cannot be achieved merely by laws directed against labor unions.

Accordingly, the President recommended that the commission which should study labor relations should have among its members representatives whose interests are directly involved in all labor disputes, namely, the public, management, and labor.

The President also recommended in his message that the commission which he proposed make its first report, including specific legislative recommendations, not later than March 15, 1947. The majority of the committee, however, have followed an entirely different course of action. They have attempted to deal, without prior study by a commission such as that proposed by the President, with a great variety of problems grouped together in an omnibus bill which include not only matters which can properly be dealt with at this time on the basis of presently available experience and study, but also questions which require the full study and investigation which the President felt should be referred to the proposed commission, including: (1) Nation-wide strikes in vital industries affecting the public interest; (2) methods and procedures for carrying out the collective-bargaining process; and (3) the underlying causes of labor-management disputes.

The committee has had before it since January 10, 1947, Senate Joint Resolution 22 which would create a temporary Labor Relations Commission to make a study and recommendations concerning labor relations along lines proposed by the President in his message. The undersigned believe that such a study is an essential preliminary to

any Federal labor legislation designed to promote labor-management peace and stability which will be fair to the public, to management, and to labor alike. The majority have, however, proceeded without such an investigation and have in a single omnibus bill proposed legislation which will outlaw the closed shop and secondary boycotts, both justified and unjustified, provide for the establishment of a new independent Federal Mediation Service outside the Department of Labor, revive the use of labor injunctions in certain cases, establish complicated procedures for handling disputes in Nation-wide industries and authorize suits by and against labor organizations in the Federal courts without regard to the ordinary requirements of Federal jurisdiction.

Only such completely repressive measures as the Hartley bill (H.R. 3020) could make this measure seem "mild." Judged by the needs of the times, or the ideal of fairness in labor relations, or the evils sought to be reached, it is a harsh bill. Some few of its provisions are useful and progressive; some others are innocuous. But the remainder look backward rather than forward. They would seriously weaken collective bargaining which in recent days has provided dramatic illustrations of its efficacy as the solution of industrial problems. We do not say, and in the work of the committee have not said, that all provisions of this bill are unwise, nor have we taken the position that no legislation can be acceptable. We respect the motives of our colleagues, and on many matters we have found them reasonable and willing to eliminate proposals which to us seemed indefensible. On matters of such moment, however, judgment will differ.

President Truman and the people are aware that our present problem is one of swollen prices and high profits. One marvels at the audacity of those who, drawing to themselves an ever-increasing share of the Nation's wealth, successful with the help of congressional allies in liquidating many of the popular protections against extortion, now call for another "Battle of the Bulge" against workers' last and best protection; their trade-unions. In the name of "fairness" many of them would give more to those who have and less to those who have not; in the name of "equality" they would increase maldistribution of wealth; masquerading as protesters against monopoly they would weaken the remaining barrier to concentration of industrial power. Enough of their position is included in this bill to make it but one further example of a determination to resurrect those mistakes of 1920–29 which led inevitably to the horrors of 1929–33.

The negative attiude of this bill should be replaced by a genuinely affirmative program for the removal of the causes of worker protest and insecurity; higher minimum wages, improved safety legislation, a genuine housing program, expanded protection for the victims of our industrial society. We must go forward rather than stand still.

The bill seems to us a distillate of fears. The successive and creditable rejection by the committee of many extreme proposals (which may be renewed) evidences a justified fear of worker retaliation at the polls. Yet the retention of many equally unwise provisions manifests a fear that those large corporate interests which have demanded repressive antilabor legislation may not be satisfied with the measure. The necessity for grudging inclusion in the bill of many presently applied rules conceals the fear of admitting that, on the whole, Federal

labor policy under the wise leadership of Presidents Roosevelt and Truman has been fair, forthright, and progressive. The adoption, in some measure, as a small segment of the bill, of the program outlined by the President in his state of the Union message illustrates a fear of rejecting present objectives as the policy of the Federal Government.

This bill does not so much turn back the clock as stop it dead. To this point, our labor policy has been premised on the assumption that collective bargaining (and trade-unions which are essential to collective bargaining) are institutions to be strengthened and fostered. We have felt that there is no alternative to collective bargaining if we are to retain a democratic society. While recognizing the imperfections and occasional past failures of collective bargaining, we have sought to improve and develop it. Now this bill calls on industrial relations to mark time, as if we were to say to the medical profession that there should be no further advancement in surgery for a season. By the denial of well-recognized rights, by hampering restrictions, and by confining rules, this measure, in the interest only of a few industrialists who have never accepted the spirit of the National Labor Relations Act, calls a halt to progress in industrial relations.

It does this in a variety of fashions:

1. It excludes entirely from the number of those who are to benefit under Federal legislation certain "agricultural" workers who are in reality industrial workers, and supervisors, who also have their problems.

2. It slices a wedge out of the Norris-LaGuardia Act by making application for labor injunctions mandatory in certain types of labor disputes.

3. It calls for the splitting up of trade-unions in many industries where collective bargaining is working well.

4. It gives an undue recognition to company-dominated unions by requiring that they be placed on the ballot under certain circumstances.

5. It requires that charges of unfair labor practices be filed within 6 months after their commission—the shortest statute of limitations known to the law thereby offering a premium to those employers who conceal commission of unfair labor practices.

6. It weakens the Conciliation Service by removing it from the Department of Labor, where it properly belongs, for no reason other than the desire to "do something," regardless of merit.

7. It severely limits the right to strike in a variety of circumstances.

8. It requires the holding of elections by the Federal Government on the issue of union security, and the holding of other elections before certain strikes become legal, despite the unhappy experience of the Smith-Connally Act.

9. In a multitude of ways it hampers the effectiveness of the National Labor Relations Board.

10. It requires labor unions to file burdensome reports with the Secretary of Labor under penalty of denial of rights under the National Labor Relations Act.

11. It provides, in the case of union-employer suits alone, that suits may be brought in Federal courts without the ordinary jurisdictional requirements of the amount in controversy and diversity of citizenship.

12. It disregards in material respects President Truman's suggestions for the establishment of an investigating commission on labor problems.

We now turn to a discussion of the specific provisions of the bill to illustrate how these undesirable results would be reached.

I. Stimulation of Industrial Unrest

A. INDUSTRY-WIDE COLLECTIVE BARGAINING

Provisions specifically prohibiting area-wide and industry-wide collective bargaining were rejected by the committee for inclusion in the bill as reported. We approve this action by the committee but, in view of announcements by some members of the committee that they intend to reinsert such provisions through amendments offered on the floor of the Senate, we have set forth below the considerations which motivated us in supporting the striking of such provisions from the bill.

The Bureau of Labor Statistics estimates that more than 4,000,000 workers in American industry are covered by contracts between a union and more than one employer. Some of these are industry-wide; most are regional or city-wide in character. A ban on such bargaining would disrupt existing relationships in these industries and make it necessary to renegotiate contracts covering 4,000,000 workers. Instead of negotiations resulting in a relative handful of agreements which cover thousands of employers as a group, the result would be piecemeal negotiations with thousands of individual employers, over a prolonged period of time, with thousands of individual agreements splintering the uniform standards previously achieved through industry bargaining.

Industry-wide bargaining is a logical development of present-day industrial organization. Employers are organized on an industry-wide scale; first in National-wide corporations, and second in trade associations. Competition is Nation-wide in character.

We should like to indicate what would be the effect of a ban on industry-wide bargaining on present-day industrial relations.

Any attempt to ban actions by employers to form voluntary associations for the purpose of collective bargaining would deny this group the protection accorded employee organizations. In many trades and industries, employers have joined together to bargain with unions representing their employees. In such industries as longshoring and building construction—where workers change employers from day to day or week to week—bargaining through employers' associations is the only practical method of establishing uniform wages and working conditions and eliminating cutthroat competition. Almon E. Roth, President of the National Federation of American Shipping, in a statement before the committee, warned that a ban against industry-wide bargaining would result in "a diversity of wage rates and working conditions among ships operated from the same coast, plying between the same ports, tying at the same docks, and employing, in turn, the same men:

> Such a condition leads to the playing off of one steamship company against another by the unions, to extreme labor unrest, and eventually to the disruption of steamship operation.

Many employers prefer industry-wide or association bargaining. Mr. Vincent P. Ahearn, executive secretary of the National Sand and Gravel Association, testified before the committee:

> Some employers believe that if they could not bargain on an industry-wide basis, unions could simply isolate one employer after another and force capitulation to their demands.

This would create a situation where the weakest member of an industry would set the standard for the others.

Because numerous employers are covered by a single collective-bargaining agreement, less time is lost in the bargaining process. Settlements are made simultaenously for these employers rather than on an individual employer-by-employer basis. Industrial peace is achieved in one step, rather than over a prolonged period of time. Bargaining with hundreds of individual firms for the same things is both wasteful and unfair to both sides.

Many small employers lack the skill in bargaining and research facilities available to unions. A ban on assocations of employers combining for the purpose of pooling their knowledge and resources in collective-bargaining negotiations would impair the bargaining power of employers.

Industry-wide agreement on wage protects wage standards from being undercut by lower-wage areas and lower-wage employers. By the same token, industry-wide bargaining may save individual employers from being singled out as wage leaders in their respective industries. A ban on such agreements would result in separate agreements with individual locals. Many firms control or own subsidiary plants in districts outside an immediate geographic area. Such firms would have to negotiate agreements with numerous local unions in widely scattered localities—a task that would unavoidably become snarled up in wage differentials and eventually would revive the old cutthroat competition and the law of the jungle between company and company, between area and area.

Barring joint activities of local unions and reducing the function of international unions to that of an advisory body should, in fairness, require the same treatment for corporations with plants scattered widely over the country.

The charge is made that industry-wide bargaining leads to industry-wide strikes which threaten the public welfare. We should like to emphasize that it is not the character of the bargaining which brings about major strikes, but the organized joint refusal of that industry's employers to meet the union's demands. Under company-by-company bargaining, employers would try to drive standards down to the level of the lowest in the industry, and unions would seek to attain the level of the highest, and the result would be an epidemic of strikes throughout the various units of the industry.

A ban on industry-wide bargaining would minimize the role of the international union and prohibit it from exercising its authority to intervene in strikes of its affiliates; and prevent it from employing its prestige in its own industry for moderation and restraining counsel.

In order for the Senate fully to realize the potential impact of a ban on industry-wide bargaining by large geographical areas, we call attention to a study recently prepared by the Bureau of Labor Statistics, which shows the extent of bargaining in specific industries with

associations and groups of employers. A careful examination of these industry groupings must of necessity uphold the committee's action in deleting that part of the bill which would seek to disrupt existing collective-bargaining practices which have developed in the past decades.

AREA COVERAGE OF GROUP BARGAINING SHOWING AREA OF BARGAINING WITH ASSOCIATIONS OR GROUPS OF EMPLOYERS, BY INDUSTRY

Bargaining on a national or industrywide scale	Bargaining by geographic (regional) areas	Bargaining within a city, county, or metropolitan area
Coal mining	Canning and preserving foods [1]	Baking
Elevator installation and repair	Dyeing and finishing textiles [1]	Beverages, nonalcoholic
Glass and glassware	Fishing	Book and job printing and publishing
Installation of automatic sprinklers	Hosiery	Building service and maintenance
Pottery and related products	Leather (tanned, curried, and finished) [1]	Clothing, men's [2]
Stoves	Longshoring	Clothing, women's [2]
Wallpaper	Lumber [1]	Confectionery products
	Maritime	Construction
	Metal mining	Cotton textiles
	Nonferrous metals and products, except jewelry and silverware [1]	Dairy products
	Paper and pulp	Furniture [2]
	Shoes, cut stock and findings [1]	Hotel and restaurant
		Jewelry and silverware
		Knit goods
		Laundry and cleaning and dyeing
		Leather products, other
		Malt liquors
		Meatpacking
		Newspaper printing and publishing
		Paper products, except wallpaper
		Silk and rayon textiles
		Steel products, except stoves [2]
		Tobacco
		Trade [2]
		Trucking and warehousing [2]

[1] There also is some bargaining on a city, county, and/or metropolitan-area basis.
[2] There also is some bargaining on a regional and/or industrywide basis.

B. LIMITATIONS ON UNION-SECURITY PROVISIONS

The bill as reported disregards the expert testimony heard by the committee which emphasized the stabilizing influence of union-security arrangements, voluntarily entered into, upon labor relations. Section 8 (3) of the present National Labor Relations Act permits an employer to enter into a closed-shop, union-shop, or maintenance-of-membership agreement with the recognized representative of a majority of his employees in an appropriate bargaining unit. This bill would outlaw the closed shop and would permit a maintenance-of-membership or union-shop agreement only under limited and administratively burdensome conditions. It would require revision of union-security arrangements based on the closed-shop principle covering nearly a third of all workers covered by collective-bargaining agreements when such agreements expire. Contracts covering 77 percent of all employees covered by collective-bargaining agreements would be affected.

Section 8 (a) (3) of the act, as amended by this bill, retains the present limitations upon the employer's right to enter into a union-security arrangement and adds others which would result in limiting and substantially diluting current practices and arrangements with respect to union security. This section permits an agreement requiring employees to join the union not more than 30 days after the employment begins. The agreement, however, may be made only with a recognized collective-bargaining representative which has been

authorized, in accordance with a new section 9 (e), to enter into such agreements by a majority of the employees in the bargaining unit as determined in a secret ballot conducted by the Board.

Section 8 (a) (3) further forbids an employer to discriminate against an employee for nonmembership in a union even under the permitted type of union security contract where the employer has reasonable grounds for believing that the employee was not offered membership on the same terms as the other union members or that he was deprived of or denied union membership for any reason other than a failure to pay prescribed dues and initiation fees, or that he engaged in activity to secure a new Board determination on the question of representation at a time when such question might properly be raised.

The effect of these provisions is virtually to make the employer the judge of the justifiability of firing or retaining a nonunion employee under a union-shop contract. The bill does not say that employees must in fact have been deprived or denied membership in the union for the reasons stated. It merely states that the employer must have reasonable grounds for so believing. Thereby, the right of the union to require the employment of union members only, is made to depend wholly upon the subjective beliefs of the employer, even if such beliefs are contrary to the facts. The Board in controversies concerning these matters would be under the necessity of determining, not a state of facts but a state of mind.

The additional burden thrown upon the Board by these provisions respecting union security is great. It is estimated that there are some twenty to thirty thousand collective-bargaining agreements containing union security provisions at present in effect. Under the present act, the Board has fallen far behind in its processing of cases involving employer unfair labor practices and representation questions. Under this bill it would be required to conduct balloting to determine authorization to enter into union security agreements and balloting to determine rescissions of such authorizations. It would be required, too, to investigate and prohibit alleged unfair labor practices by unions as well as by employers, and it would have the task of discovering an employer's subjective beliefs in refusing to fire nonunion employees under union shop contracts.

Section 8 (b) (2) contains further restrictions on union security arrangements. Labor organizations which attempt to presuade an employer to discriminate against an employee who has been deprived of or denied union membership for any reason other than nonpayment of dues and initiation fees would commit an unfair labor practice. This provision together with those of section 8 (a) (3) previously discussed would deprive even permissible union security arrangements of their effectiveness in stabilizing labor-management relations.

Even under a union-security contract which this bill permits, an employee could with impunity completely defy the union. He could defame it, he could betray confidential union information, he could seek to wreck it, attempt to bring it into disrepute, act as a spy or stoolpigeon or strikebreaker, be a racketeer or a grafter, and yet the union would have no effective sanction against him. If he pays or offers to pay his dues and initiation fees, the employer need not fire him and any attempt by the union to persuade the employer to do so would be an unfair labor practice on the part of the union. The

union would be completely shorn of effective power to discipline its members for good cause.

If these provisions are merely designed to outlaw the closed-shop closed-union arrangement and to permit union-security agreements not based on the closed-union practice, they have gone far beyond what is needed to achieve that purpose.

C. LIMITATION ON RIGHT OF STRIKERS TO VOTE

Section 9(c)(3) would also provide that strikers not entitled to reinstatement shall not be eligible to vote in a Board election unless such strike involves an unfair labor practice on the part of the employer.

As we understand this provision it would prevent employees who go out on strike because of a dispute over such matters as wages, hours, or working conditions from voting in a Board election held during the strike. This restriction is not conditioned upon replacement or an offer of reinstatement by the employer. It is automatic.

We deem it highly undesirable because it enables an employer to secure the rejection of an established bargaining agent at the very time that the public interest makes it particularly urgent that collective bargaining continue. The employer can in some cases achieve this result merely by filing a petition for an election (or encouraging a dissident group to file such a petition) as soon as his employees go out on strike. In such an election, the strikers who normally would constitute the bulk of the union's adherents could not vote. The defeat of the bargaining agent is thus assured. Anti-union employers are thus encouraged to refuse settlement of disputes in order to bring about strikes and thereby secure the defeat of the collective-bargaining representative. We can think of few provisions in this bill better calculated to produce and prolong strife and to defeat collective bargaining.

D. DISLOCATION OF ESTABLISHED BARGAINING UNITS

Section 9(b) of the bill would amend the National Labor Relations Act to leave the National Labor Relations Board little or no discretion with respect to the appropriate bargaining unit in two situations where the exercise of discretion is now permitted under the National Labor Relations Act and, in the interest of sound industrial relations, should be preserved. First, the bill would bar the Board from finding appropriate a unit of both professional and nonprofessional employees unless a majority of the professionals voted for inclusion in the unit. The decisions of the Board reveal that it seldom includes professionals in the same unit with other employees, but this restriction on the discretion of the Board would require the Board to wholly ignore existing and satisfactory bargaining patterns and units.

Section 9 (b) of the bill would prohibit the Board from deciding a craft unit to be inappropriate on the ground that a different unit has been established by a prior Board deermination, unless a majority of the employees in the craft unit vote against separate representation. This provision, in its effect, would tend to fragmentize unions based upon any membership broader than that of a single craft. We recognize that some of the State labor relations acts, such as that of New York, contain similar provisions, though that act requires a vote for

rather than against separate representation. However, while these may be appropriate when applied to small enterprises such as are regulated by the State acts, they are inappropriate when applied to the large enterprises covered by the national act. The provision can only have an unsettling effect on many industries such as the automobile, rubber, and electrical industries, which inlude in a single enterprise numerous crafts. In such industries, raiding by rival unions would be encouraged and employers would be forced to deal with many craft unions rather than a single large industrial union. The provision, if enacted into law, would seriously disturb existing labor relations in large segments of our economy and would allow no room for the play of administrative discretion on this issue, one of the most troubled with which the National Labor Relations Board has had to deal. Any proposal such as the one here involved can only aggravate an already complicated problem. We can see no useful purpose to be served by a change in the present law in this respect but on the contrary, feel that by permitting small groups to break up an established unit against the will of a majority of the employees, stability and responsibility in collective bargaining may be seriously disrupted.

E. EMPLOYER PETITIONS AND DECERTIFICATION PETITIONS

Under the present rules of the Board, an employer may file a petition where two or more labor organizations have presented conflicting claims that each represents a majority of the employees in an appropriate unit. In addition, where an employer doubts a union's majority status in good faith, he need only decline to bargain. Section 9 (c) (1) (B) would provide, however, that an employer could also file a petition whenever one labor organization presented a claim to be recognized. The most serious objection to the proposed amendment is that in situations where unions are established in a plant and only questions of continuing majority are involved, the Board would not clearly have discretion to dismiss the petition if there was no reasonable basis in fact for the employer to doubt that the labor organization still represents a majority. This is most important and should not be left to statutory interpretation. Unless the Board has such discretion, employers seeking to avoid collective bargaining acquire a useful device for delay by filing petitions. Moreover, unions would be compelled to engage in election campaigns at the close of each bargaining term and would be tempted to make unreasonable demands in order to retain the allegiance of the employees. Uninterrupted and stable bargaining relations would thus be impaired.

Section 9 (c) (1) (A) (ii) of the bill would allow a petition for an election be filed by employees who assert that "the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer a representative as defined in section 9 (a)." Such a petition would be purely negative, filed by persons who do not want a collective-bargaining representative.

The encouragement of collective bargaining and the maintenance of stable relationships already established would be seriously impeded if the above provision were enacted into law. Under the guise of protecting the freedom of workers the section would furnish employers

with a useful device for undermining the position of the bargaining agent and for delaying collective bargaining. By encouraging dissident groups to file petitions, the employer can repeatedly bring into issue the majority status of the bargaining representatives. How useful a device it could be becomes apparent when we realize that under the Board's present budgetary situation, it takes approximately 6 months to process a contested election case. A year could very easily elapse, therefore, between the election and the consummation of the bargaining negotiations by a contract. At this pont, a group of dissident employees, with or without the encouragement of the employer, might demand a new election under this provision, thereby delaying or defeating collective bargaining.

We have not yet reached the point in labor-management relations where employers generally have fully accepted the principles of collective bargaining. Until we reach that point we must not, in the interests of the American people, furnish anti-union employers with statutory techniques by the use of which they can avoid or defeat the collective-bargaining process.

II. Increase in Governmental Intervention in Labor-Management Problems

A. VIOLATIONS OF COLLECTIVE-BARGAINING ARGEEMENTS

Sections 8 (a) (6) and 8 (b) (5) would make it an unfair labor practice for either an employer or a labor organization to violate the terms of a collective-bargaining agreement or of an agreement to submit a labor dispute to arbitration and would require the National Labor Relations Board to dismiss any charge under these subections if the complainant has committed a similar breach. There can be no question that collective-bargaining agreements, like other contracts, should be faithfully performed by the parties. In most labor-management relationships they are so performed, and disputes over the meaning of the terms of the agreement or generally resolved peacefully by negotiations or arbitration.

These sections may appear to carry out the recommendations of the President's State of the Union message. However, these proposals contain no provision requiring the disputants to utilize procedures prescribed by their collective-bargaining agreement or to exhaust mediation and conciliation processes prior to resort to the Board. Although the bill elsewhere makes available machinery for voluntary conciliation, mediation and arbitration, resort to these is not required as a condition precedent to filing a charge of an unfair labor practice for breach of a collective-bargaining agreement.

The effect of this omission would be to discourage the voluntary adjustment of disputes and unnecessarily increase the number of cases coming before the Board. In this connection it should be noted that experience with the War Labor Board during the recent war has demonstrated that the immediate availability of an agency for settling disputes, without a preliminary requirement of resort to all the processes of negotiation, mediation, and conciliation, discourages the parties from settling such disputes themselves by voluntary adjustment. The results, therefore, might well be a disuse of the collective-bargaining process and a congestion of cases before the Board which

would make it impossible to settle disputes promptly in an area where prompt settlement is essential to the cause of industrial peace.

Finally, sections 8 (a) (6) and 8 (b) (5) together with section 301 would give rise to a conflict of jurisdiction between the National Labor Relations Board and the United States district courts. This latter section permits suits in the United States district courts for violations of collective-bargaining agreements. Parties to such agreements thus have the choice of bringing their action before the Board or the United States district courts. Obviously, the necessity for uniform decisions in such matters and the avoidance of conflicting decisional rules by judicial bodies make this legislative scheme wholly undesirable.

B. SUITS BY AND AGAINST LABOR ORGANIZATIONS IN THE FEDERAL COURTS

Section 301 of title II of the bill gives the Federal district courts broad jurisdiction to entertain suits for breach of collective-bargaining contracts in industries affecting interstate commerce regardless of the amount in controversy and of the citizenship of the parties. This section permits suits by and against a labor organization representing employees in such industries, in its common name with money judgments enforceable only against the organization and its assets.

(1) Suits for violation of collective-bargaining agreements

The Federal courts have always had jurisdiction to entertain suits for breach of collective-bargaining contracts and have awarded money damages where the amount in controversy fulfills the present $3,000 requirement and diversity of citizenship exists. *Nederlandsche Amerikaanische Stoomvart Maatschappij* v. *Stevedores and Longshoremen's Benevolent Society* ((1920), 265 Fed. 397). It is apparent from the language of section 301 that no change is made in the application of State law for this purpose. The section states that—

> suits for violation of contracts concluded * * * in an industry affecting commerce * * * may be brought in any district court of the United States * * *.

Every district court would still be required to look to State substantive law to determine the question of violation. This section does not, therefore, create a new cause of action but merely makes the existing remedy available to more persons by removing the requirements of amount in controversy and of diversity of citizenship where interstate commerce is affected.

The abandonment of the present amount in controversy and diversity of citizenship requirements is an unwise departure from existing law, which would impose a needlessly increased burden upon the Federal courts, already weighted down with litigation. An examination of figures showing the case load in these courts demonstrates the extraordinarily crowded conditions of their dockets. According to the Annual Reports of the Attorney General, the number of civil actions of all kinds pending in the United States district courts have risen from 29,394 on June 30, 1941, to 46,840 on June 30, 1946, constituting an increase of more than 63 percent. During this period the number of such cases commenced in these courts similarly increased from 38,477 to 67,835 and the number of such cases terminated rose from 38,561 to 61,000. Although the Federal courts appear to be handling

this increased load as efficiently as possible, it is obvious that there are human limitations upon the capacity of present staffs and that constant increase in litigation can only be met by an increase in the number of judges and court personnel, with corresponding increases in the cost of government. The alternative would be a break-down in our judicial system.

These cases involve not only questions arising under the Constitution and laws of the United States in the myriad fields now encompassed within the scope of Federal regulation, but also controversies arising under the laws of the various States where diversity of citizenship provides the basis for Federal jurisdiction. Yet, in the face of these conditions prevailing in the administration of justice, the Federal courts would be made an available tribunal for every petty cause of action between citizens of the same State, and, undoubtedly in many instances, residents of the same community, with application by the Federal judge of exactly the same principles of law which would govern the controversy if it were brought before a State judge in the more numerous State courts.

Added to these practical objections, are serious questions concerning the legality of abandoning the diversity-of-citizenship requirement. The Constitution limits suits in the Federal courts, inter alia, to cases arising under the Constitution and laws of the United States or involving diversity of citizenship (Constitution, art. III, sec. 2).

Reflection upon these practical and legal objections to this phase of the bill lead to the conclusion that very useful purpose would be served by making Federal courts more broadly available for the adjudication of disputes under collective-bargaining agreements. The only advantage if indeed it may be called an advantage, is to give many disputing parties an otherwise unavailable opportunity to choose a Federal forum rather than a State forum. The substantive law governing the settlement of the dispute would not be changed in the least no matter which forum were chosen. It is our conviction that the added burdens upon the Federal courts and the doubtful legality of this measure constitute an extravagant price to pay for a needless indulgence benefiting litigants whose remedies are now as adequate in the State courts as they would be in the Federal courts.

(2) Suits by and against labor organizations

It is believed that the provisions of this section, which permit suits by or against a labor organization in its common name, fail to give proper consideration to the present ease with which these organizations may now sue or be sued in the Federal courts regardless of whether they represent employees in industries affecting interstate commerce. Whenever a substantive right under Federal law is asserted by or against such associations the right to sue or be sued by common name is clearly granted regardless of State procedural laws.

It was clearly shown by testimony at the hearings that unions are not immune from suit under State law because they are labor organizations. Union assets are sometimes reached only with difficulty under some State laws solely because unions are unincorporated associations. At the present time, however, a great majority of States permit effective suits against unincorporated associations or provide effective means of reaching their funds. By conservative estimate, 25 State laws now provide that these associations may be sued in their common

names, in some instances with liability attaching not only to the union funds but also to the assets of every individual member of the union. At least 10 other States allow representative suits against the union members in any form of action, thereby enabling satisfaction of judgment from the joint assets. In only 13 States, at most, are there presented difficulties in reaching the assets of the unions as distinguished from those of individual members who are sued. Even in these 13 States, however, representative suits are permitted in equity cases and doctrines of waiver and estoppel are frequently applied to prevent the union from denying that it is an entity similar to a corporation when it is sued in its common name. The over-all result is that unions are readily amenable to suit in the Federal courts in at least 35 of the States in which Federal courts are held.

C. NATIONAL EMERGENCIES

Section 206–210 of the bill would provide special machinery for handling cases affecting the national health or safety. These sections would authorize the Attorney General to obtain injunctive relief in Federal courts whenever he deems a threatened or actual strike or lock-out to be of sufficient magnitude to imperil the national health or safety. The Attorney General would not be authorized under the bill to petition for an injunction until after he had received a report as to the facts involved in the dispute, to be made by a board of inquiry appointed by the Attorney General. The boards of inquiry would be given power to issue subpenas for attendance of witnesses and production of books, papers, and documents.

Upon issuance of an injunction by the district court, the parties would be under a duty to use the facilities of the Federal Mediation Service to assist them in the settlement of their dispute.

Under section 209(b), if the parties have not reached agreement within 60 days of the issuance of the injunction, the Attorney General would reconvene the board of inquiry and the board would report to him the current positions of the parties. Report of the board would be made public by the Attorney General. Within the next 15 days a secret ballot would be taken by the National Labor Relations Board to determine whether the employees wished to accept the final offer of settlement made by the employer.

Section 210 provides that upon the certification of the results of the ballot or upon a settlement being reached, whichever occurs sooner, the Attorney General is directed to move for the discharge of the injunction. Upon discharge of the injunction the Attorney General is directed to submit to the President a full report of the proceedings and the President is directed to transmit such report together with such recommendations as he may see fit to make to the Congress for consideration and appropriate action.

Under these sections of the act the Attorney General, boards of inquiry, Federal district courts, Federal Mediation Service, the President, and the Congress would all be participating in the handling of a single labor dispute. We believe that the handling of labor disputes should be concentrated in one agency. Diffusion of responsibility would confuse the handling of these important matters. The public would be unable to fix responsibility when one of these critical labor disputes is mishandled.

We believe that there are many other criticisms that warrant mention.

1. The fact-finding functions provided for in sections 206–210, if they are to be exercised, should be vested in the Secretary of Labor who has the facilities to insure their most effective performance.

2. The wisdom of the reversion to "government by injunction" in disputes between private parties is open to very serious doubt. The Norris-LaGuardia Act has long stood as one of the safeguards against the abuse of the injunction process in private labor disputes. The majority bill must not be confused with the action taken by the Government during the recent coal strike. In that case the coal mines had already been seized by the Government. Under this bill the coercive effect of the Government's action would be completely one-sided. An employer would be assured that if he delays negotiations for a sufficient period of time the situation will reach a point where the Attorney General will be forced to secure an injunction against the employees. Under this bill such an employer runs no risk of seizure or of any economic loss.

3. The standards provided in section 206 as to the types of cases that might affect the national health or safety are inadequate.

4. There are no statutory standards to assist the Attorney General in determining at what stage of the negotiations a strike may be "threatened."

5. The Attorney General could not petition for an injunction until after receipt of a report from a board of inquiry. Hearings before a board of inquiry are time consuming. Therefore, there would be a natural tendency to appoint boards of inquiry at early stages in the collective-bargaining processes. Early appointment of boards of inquiry would completely frustrate free collective-bargaining processes.

6. The broad scope of the phrases "threatened or actual strike or lock-out" and "imperil the national health or safety" would inevitably lead to heated debate as to when action should or should not be taken and would tend to aggravate rather than settle labor disputes in key industries.

7. The provision in section 206 that the board of inquiry shall be limited to findings of fact and shall not make any recommendations is unwise. As we have said earlier, conciliation and mediation functions require flexibility. There are many occasions upon which it is desirable for boards of inquire to make recommendations. It is difficult in heated controversies to limit a report to findings of fact, for the findings themselves or the way in which they are stated are frequently tantamount to recommendations. The discretion as to whether or not recommendations should be made should rest with the appointing officer.

8. Section 209 (b) of the bill requires the National Labor Relations Board to conduct a secret ballot among the employees of each employer involved in a dispute subject to the emergency provisions of the bill on the question whether they wish to accept the final offer of settlement made by their employer. The Board is required to conduct such election within 15 days after the lapse of a 60-day period during which the court's restraining order has been in effect and to certify the results to the Attorney General within 5 days thereafter.

Experience under the Smith-Connally Act has demonstrated the undesirability of strike votes such as those contemplated under this bill. This experience has shown that such votes are completely ineffectual in reducing strikes. This experience has further shown that such votes serve as an irritant to existing labor-management relations, creating an atmosphere that is harmful to the peaceful resolution of industrial disputes. Moreover, the duty of conducting such votes by the National Labor Relations Board under the Smith-Connally Act reached such proportions that that agency virtually had to discontinue the administration of the National Labor Relations Act in order to discharge its duties under the Smith-Connally Act. There is no reason to anticipate any different result in the case of the provisions of this bill particularly in view of the severe restrictions as to time. Finally, the provisions of section 209 (b) would require the expenditure of substantial additional Government funds. An indication of the amount which may be involved is found in the experience of the National Labor Relations Board in conducting a strike vote in the bituminous coal industry under the Smith-Connally Act. That strike vote alone required the expenditure of over $160,000.

After all the steps prescribed in the bill are taken a report would then be filed with the President. The bill does not prescribe the duties of the President other than to state that he should in turn file a report with such recommendations as he may see fit to make to the Congress. We believe it would be most unwise for the Congress to attempt to adopt laws relating to any single dispute between private parties.

Thus far, in our opinion, no satisfactory solution to the troublesome problem of industry-wide labor disputes has been presented. We believe the proposal of President Truman in his state of the Union message for a study of this problem warrants universal support. When President Truman in his state of the Union message requested the appointment of a joint-study commission, he placed at the head of the list of things to be studied the problem of Nation-wide strikes.

Only by such a study can a solution to this problem be found. To the argument that the majority's remedy for dealing with this problem is better than none, we say that this remedy may well prove to be worse than the disease. We believe it is imperative that the proposal for study of this problem, contained in Senate Joint Resolution 22, be adopted at the earliest possible moment. Until a solution is found, let us not be stampeded into action that can lead only to more strikes and industrial chaos.

The people of this country want less Government interference in their domestic affairs. The free enterprise system requires that Government interference be kept to a minimum. This bill instead of providing for less Government interference provides for more Government interference.

III. Unequal and Unjustified Restraints Upon Labor Unions

Some of the provisions already discussed are, in our judgment, unduly discriminatory against labor unions and their legitimate activities. In addition, the following points should be made:

A. WEAKENING OF THE NORRIS-LAGUARDIA ACT

This matter has already been discussed in the preceding section. Section 10 (j), (k), and (l) add new remedies to those now available to the National Labor Relations Board. Section 10(j) empowers the Board to apply to any district court of the United States for a temporary restraining order once a complaint has issued (and before determination of the issues by the Board). Section 10(k) is to be read in connection with paragraph (4) of section 8(b) which makes it an unfair labor practice for a labor organization to strike in connection with a jurisdictional dispute. The Board is directed either to hear the dispute itself or to appoint an arbitrator unless within 10 days the parties have adjusted or agreed upon methods for the voluntary adjustment of the dispute. The award of the arbitrator is to be final.

Section 10(l), which directs the Board to apply for injunctions in connection with certain unfair labor practices, is discussed in our analysis of the provisions of section 8(b).

We are not persuaded of the necessity for the additional powers conferred upon the Board by section 10(j). The present National Labor Relations Act, in section 10(e), grants the circuit courts of appeals power to issue a temporary restraining order once a petition for enforcement has been filed in the court, after decision of the matter by the Board. In very few instances has the Board found it necessary to exercise even this power. It may be anticipated that, if this section became law, the Board would be harassed by demands that it seek immediate injunctive relief if unfair labor practices were alleged by either employees or employers. If such applications were made the clear result would be to throw decision of the merits of such cases into the Federal district courts and thus to oust the Board of jurisdiction, since it is not to be supposed that district courts could act without some inquiry into the merits of the dispute, or that the Board could, at a later date, take a view of the case inconsistent with that of the court. Mere existence of such power might prove a handicap. While in some instances this might prove a speedy remedy, under normal circumstances the Board's docket should be at least as current as that of the district courts. We feel that expeditious handling is to be obtained by adequate funds to enable the Board to act speedily rather than resort to premature consideration of these matters by the courts.

Section 10(k) in effect provides for compulsory arbitration of jurisdictional disputes. We agree with President Truman's statement in his state of the Union message that "jurisdictional strikes are indefensible." We believe this provision of the bill to be sound, and are pleased to note that full opportunity is given the parties to reach a voluntary accommodation without governmental intervention if they so desire. We are confident that the mere threat of governmental action will have a beneficial effect in stimulating labor organizations to set up appropriate machinery for the settlement of such controversies within their own ranks, where they properly should be settled. As we have observed, however, we feel that the immediate requirement of a mandatory injunction is undesirable. The administrative agency charged with the duty of enforcing these provisions should be given discretion to determine whether or not such injunction should be applied for under section 10(l). Legislative wisdom does not extend

to foreseeing all possible contingencies, and circumstances may well arise in which the Government should withhold its hand.

We are opposed to such a weakening of the Norris-LaGuardia Act. That act sought to protect workers in their rights to organize and bargain collectively through representatives of their own choosing by denying the issuance of injunction, whether on petition of private persons or officers of the Govenment, except in the manner and under the conditions set forth in its provisions. The safeguards against "government by injunction" which the Norris-LaGuardia Act sought to erect should be preserved.

The record of the hearings before this committee, in our opinion, contain no evidence showing a need to waive the safeguards of the Norris-LaGuardia Act in preventing unjustified secondary boycotts and jurisdictional strikes. These complicated questions require investigation and determination by an administrative agency having expert knowledge and experience in the field of labor-management relations, such as the National Labor Relations Board, rather than summary equity proceeding and restraining orders.

B. PROHIBITION OF JURISDICTIONAL STRIKES AND BOYCOTTS

Section 8(b)(4) would add to the National Labor Relations Act a new section which would provide that various concerted activities of labor unions, such as secondary boycotts, jurisdictional disputes, and sympathy strikes, defined in broad terms, would be unfair labor practices which could be prohibited by the National Labor Relations Board.

We are of the view that legislation to ban clearly unjustifiable forms of economic action by labor unions is warranted. The President recognized this when, in his state of the Union message, he requested legislation to prevent (1) jurisdictional strikes, (2) secondary boycotts when used to further jurisdictional strikes or to compel employers to violate the National Labor Relations Act, and (3) the use of economic force to decide issues arising out of the interpretation or application of existing agreements.

We would support legislation which was limited in its scope to these recommendations. We do not have that in the language of this subsection. We have instead an indiscriminate attack on forms of peaceful economic action by unions which the most enlightened courts and authorities in labor relations have come to recognize as legitimate.

This is clearly demonstrated in the provision of this subsection which bans a strike or a refusal to handle—

> for the purpose of forcing or requiring any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any othe person.

This provision is presumably designed to outlaw secondary boycotts, and is predicated on the assumption that all secondary boycotts are unjustified. It ignores the President's observation that—

> Not all secondary boycotts are unjustified. We must judge them on the basis of their objectives. For example, boycotts intended to protect wage rates and working conditions should be distinguished from those in furtherance of jurisdictional disputes. The structure of industry sometimes requires an employer to extend the conflict beyond a particular employer. There should be no blanket prohibition against boycotts. The appropriate goal is legislation which prohibits

secondary boycotts in pursuance of unjustifiable objectives, but does not impair the union's right to preserve its own existence and the gains made in genuine collective bargaining.

No one who has undertaken to examine the law with respect to secondary boycotts can help but be impressed with its present confusion. Nonetheless, an unmistakable trend in the law on this subject is recognizable. Courts are beginning to turn from the practice of considering secondary boycotts in terms of common law conspiracy doctrine, and are determining the legality of particular factual situations on the basis of tort doctrine. On this basis there is a growing acceptance of certain forms of action directed against parties who are not immediately involved in a labor dispute when (1) such parties are found to possess "unity of interest" with the disputing employer, and (2) such action is found to be necessary in order to promote the legitimate interests of the labor union.

This bill would reverse that trend. Under this bill, a refusal by union labor in one craft to handle products made by nonunion labor in the same or a related craft would be an unfair labor practice. A strike by union labor in order to compel their employer to cease dealing with a nonunion employer would be an unfair labor practice. A refusal of union workers to work next to nonunion workers of another employer engaged in a common project would be an unfair labor practice. In each of these situations the efforts of the unionized workers are primarily directed at protecting their own organizations, and their wage and hour standards against the destructive competition of nonunion labor. This bill ignores valid distinctions between justified and unjustified boycotts based on the objective of the union in carrying on such a boycott and the relationship of the boycotted employer to the disputing employer. It indiscriminately bans all such boycotts, whether justified or not.

This section also defines as unfair labor practices strikes or boycotts "for the purpose of forcing or requiring any employer to assign to members of a particular labor organization, work tasks assigned by an employer to members of some other labor organization" unless the employer is failing to comply with an order or certification of collective-bargaining representatives issued by the National Labor Relations Board with respect to employees performing such work tasks. Section 10(k) would authorize the Board to appoint an arbitrator or arbitrators to hear and determine such questions. The arbitration award in such cases would be deemed a final order of the Board and would be enforced as such. Workers would not, however, be required to go through picket lines during a strike against an employer other than their own if the strike has been ratified or approved by a representative whom such employer is required by the act to recognize.

If the activities of labor organizations dealt with in section 8(b)(4) were more precisely defined and were limited to those which are generally recognized as clearly unjustified, and if the procedure for dealing with these activities were limited to describing them as unfair labor practices which, after investigation and after opportunity for hearing, could be prohibited as such by the National Labor Relations Board, we would have no objection to the proposed legislation. On both counts, however, the bill which has been reported by the majority of the committee goes beyond what we believe to be necessary for sound labor legislation.

C. LIMITATION ON THE RIGHT TO STRIKE

Various other restrictions, in addition to those already discussed, are imposed upon the right to strike. Section 8(d) defines "bargain collectively" as—

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiations of an agreement, or the settlement of any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party but such obligation does not compel either party to agree to a proposal or require the making of a concession.

This section also provides that the duty to bargain collectively includes, where there is a collective-bargaining contract in effect, the duty to refrain from terminating or modifying such contract without fulfilling the following requirements: (1) Serving a 60-day written notice upon the other party of the proposed termination or modification; (2) offering to meet with the other party concerning the dispute; (3) notifying the Service of the existence of a dispute within 30 days of the giving of notice; and (4) observing all terms and conditions of the contract for the 60-day period of the notice or until the expiration date of the contract, whichever occurs later. A union or an employer failing to observe each of the foregoing steps could be found by the National Labor Relations Board to have been guilty of an unfair labor practice (secs. 8(a)(5) and 8(b)(3)). In addition, however, an employee engaging in a strike during the 60-day period would lose his status as an employee under sections 8, 9, and 10 of the National Labor Relations Act unless and until reemployed by the employer.

Under the provisions of section 8 both unions and employers are required to bargain collectively. A violation of this requirement is made an unfair labor practice, subject to a cease-and-desist order from the Board. Clearly a strike or lock-out during the 60-day period would constitute an unfair labor practice. We can see no reasonable grounds for discriminating against the employees by providing an additional penalty which will cause them to lose their status as employees under the National Labor Relations Act. An order to the employer to cease and desist issued months after the violation cannot be compared in severity with the loss to the employee of his job. We feel that the treatment of employees as against employers, as provided in this section, is strikingly disparate.

Moreover, the section is silent as to the Board's authority to accommodate conflicting issues such as provocation on the part of the employer. Under this section an employer desirous of ridding himself either of the employees or their representative can engage in the most provocative conduct without fear of redress except by way of a lengthy hearing before the Board and a subsequent admonition to thereafter "cease and desist" from such practices. In striking contrast to the relatively delicate treatment provided for such action by an employer, employees unwilling idly to countenance abuse, who resort to self-help under the circumstances, are removed from the protection of the statute and lose "employee" status. An employer is at liberty under such circumstances freely to replace any employer bold enough to insist upon justice. The provision denies to the Board the exercise of any discretion to accommodate the equitable doctrine of

"clean hands." The provisions of the section are conclusive—the employee is subject to summary dismissal irrespective of the employer's conduct.

Since not every collective-bargaining contract contains a no-strike clause, the effect of the proposal is to incorporate such provisions by legislative fiat. Although we believe that such provisions are eminently desirable, it is our further belief that such agreements should be reached voluntarily in friendly, valid collective bargaining. The sanction would then be that employees striking in violation of such an agreement would lose their right to reinstatement, as presently provided by both Board and court decision.

An equitable balance as between employees and employers for violation of contractual provisions during this period would require that the employer be denied his right to continue in business. No such result is desired, and in fairness we believe the employee should not be denied his employee status.

D. REGISTRATION OF UNION AND FINANCIAL REPORTS

Sections 9 (g) and (h) of the bill would require unions to file, both annually with the Secretary of Labor and as a prerequisite to each initiation of a representation investigation or unfair labor practice proceeding against an employer, extensive and detailed reports on their financial affairs and other activities, such as manner and mode of elections, initiation fees, and dues, and to furnish such financial reports to their members. The effect of these provisions is to encourage resort to self-help by unions instead of encouraging them to resort to the procedures provided by the act. This is an inevitable result of erecting these additional obstacles to securing the relief the act is designed to provide. Industrial peace will not be extended by these provisions, but rather the area of conflict will be widened and trials of economic strength increase in number.

One consequence would be to compel the Department of Labor to set up a new bureau to collect and compile a tremendous quantity of figures and documents at a completely unjustifiable added expense to the Government. If these provisions are designed to secure publicity concerning union activities and finances, they are superfluous. Virtually all of the international unions of both the CIO and the A. F. of L. already furnish regular financial reports and accounts of their activities either to their members or to the public. Section 117 of the Revenue Act of 1943 already compels labor organizations to file detailed financial returns with the Bureau of Internal Revenue. Amending the revenue act to require publication of such returns would achieve the objective of assuring adequate publicity to the financial affairs and activities of unions, without confusing this problem with that of enforcing the National Labor Relations Act—with which it has nothing to do.

E. HEALTH AND WELFARE FUNDS

In considering S. 1126, the committee properly eliminated sections prohibiting any payment by an employer to any representative of his employees engaged in interstate commerce or the production of goods for interstate commerce, except under narrowly restricted circumstances. One of the principal exceptions was permissible payment to a

trust fund solely for the benefit of the employer's own employees, their families and dependents, but only so long as the fund was used for medical or hospital care, pensions, sickness or injury compensation or life insurance, or insurance providing any of these benefits. No payment could be made unless the fund was jointly managed by employers and employees under a written agreement, the terms of which would provide a rigid method of selecting the representatives and of settling disputes which might arise in the course of administration. Other less significant but equally restrictive conditions were also attached. Among other enforcement provisions, maximum fines of $10,000 and maximum imprisonment for 6 months were provided for willful violations.

It would appear appropriate for the minority to state its reasons for concurring in this action, particularly since it has been stated that this proposal will be renewed. In discarding these sections it was recognized that welfare funds of all varieties are proper subjects for free collective bargaining and that any fetters placed upon their normal development through voluntary and independent or cooperative action of management and labor are completely unjustified. Most important was the realization that neither the methods of management or of contribution, nor beneficial purposes for which such funds are used, follow any completely defined pattern.

Two significant features became apparent in the course of studying these welfare funds. First, it appeared in the interest of sound governmental policy to encourage rather than confine or prohibit voluntary private plans aiding citizens by medical care, hospitalization, or other methods protecting their health and well-being and easing the blow of physical or economic misfortune and distress. These plans decrease the responsibility and burdens of the State. Legal restrictions or prohibitions would, on the other hand, tend to increase the public burden and responsibility and the dependence of the wage earner upon the State. Second, existing welfare plans and funds established by employers or by unions, administered jointly or by one group or the other, in many instances, resulting from collective-bargaining agreements, affecting millions of workers, might well be dealt a disastrous blow by arbitrary legislation. An examination of the scope and development of these plans today is enough to convince of the inherent danger of such action in terms of industrial strife and injury to the public welfare.

It is indisputable that the administration of untold numbers of these systems would be adversely and needlessly affected by restrictive legislation. Some industrial experts estimate that 4,000,000 workers are covered by some form of health-benefit plan negotiated by unions and employers. The Bureau of Labor Statistics (Collective Bargaining Developments in Health and Welfare Plans, 64 Monthly Labor Review 191) very conservatively states that at present 1,250,000 are covered by such plans. These workers are employed in clothing, textiles, coal mining, building trades, fur and leather, furniture, hotel, laundry, cleaning and dyeing, office, paper, retail and wholesale trade, shipbuilding, and street and electric railway industries. Previous studies in 1945 (Health Benefit Programs Established Through Collective Bargaining, 1945, Bull, 841, p. 2) state as to plans covering 600,000 workers and more than 15 international unions:

A little more than a third of the employees covered by health-benefit programs included in this report are under plans which are jointly administered by the union and the employer. Another third are covered by programs for which insurance companies assume the major administrative responsibility; and somewhat less than a third are under those administered by the union.

It is evident that the sections which were rejected by the committee would have imposed a straitjacket upon the growth of all these plans and upon the administration of their funds.

F. CHECK-OFF

Similar considerations apply to proposals which have been made from time to time to restrict or prohibit the check-off of union dues by employers. Such a proposal is contained in H.R. 3020 (the Hartley bill) now pending on the Senate Calendar.

A recent analysis prepared by the Bureau of Labor Statistics shows that approximately 6,000,000 workers, or about 40 percent of all workers under agreement, were covered by some form of check-off provision in 1946, an increase of close to three-quarters of a million from the 1945 figure. Automatic deduction of dues was specified for close to 60 percent of these workers, while the other 40 percent specified check-off of union dues on individual written authorization. Some of these may be withdrawn at any time, others remain in effect for the life of the agreement.

In manufacturing industries alone, close to 5,000,000 workers had their dues checked off, as compared to 4,000,000 in 1945. The manufacturing industries which are predominantly covered by automatic check-off provisions which would have been modified by the proposals of section 301 are aircraft engines, aluminum, automobiles, carpets and rugs (wool), cigarettes and tobacco, electrical machinery, leather (except gloves and shoes), meat packing and slaughtering, nonferrous smeltering and refining, rubber tires and tubes, basic steel, and beet sugar.

In nonmanufacturing industries approximataely 1.3 million workers were covered by check-off provisions.

No need for the enactment of proposals to restrict or prohibit the check-off was shown by the evidence received by the committee during its hearings. We would oppose the writing of any such proposal into Federal labor legislation at this time.

IV. Impairment of the Effectiveness of Governmental Labor Agencies

A. DEPARTMENT OF LABOR

(1) Mediation and conciliation facilities

Title II of S. 1126 would wipe out the existing Conciliation Service and establish an independent agency to be known as the Federal Mediation Service. All of the mediation and conciliation functions of the Secretary of Labor and the United States Conciliation Service, as provided for under the Enabling Act of 1913 establishing the Department of Labor, are transferred to the new Federal Mediation Service. Aside from the special procedures relating to cases affecting the national health or safety, the new Federal Mediation Service would have no new or additional powers other than those now performed by the

United States Conciliation Service. Since the functions and duties of the Federal Mediation Service would be identical with those now being performed by the United States Conciliation Service, there is no sound reason for creating a new agency independent of the Secretary of Labor.

As President Truman stated in his veto message on the Case bill when referring to the provision creating an independent mediation agency:

I consider the establishment of this new agency to be inconsistent with the principles of good administration. As I have previously stated, it is my opinion that Government today demands reorganization along the lines which the Congress has set forth in the Reorganization Act of 1945, i.e., the organization of Government agencies consistent with efficiency. Control of purely administrative matters should be grouped as much as possible under members of the Cabinet, who are in turn responsible to the President.

* * * * * * *

Since 1913 there has been within the Department of Labor, and responsible to the Secretary of Labor, a United States Conciliation Service formed with the very purpose of encouraging the settlement of labor disputes through mediation, conciliation, and other good offices. The record of that Service has been outstanding. During the period of 1 year, from May 1945 through April 1946, it settled under existing law 19,930 labor disputes. Included in this total were 3,152 strikes, almost 10 each day. The Conciliation Service has formed one of the principal divisions of the Department of Labor.

* * * * * * *

In the eyes of Congress and of the public the President and the Secretary of Labor would remain responsible for the exercise of mediation and conciliation functions in labor disputes, while, in fact, those functions would be conducted by another body not fully responsible to either.

As far back as September 6, 1945, I said in a message to Congress: "Meanwhile, plans for strengthening the Department of Labor, and bringing under it functions belonging to it, are going forward." The establishment of the proposed Federal Mediation Board is a backward step.

Everything that the President said with respect to a Federal Mediation Board applies with equal force to a Federal Mediation Service. Many former proponents of an independent agency for mediation of labor disputes have since changed their position.

The proposal in title II is not based upon any substantial evidence presented at the hearings before the committee. Indeed, such a proposal was strongly opposed by the Secretary of Labor and the following representatives of management and organized labor:

Theodore Iserman, attorney, member of the New York law firm of Rathbone, Perry, Kelley & Drye (hearings, p. 158).

Vincent P. Ahearn, executive secretary, National Sand and Gravel Association, industry member, National Labor-Management Advisory Committee appointed by the Director of the United States Conciliation Service (hearings, p. 504).

Charles R. Kuzell, general manager, Phelps-Dodge Corp. and representative of the American Mining Congress (hearings, p. 681).

Ira Mosher, chairman of the executive committee, vice president of the legislative policy committee, National Association of Manufacturers (hearings, p. 955).

William Green, president, American Federation of Labor (hearings, p. 974).

Philip Murray, president, Congress of Industrial Organizations (hearings, p. 1146).

Joseph Beirne, president, National Federation of Telephone Workers (hearings, p. 1198).

Walter P. Reuther, president, United Automobile, Aircraft, and Agricultural Implement Workers of America, CIO (hearings, p. 1326).

Joseph Selly, president, American Communications Association, CIO (hearings, p. 1435).

Harvey W. Brown, president, International Association of Machinists (hearings, p. 1621).
Raymond S. Smethurst, general counsel, National Association of Manufacturers (hearings, p. 1819).

An important advocacy of retaining the Conciliation Service in the Department of Labor is also to be found in the 1944 Republican platform, which states:

> All governmental labor activities must be placed under the direct authority and responsibility of the Secretary of Labor.

The proposed separation of the conciliation facilities of the Government from the Department of Labor likewise is contrary to the unanimous recommendation of the President's National Labor-Management Conference on Industrial Relations. That Conference composed of representatives of the National Association of Manufacturers. Chambers of Commerce, AFL, CIO, railway brotherhoods, and United Mine Workers reached agreement on few points when it adjourned in November 1945, but it did reach agreement that the United States Conciliation Service should be reorganized "to the end that it will be established as an effective and completely impartial agency within the Department of Labor" (p. 48. Bull. No. 77, Department of Labor).

The Thirteenth National Conference on Labor Legislation, held in December 1946, went on record as recommending:

> That the Federal Government continue to discharge its responsibility for mediation and conciliation of disputes through the Conciliation Service within the United States Department of Labor.

When representatives of management and labor agree upon a proper method for the handling of labor disputes we, as Members of Congress, should give great weight to their recommendation, for they are the people who deal with these problems on a day-to-day basis. Conciliation and mediation, to be successful, require the acceptance of both parties to disputes. Unless both parties have respect and confidence for the conciliation agency, that agency cannot hope to succeed. The existing Service in the Department of Labor, we believe, enjoys that respect and confidence. It would seem to be folly to discard that agency in favor of some unknown quantity. We all know that a good reputation cannot be built overnight.

The only argument advanced by advocates of an independent conciliation service is that impartiality is inconsistent with the Organic Act of the Department of Labor to "foster, promote, and develop the welfare of the wage earners."

It should be noted, however, that section 8 of the Organic Act provides that—

> the Secretary of Labor shall have power to act as mediator and to appoint commissioners of conciliation in labor disputes whenever in his judgment the interest of industrial peace may require it be done.

The Organic Act, in effect, gives the Secretary of Labor two responsibilities: (1) To promote the welfare of wage earners; and (2) to act as mediator when the interest of industrial peace requires such action. The vesting of dual functions in an executive office is, of course, not uncommon. It might be pointed out that independence in itself has not always been looked upon as a guaranty of impartiality. The fact is that the first Secretary of Labor, William B. Wilson, in his first annual report to the Congress laid down the policy of the Department

under the Organic Act to the effect that the function of the Department was not only to promote the welfare of the wage earners but to do so "in harmony with the welfare of all industrial classes and of legitimate interests." His policy and impartiality has been followed by all of the succeeding Secretaries of Labor. Conciliators are pledged to act impartially in the interest of promoting free collective bargaining.

As a further indication of the impartiality of the United States Conciliation Service, the Service has prepared a roster of 160 arbitrators, all of whom have been approved by the regional labor-management advisory committees on the basis of competence and impartiality. It is significant that more than 60 percent of the collective-bargaining agreements surveyed by the Bureau of Labor Statistics show that the Conciliation Service has been designated as the agency to appoint the arbitrator in the event the parties do not reach agreement upon their own arbitrator. During the year 1946 the Arbitration Division of the Conciliation Service designated more than 1,000 arbitrators pursuant to joint request of the parties.

Title II of the bill would really constitute a reorganization of the reorganization program of the Conciliation Service. The Conciliation Service during the past year has been engaged in a reorganization program to strengthen and extend the facilities of the Service pursuant to the recommendation of the President's Labor-Management Conference. This program has met the acclaim of both labor and management. In the short period of little more than a year since the program began, the Service has made great strides in improving its work. In the past year the Service settled more than 13,000 cases. In more than 90 percent of the cases that the Service entered before a strike occurred, the Service succeeded in closing those cases without a stoppage occurring. We believe that this reorganization program is functioning smoothly. There is no advantage to be gained by upsetting it and superimposing a new unknown agency at this time. To do so would be to cast aside all the beneficial effects of the reorganization program.

As part of the reorganization program a Labor-Management Advisory Committee was established composed of representatives nominated by the National Association of Manufacturers, Chamber of Commerce, AFL, and CIO. Thus for the first time in the history of the Department, management has had a voice in its operations through the advisory committee.

Secretary of Labor Lewis B. Schwellenbach described in some detail the record of the Conciliation Service since the President's Labor-Management Conference at page 33:

> **Since the unanimous recommendation of the President's Labor-Management** Conference that the Conciliation Service be strengthened the Director has taken numerous steps to extend the facilities of the Conciliation Service to assist labor **and management in their collective-bargaining efforts. Pursuant to this recommendation certain basic measures were taken by the Director to achieve this purpose.**
>
> 1. Establishment of a Labor-Management Advisory Committee from nominees recommended by the AFL, CIO, NAM, and Chamber of Commerce.
> 2. Establishment of regional advisory committees on the same basis.
> 3. Decentralization of the organization.
> 4. Reorganization of the Arbitration Division.
> 5. Reorganization of the Technical Division.

6. Establishment of a Program Division for training of new officers and keeping the staff up to date on current labor relations problems and developing improved mediation techniques.
7. Appointment of special conciliators to supplement the activities of regular conciliators in key disputes.
8. Commencement of a program through the Philadelphia Assembly and Utility Conference for cooperation with local groups for settlement of labor disputes on the local and industry levels.
9. Establishment of procedures for tripartite mediation.
10. Fact findings.

The record of the Conciliation Service during the past year and a half, as developed before the committee in the course of the hearings, is one of significant accomplishments. That record seems remarkable when it is remembered that it was made during the initial period of experience with relatively free collective bargaining following 3 years of wartime controls and restraints. For approximately 3 years prior to VJ-day, the overwhelming majority of unsettled serious disputes were resolved by War Labor Board governmental directives. No agency has existed since January 1, 1946, however, which could order changes in contracts or adjudicate disputes over grievances.

With the increase of union membership during the war and because of changes in union and business management and representation, many representatives of both groups were, during the immediate period following VJ-day, undertaking free collective bargaining for the first time. These changes and the relative lack of experience in the collective-bargaining process on the part of many labor and management representatives, materially affected the operations of the Conciliation Service.

The elimination of the National War Labor Board and the National Wage Stabilization Board also meant that settlement of cases became more difficult. Nevertheless, the Conciliation Service has succeeded in settling 13,000 disputes in the past year. With labor and management relearning the processes of free collective bargaining, we believe that the country may look forward to a period where labor and management can resolve their own difficulties with less and less governmental interference or assistance. Some of the major industries in which we witnessed work stoppages last year have settled their collective-bargaining agreements for the next year. Some of the leading examples are in the oil industry, textiles, meat packing, electrical manufacturing, and steel. We have had the most dramatic example of successful free collective bargaining at work this week with the announcement of major agreements covering Western Union, Westinghouse, United States Steel, and General Motors rubber and electrical divisions.

There are no valid reasons for creating a new independent agency to replace the present Conciliation Service. On the other hand, there are very good reasons for not taking such action. It would deprive the Service of the prestige of having a Cabinet officer as its head, with the consequent benefits to be derived from direct contact with the White House for handling critical labor disputes. It would create a system of dual responsibility, since the Congress and the country would still look to the Secretary of Labor as the Cabinet officer responsible for the maintenance of peaceful industrial relations. Unless the conciliation facilities are under his direction and supervision, he would be unable to execute properly the functions that the country would expect him to

perform. The creation of dual responsibility would run counter to the general trend in the reorganization functions of our Government for consolidation of all agencies responsible for handling the same types of problems. As President Truman stated in his veto message on the Case bill, establishment of a separate agency "is a backward step."

We of the minority support the program of the President for strengthening and extending the facilities of the Conciliation Service in the Department of Labor as set forth in his state of the Union message of January 6, 1947. We believe the proposal of the majority fails to meet the constructive standards set forth by the President.

(*a*) *Functions of the Mediation Service.*—Section 203 sets forth the functions of the Mediation Service. The Service is given the duty of assisting the parties to labor disputes to settle such disputes through mediation and conciliation. The Service is authorized to proffer its services either upon the request of one or more of the parties or upon its own motion when in its judgment such dispute threatens to cause a substantial interruption to commerce. If the Service is unable to bring the parties to an agreement by conciliation or mediation within a reasonable time, it is directed to seek to induce the parties to voluntarily submit the controversy to arbitration. None of the duties or functions described above are new. They are all being performed at present by the existing Conciliation Service.

Section 203(c) provides that when the parties voluntarily agree to submit the issues to arbitration, the Service shall provide free arbitration up to $500. Section 203 (c) further provides that when arbitration at the suggestion of the Federal Mediation Service is refused by one or both parties, the Director of the Service shall at once notify the President and both parties to the controversy that its efforts at mediation and conciliation have failed.

The provision for free arbitration is not new. It merely places a ceiling on the amount of free arbitration to be provided in any one case. At present the United States Conciliation Service provides free arbitration where the parties are able to show that they are unable to pay the costs. While we believe that the Government should provide free arbitration where the parties are unable to assume the cost, we do not think it wise to provide that the Government assume the cost in each and every case where arbitration is recommended by the Government as the means of settling the dispute. The provision of section 203 (c) providing for payment by the Government of arbitration costs in contrary to the unanimous recommendation of the Labor-Management Advisory Committee that free arbitration should be discouraged in order to avoid premature use of arbitration.

We believe there is a much more serious objection to the provision of section 203 (c) that the Director of the Service shall at once notify the President that its efforts at mediation and conciliation have failed when either party refuses to accept a suggestion of arbitration. This section of the bill is unrealistic and fails to take into consideration many of the facets of the collective bargaining and conciliation techniques. Very frequently disputes are settled after one or both of the parties refuse to arbitrate the issues. On many occasions the parties may be in complete accord on the desirability of arbitration as a method of settlement but at the same time they may be in serious disagreement as to the formula for arbitration. The disagreement may be as to the issues to be arbitrated, or the number of arbitrators,

the scope of the arbitrator's discretion, or it may involve the question of whether or not there should be tripartite arbitration or arbitration restricted to public representatives. These are just a few of the areas of possible dispute in cases where both parties agree that the arbitration method is the desirable method for settling the dispute. On some occasions arbitration may be proposed by the conciliator as a "feeler" to assist the conciliator in his mediation efforts. This provision of the bill would stultify the conciliator in his attempts at settling the dispute, for if this "feeler" offer of arbitration were rejected no discretion is left to the Director. He must notify the President and the parties that the Service has failed to settle the dispute.

The Conciliation Service on frequent occasions has succeeded in settling disputes by various methods other than arbitration after a proposal for arbitration has been rejected. Sometimes the disputes are settled by new approaches to the arbitration method and sometimes they are bargained out across the bargaining table. Successful conciliation requires flexibility. This provision removes that flexibility. Worse than that it leaves the parties to the dispute at a complete dead end. Under this provision the Director would be violating the act if he attempted to assist the parties after one or both of them rejected an arbitration proposal. Instead of encouraging arbitration this provision would discourage arbitration, for the Service would be most reluctant to suggest arbitration knowing that if it is rejected the case has reached a complete dead end. Section 203 (c) would discourage arbitration, rather than encourage it.

Serious as this provision may be in discouraging arbitration, we believe a much more serious objection to the provision is its potential effect of sending innumerable labor disputes to the President. Representatives of labor and management, desirous of having their cases handled by the President, can do so by the simple device of refusing to accept a proposal for arbitration. Virtually every witness who testified before the committee favored the strengthening of the conciliation functions of the Government. By this single provision the conciliation functions are seriously weakened, for as soon as a next step is provided for over and beyond conciliation, we encourage a procedure that is tantamount to appeal to a higher level. The Service is thereby relegated to a secondary position, and would be used by the parties merely as a certifying device to get their cases to the President.

The President would undoubtedly find so many cases coming to the White House because of refusal of the parties to accept proposals for arbitration that he would be faced with two alternatives: (1) To build up a labor relations staff in the White House, or (2) refer the cases to the Secretary of Labor. The President would undoubtedly adopt the second alternative. The Secretary himself would be unable to handle all the cases personally and would therefore have to set up a conciliation staff, and the country would be right back where it started from. This description of the potential effects of section 203(c) is not a mere flight of fancy. In view of the fact that the Director of the Mediation Service would have no authority to take any further steps toward assisting the parties once a proposal for arbitration has been refused, it naturally follows that there must be some agency to take up the problem where the Mediation Service left off. The potential effects that we described are the ones that we believe are the

most likely to occur. In short, this proposed bill would accomplish nothing. Conciliation functions would still be performed within the Department of Labor.

Section 203(d) directs the Federal Mediation Service in grievance disputes to emphasize to the parties their obligation to provide in their collective bargaining agreements for the final adjustments of grievances by submitting such disputes to an umpire or adjustment board. We thoroughly concur in the desirability of the inclusion in agreements of arbitration as the final step in the adjustment of grievances. We believe that machinery should be established for the resolution of all disputes arising out of interpretation of existing contracts.

Section 204 describes the duties of labor and management in preventing and minimizing industrial disputes and provides for an affirmative obligation by labor and management to cooperate with the Federal Mediation Service in the settlement of the dispute. We believe that this provision has a desirable objective.

(*b*) *National Labor-Management Panel.*—Section 205 provides for the establishment of a national labor-management panel to be appointed by the President, six of the members to be selected from the field of management and six from the field of labor. The bill provides that "it shall be the duty of the panel at the request of the Director to advise in the avoidance of industrial disputes and the manner in which mediation and voluntary arbitration shall be administered, particularly with reference to controversies affecting the general welfare of the country." This provision merely gives legislative status to the existing Labor-Management Advisory Committee of the Conciliation Service. However, it limits the duties of the labor-management committee so as to seriously impair its effectiveness. The committee could give advice only at the request of the Director. We believe it is desirable that the committee be allowed to offer advice upon its own motion, as it does now.

(2) Bureau of Labor Statistics

Section 211(a) of title II of the bill reported by the majority of the committee requires that the Bureau of Labor Statistics maintain a file of all available collective-bargaining agreements and all agreements reached as a result of conciliation and arbitration. This file would be open to inspection under appropriate conditions prescribed by the Secretary of Labor. In addition, the Bureau of Labor Statistics would be directed to furnish, upon request by the Federal Mediation Service, "all available data and factual information which may aid in the settlement of any labor dispute," unless specific information was submitted in confidence.

The obligation on the part of the Bureau of Labor Statistics to maintain a file of copies of agreements and arbitration awards does not adequately and clearly define the responsibilities of the Bureau in this field. The Bureau would be required to obtain all available agreements reached as a result of mediation, conciliation and arbitration. There is no specific indication, however, as to how this is to be brought about. If it is the intention of the majority that information obtained from existing collective bargaining agreements, mediation and arbitration awards be compiled and utilized, the language of section 211(a) should be made specific to require that employers engaged in

any industry affecting interstate commerce who are parties to a collective labor agreement file such agreements no later than a specified number of days after the execution of the agreement. The same requirement may be applied to mediation and arbitration awards. Provision should also be made to equip adequately and to authorize the Bureau to furnish information developed from the file of agreements or mediation and arbitration awards, upon request, to employers, employees, and others. If the Bureau of Labor Statistics is required to maintain a file of agreements and conciliation and arbitration awards, provision should also be made so that the factual information found in the agreements and arbitration awards may be summarized in a form which will be of assistance in the settlement of labor disputes.

B. NATIONAL LABOR RELATIONS BOARD

(1) Changes in Board structure

(a) Abolition of Review Section.—Section 4(a) prohibits the Board from employing any attorneys, except legal assistants assigned to each Board member, for the purpose of reviewing transcripts of hearings and preparing drafts of opinions. The purpose is said to be to outlaw the Board's present Review Section, which now operates as a pool of attorneys to assist the Board members in regard to these matters.

The hearings are completely lacking in evidence of any abuse arising out of the present structure. There is no demonstrated need for such provisions. The Board could itself establish the structure provided in the bill, if it found it more economical or useful to do so. Because of the great volume of cases and the length of the records in Board cases, it would still be necessary for the Board to employ attorneys to perform these review duties effectively. Thus, the result of the bill is to establish seven small review sections. We do not believe the Congress ought to substitute its judgment for that of the Board with respect to a matter of internal structure and functioning, such as this.

Adoption of this rule, which has no demonstrable advantages, would require that cases be analyzed seven times by clerks of individual Board members. At present a single attorney reports to all Board members. The proposal would be expensive and time consuming; it would overburden the Board Chairman who would presumably be required to assign cases to other members for processing. The concept of a single Board working in harmony would be rejected and replaced by seven "little Boards" operating as largely autonomous units. Most administrative agencies with similar problems historically have handled them in the manner of the Board. The exhaustive studies of administrative practice that preceded unanimous adoption by the Congress of the Administrative Procedure Act contained no facts or recommendations to support this proposal. On the contrary, the utility of this widespread practice among quasi-judicial agencies received favorable recognition.

(b) Enlargement of Board.—Section 3(a) enlarges the Board so that it would consist of seven members, instead of three, as at present. While the hearings disclosed that the Board is called upon to handle a large volume of business annually and has a backlog of over 5,000 cases, nothing in the hearings indicates, in our opinion, any need to enlarge the Board itself. On the contrary, it seems to us that the real

need is, by providing adequate appropriations, to permit the Board to employ a staff adequate to the exigencies of its duties. Enlarging the Board in the manner suggested is subject to the danger that it may make the Board unwieldy and interfere with efficient administration, without any legitimate compensating advantages. At most, it should not be expanded beyond five members.

(*c*) *Economic analysts.*—Section 4(a) also prohibits the Board from employing any individuals for "economic analysis." The Board at one time employed a Division of Economic Research, which engaged in general economic research and obtained economic data and similar material for use in Board cases. The Division was abolished by the Board in October 1940. If the provision of the present bill is intended to insure that the Board does not reestablish a Division of Economic Research in the future or reemploy individuals to perform its former duties, it is meaningless. However, if, as we understand, it is not intended to prevent the Board from employing competent persons to analyze employment records and pay rolls, compute back pay or deductible net earnings, and perform other similar work in connection with specific cases, it can only lead to confusion.

We see no need to legislate on this matter at this time. If the Board should ever attempt to reestablish the former practice at which this provision presumably is aimed, it will be time then to consider it.

(*d*) *Informal reports by hearing officers in representation cases.*—Section 9(c)(1)(B) prohibits hearing officers in representation cases from making any report or recommendation to the Board. Presumably, the purpose is to isolate the Board members from the Board agents who conduct the representation investigations required under the act.

These investigations are fact finding, to determine the identity of the representative selected, if any; they are entirely nonadversary; and they result in no order requiring the employer to do or refrain from doing anything. The Administrative Procedure Act of 1946, in recognition of these facts, expressly exempted these proceedings from the separation-of-functions provisions of section 5 of that act, as well as from the other careful procedural and decisional safeguards established in that law. The effect of the instant bill is to override the Administrative Procedure Act in this respect without any basis in the record for doing so. Moreover, the Board is denied the assistance which the hearing officers' recommendations provide, although no considerations of fair procedure or due process require it.

The only result can be to insulate the Board from some of the facts and to deprive it of the informal judgment of the man who knows most about the case. It will prevent the Board from following its present wise administrative practice of determining only, on the basis of hearing officers' reports, whether the issues involved are important enough to warrant hearing oral argument or giving the case priority. Simple cases cannot be handled expeditiously because the Board will have no ready way of learning at the outset whether the issues are or are not simple.

(*2*) *Consent card checks*

Section 9(c)(4) provides that nothing in the section shall be construed to prohibit "the waiving of hearings by stipulations for the purpose of a *consent election* in conformity with the regulations and

rules of decision of the Board." [Emphasis supplied.] The effect of this provision read together with the provisions of section 9(c)(1)(B) would be to prohibit the Board from determining an issue concerning representatives by means of a consent card check. This procedure is utilized only where the parties consent and consists of a check of the union's membership cards against the names appearing on the employer's pay roll. Consent card checks serve a useful purpose in the administration of the National Labor Relations Act. They make possible a quick determination of the question of whether the employees desire a bargaining representative. In addition, they obviate the necessity for formal proceedings in cases in which there are no issues of fact, thus allowing the Board more time to devote to litigated matters.

So far as we know, no serious objection against this procedure has been advanced. We can see no useful purpose to be served by the prohibition. On the contrary, we feel that the bill in this respect would deprive the Board of a proved and useful technique which the Board has been able to utilize in over 20 percent of the adjusted representation cases. The technique has resulted in a substantial saving in both personnel and money.

(3) Limitations on elections

Section 9(c)(3) of the bill would amend the National Labor Relations Act to provide that no more than one election for the selection of bargaining representatives shall be held within a 12-month period. This provision, like so many others of this bill, demonstrates the danger of establishing inflexible rules by statute. While the National Labor Relations Board has only infrequently directed elections more than once among the same unit of employees in any one year, there have been circumstances which require exceptions to this general principle. Thus, significant changes in operations involving the employment of different occupational groups may require a redetermination of bargaining representation. Similarly, a substantial expansion or diminution of the working force or a new showing of strength by the union might require special treatment. We, therefore, feel that this matter should be left, as it is now, to the discretion of the National Labor Relations Board.

(4) Multiple-employer bargaining units

The bill would amend section 2(2) of the National Labor Relations Act by adding to the definition of the term "employer" a proviso to the effect that for the purposes of unit determinations "the term 'employer' shall not include a *group* of employers except where such employers have *voluntarily* associated themselves together for the purposes of collective bargaining." [Emphasis supplied.]

Under the National Labor Relations Act, the National Labor Relations Board has included within a single unit the employees of more than one employer in two classes of cases: Those involving two or more companies operated as a single business enterprise with the direct control of labor relations vested in a single source (*National Labor Relations Board* v. *Lund*, 103 F. 2d. 815 (C.C.A. 8)) and those involving employers engaged in the same industry who have formed trade or employer associations to which they have delegated the right to bargain collectively for all the members (*Matter of Rayonier, Incorporated*, 52 N.L.R.B. 1269; *Matter of California Metal Trades Association, et al.*, 72 N.L.R.B. No. 120).

As we read this proposal it enacts into law present Board practice. We are troubled, however, by the use of the word "voluntarily." We, of course, are of the opinion that the establishment of a multiple-employer unit should be conditioned upon employer consent. We feel, however, that assent or nonassent should be ascertained on the basis of whether a past course of conduct demonstrates the employer's desire to be bound by group rather than individual action. (See, for example, *Matter of Rayonier, Incorporated*, 52 N.L.R.B. 1269.) The use of the term "voluntarily" in section 2 (2), however, may be construed as permitting an employer to come forward at any time and state that he had not "voluntarily" joined in group action. We view the use of this subjective standard as undesirable and feel that it should be stricken so as to make clear that the Board may base its finding of assent on the objective standard of a past course of conduct. Any other rule would allow individual employers at will to disrupt established bargaining relations which have contributed much to industrial peace.

(*5*) *Encouragement of company-dominated unions*

Section 9 (c) (2) provides in substance that in determining whether to proceed in a representation case the National Labor Relations Board shall apply the same regulations and rules of decision irrespective of the identity of the persons filing the petition or the kind of relief sought. This provision is supplemented by the requirement in section 10 (c) that in determining whether a complaint should issue under section 8 (a) (1) or 8 (a) (2) and in deciding such cases, the Board shall apply the same regulations and rules of decisions irrespective of whether or not the labor organization affected is affiliated with a national or international labor organization. Under this section the Board would be prohibited from issuing an order, to withhold or deny recognition to a company-dominated union unless it would issue the same order with respect to an affiliated union.

Section 9 (c) (2) would require the Board to place on ballots for election of representatives independent unions which have been found by the Board to be company-dominated and which have been ordered by it to be disestablished. It would have to do so in an election ordered the day after such an order issued, and regardless of the fact that its order had not been complied with. Why bother to disestablish a company-dominated union if it—and not merely its successor—can be chosen again the next day?

These provisions possess a superficial plausibility which is divorced from the realities of the industrial scene. They would tend to revive the company-dominated union in American industry and by placing the employer on both sides of the bargaining table develop spurious collective bargaining.

The proposal ignores the very nature of company-dominated unions and the respects in which they operate to deny employees genuine collective-bargaining representation. It overlooks the fact that the very existence of a labor organization under the dominance of an employer provides the employer with a device by which his power may be made effective. The employer is thus able, with little further action on his part, to obstruct his employees' right to self-organization. The employees, even though they would not initially have chosen the company-dominated union if they had been free of employer domination, may, unless the disestablishment of such a union is required, "by force

of a timorous habit, be held firmly to * * * [their] choice" (*N.L.R.B.* v. *Pacific Greyhound Lines, Inc.*, 303 U.S. 272, 275). Such unions, as the United States Supreme Court has held, are incapable of functioning as genuine agencies for collective bargaining (*N.L.R.B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 270, 271; *N.L.R.B.* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 250, 251). The theory of the National Labor Relations Act is that employee desire under the circumstances stems from employer domination and can be freed only by the destruction of the dominated organization.

Unions affiliated with national labor organizations stand in a different posture. Because of their affiliation they draw strength and direction from sources outside the employer's control. Assistance by an employer to a local union thus cannot extend to the point of constituting domination. It is sufficient in such cases merely to require the withdrawal of recognition by the employer from the assisted affiliated union.

The bill, on the basis of purported equal treatment of affiliated and nonaffiliated unions, ignores the difference in facts and circumstances which warrants the difference in remedy prescribed by the Board. Under the guise of a plausible formula, the bill again seeks to impose an inflexible rule upon the Board which has no relation to the realities of the industrial scene. Under the guise of a plausible formula, the bill would render immune from effective sanctions unions found to be employer-dominated and would saddle the workers of this country with bogus bargaining agents. Stable industrial relations and true collective bargaining are not encouraged or developed by such an approach.

The present practice of the Board does not preclude employees from subsequently selecting an unaffiliated union as their bargaining representative where a prior organization has been found to be company-dominated. They are free to choose an unaffiliated or affiliated union or no union at all so long as there is no interference with their exercise of this freedom by the employer. As the Chairman of the National Labor Relations Board pointed out in his statement before this committee:

> The facts are clear that employees have been protected in their choice of unaffiliated unions. Thus, for the fiscal year ending June 30, 1946, of 270 cases disposed of involving charges of company domination, only 51, or 18.9 percent, resulted in disestablishment of the accused union. Moreover, independent unions participated in 722, or approximately 11 percent, of all elections and crosschecks conducted by the Board during the year, winning 484, or 67 percent, of the contests in which they participated (Eleventh Annual Report, N. L. R. B., appendix A, tables 13 and 15). Independent unions have been put on the ballot in 89 percent of the cases in which they have petitioned for elections, as compared to 75 percent in the case of the AFL and 78 percent in the case of the CIO.

(6) Time limitations on filing charges

Section 10(a) of the bill amends section 10(a) of the National Labor Relations Act so as to prevent the Board from issuing any complaint on unfair labor practice charges unless the practices occurred within 6 months prior to the filing and service of the charge.

The effect of this provision would be particularly harmful in cases where employers establish company unions or engage in surveillance, espionage, and similar misconduct. Such activities are usually carefully concealed and normally do not come to light until an outside

union attempts to organize the plant. Under the present National Labor Relations Act and the Board's rules, employers are afforded adequate protection against untimely charges, for the Board will not proceed on them unless good cause appears for the delay. Moreover, even in those cases in which it proceeds, the Board usually does not require the employer to pay back wages for the period of delay. There is, therefore, no need for the proposed amendment.

Furthermore, the provision would merely encourage employer unfair labor practices of a kind that cannot readily be detected. By establishing within the passage of a short space of 6 months, an absolute immunity against such malpractices, the bill would deprive employees and the public in many cases of the benefits of genuine collective bargaining and encourage resort to strikes and other means of self-help.

(7) *Jurisdictional provisions*

(*a*) *Exclusiveness of Board's jurisdiction.*—Section 10(a) as amended would change the National Labor Relations Act by omitting the present language that "this power shall be exclusive." This language was included to make it clear that all unfair labor practices are to be handled solely by the National Labor Relations Board. No good reason for omitting this provision has been cited to us.

(*b*) *Scope of judicial review.*—Sections 10 (e) and (f) of the bill would amend the same sections of the present National Labor Relations Act so as to substitute for the familiar phrase, "The findings of the Board as to the facts, if supported by evidence, shall be conclusive," a new phrase reading as follows:

> The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

The Supreme Court has interpreted the term "evidence" as now used in the act to mean "substantial evidence" (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229). Moreover, the Administrative Procedure Act of 1946 establishes the uniform scope of judicial review of all agency action subject to its provisions, including the National Labor Relations Board, to be the "substantial evidence" rule; and it provides further that in determining whether the agency's findings are adequately supported by substantial evidence, "the court shall review the whole record * * *" (sec. 10(e) of Administrative Procedure Act). The instant bill is designed to bring the language of the National Labor Relations Act into strict conformity with the Supreme Court's decision and the Administrative Procedure Act's requirements.

Our difficulty with this proposal results from the fact that we fear the changes in language will invite litigation concerning its true meaning. This is particularly true of the substitution of the phrase "questions of fact," for the present phrase, "findings * * * as to the facts." Both of these phrases are words of art. Questions of law are, under well-settled rules, for the courts (sec. 10(e) of the Administrative Procedure Act of 1946); no legislation is now needed to establish that principle. The change in language will, therefore, merely encourage litigation and tend to create uncertainty in cases involving so-called mixed questions of law and fact. All this can be avoided by leaving the present provisions of the National Labor Relations Act and the Administrative Procedure Act unchanged.

(c) *Concession of Federal jurisdiction to States.*—Section 10(a) adds a proviso to the present act empowering the Board to concede to any agency or any State or Territory jurisdiction over any cases not predominantly national in character even though such cases involve an effect upon interstate commerce. We agree with the majority that it is desirable thus to clarify the relations between the National Labor Relations Board and the various agencies which States have set up to handle similar problems. This proposal is made necessary by the decision of the Supreme Court in *Allegheny Ludlum Steel Corp.* v. *William J. Kelley and H. Myron Lewis, etc.*, decided on April 7, 1947.

(8) *Exemption of employees from the act*

(a) *Agricultural employees.*—Subsection 3 of section 2 excludes from the definition of the term employee "any individual employed in agriculture."

Subsection 13 of section 2 described "agriculture" to mean farming in all its branches and, among other things, includes "cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities." The section adopts the definition of agricultural commodities as provided in section 15(g) of the Agricultural Marketing Act and also lists the raising of livestock, bees, fur-bearing animals or poultry, and any practices performed by a farmer on a farm or incident to his farming operations. The proposal writes into law a proviso to the Board's present appropriation act.

The effect of the amendment is to exclude from the present coverage of the act many persons who are engaged in truly commercial, as distinguished from farming operations. The amendment is not, and has not been, in the interest of farmers but of the operators of the industrial and commercial processing plants. No good reason appears for extending the exemption to such persons who are actually engaged in industrial operations, and we believe that the common-sense distinction between commercial operations and farming operations applied by the National Labor Relations Board before the rider was attached to its appropriation act should be preserved.

(b) *Supervisory employees.*—Section 2(3) of the bill, in defining the term "employee" among other exclusions, hereinafter commented upon, would exclude from the provisions of the act "any individual employed as a supervisor."

The term "supervisor" as defined in section 2(11) includes—

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to adjust their grievances, or to effectively recommend such action—

If such authority is exercised in an independent manner and is not merely routine or clerical in nature.

Section 14 of the bill states that—

> nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization.

It further provides, however, that no employer shall be compelled to deem "supervisors" as employees for the purpose of any law relating to collective bargaining.

We find seriously objectionable the complete exclusion from the procedures and protections of the act of supervisors as a class. The

beguiling statement of principle in section 14 that recognizes their natural right to self-organization and self-help is made meaningless by the removal of the legal sanctions that give vitality and substance to that right. As to these employees the Board hereafter will be powerless to hold elections to determine their choice of bargaining representative, if any, or to stop interference with their basic rights. The normal effect of such exclusion will be to force such employees to seek redress in self-help.

The experience of the National Labor Relations Board in treating this troublesome problem gives striking emphasis to this inevitable result. A majority of the Board in 1943, in the *Maryland Dry Dock Case* (49 N. L. R. B. 733) dismissed a representation petition seeking a unit of foremen. Data furnished to the committee by the Department of Labor disclosed that immediately following the Board's decision in the case the number of strikes by foremen and the number of days of work lost as a result of these strikes increased markedly. Practically all of the strikes were for recognition. It is the more significant that the incidence of such strikes declined sharply as soon as the Board issued the first Packard Motor Car Co. decision (61 N. L. R. B. 4) early in 1945, holding that foremen were entitled to bargaining rights under the act, which holding was affirmed by the Supreme Court on March 10, 1947.

We believe this problem can be met successfully by providing that the natural right of supervisors to organize and bargain collectively with their employers will be protected, provided they do not belong to the union to which the production employees belong or to any organization under the domination or control of a union to which the production employees belong. The long history of successful union activities on the part of supervisors in the building industry, the maritime industry, the printing industry, and the railroad industry dramatically refutes any suspicion of conflict or betrayal on the part of such supervisors to their employer. The essential loyalties required of supervisors in the effective accomplishment of their duties are no more inconsistent with their interests in the conditions of their employment than is true in the case of other employees.

The recognition by the National Labor Relations Board of the supervisors' desire to organize for collective-bargaining purposes has diminished industrial unrest over the issue of recognition. To eliminate completely the protection and procedures of the act from such employees will not intercept organizational efforts on their part. Such provisions will only lead to a test of strength and resultant industrial unrest.

V. Acceptable Provisions of the Bill

We conclude this report by noting provisions of the majority measure which we feel are salutary or unobjectionable.

The first is the provision in title IV of the bill for the formation of a joint congressional committee composed of seven members each drawn from the Senate Committee on Labor and Public Welfare and the House Committee on Education and Labor to study the whole field of labor-management relations.

We are in complete accord with the objectives of this portion of the majority bill. Indeed we have at several points indicated that many of the problems with respect to which this bill proposes to legislate

immediately should be subjected to a thorough investigation before any legislation is attempted. We do not feel, however, that the investigatory body created by this bill is so constituted as to give assurance that its studies would be productive of sound results or that its recommendations would be of a character to command the wholehearted respect by all of the interests concerned which legislation in this field urgently requires. The problems which underlie labor unrest are deep-rooted, and involve basic and conflicting interests. These interests of management, of labor, and of the public should all be directly represented on the investigatory body, and should all participate in its deliberations and in the formulation of its recommendations. The President recognized this when he called for the creation of a commission composed of 12 Members of Congress, and 8 representing the public, management, and labor. We urge that his recommendation be accepted.

With the qualification indicated hereinbefore, we find no objection to restricting industry-wide bargaining to circumstances where employers have banded themselves together as provided in section 2 (2). We should not object to limiting supervisors to joining a union unaffiliated with the rank and file under section 2 (11).

We agree, with the qualifications noted, that there should be machinery for procuring adherence to contracts as attempted by sections 8 (a) (6) and 8 (b) (5). We agree that it should be made an unfair labor practice for a union to interfere with an employer in the designation of his representatives, as provided by section 8 (b) (1).

We agree with our colleagues that "jurisdictional strikes" or "boycotts" should be limited. We believe, however, that as the President recommended, these terms should be carefully and narrowly defined. This has not been done in the majority bill. We approve of the provisions of the bill which treat them as unfair labor practices, subject to cease-and-desist order of the National Labor Relations Board, but we cannot agree with the mandatory preliminary injunction proceeding against such activities which this bill provides. We agree with the excellent protection of the right of free speech accorded by section 8 (c), and, except for the qualifications that we have noted with respect to the cooling-off provisions, with the definition of collective bargaining contained in section 8 (d).

The majority of the committee has spelled out desirable grievance procedures in section 9 (a). We concur with the grant of the right of employers' petition in section 9 (c) (1) (B), and with the revised run-off procedure under section 9 (c) (3).

We think the clarification of relations between the Federal and State boards contemplated under section 10 (a) a wise solution to a complex problem.

We are convinced that the National Labor Relations Board should have a limited access to the courts for temporary injunctions of the kind contemplated under section 10 (j), (k), and (l) but feel this should be limited to cases involving strikes against Board certifications. We commend the majority for establishing by statute the national labor-management panel provided under section 205 (a). We have not discussed these wholesome provisions at greater length since we assume they will be dealt with in the majority report.

Summary and Conclusions

The bill S. 1126 makes a number of proposals which are ostensibly designed to "redress the balance" in labor relations. Their underlying premise is that labor has grown more powerful than employers in the economy and it concludes therefore that labor must be weakened and employers strengthened. This premise is false.

The test of power is its fruits. No candid observer can fail to be impressed with the imposing evidence that since the end of the war the real wages of labor have declined while profits and prices have risen to unprecedented heights that endanger our continued prosperity. Nor can it be denied that while on the whole the income of corporations, of small business and of farmers has risen during and since the war, factory workers' earnings have not kept pace with them.

The basic and incontrovertible fact of our recent economic history is that prices and profits are higher than ever before in our history, while real wages have actually fallen. A prolongation of this condition spells, as all impartial economists agree, disaster for the economy.

Consumer prices rose more than 25 percent between the end of the war and January 1947, 15 of these within the last year. Food alone rose by more than 43 percent—and food bulks largest in the expenditures of most people.

While our national income increased in 1946, the total paid out in salaries and wages actually fell, even though the number of employees increased. Thus the increased prices, both at wholesale and at retail, resulted in sharp increases in the incomes of other sectors of the business population. The fact is that while the total number of wage earners was swelled by millions of returned veterans during the year, the average share of labor in the national income was smaller than in 1945.

The measure recommended by the majority, we fear, would return this Nation to an era of industrial strife between management and labor. It would substitute conflict and Government intervention for the orderly processes of collective bargaining. Its economic impact would be to further tip the scales in the direction of profiteering, and aggravate the disparity between wages and prices. It would thus strengthen the factors making for a depression, and bring nearer this dangerous economic cataclysm. We therefore strongly urge the Senate to reject this type of legislation which will harm not only labor but all the people of the Nation.

It is our belief that any genuine concern for the economic welfare and future of America must be directed toward maintaining a free competitive economy and that Government intervention should be limited to guaranteeing this freedom and providing those services which the people require and which only the Government, as the instrument of all the people, can furnish. We give our support to those provisions of the bill which really remedy proven abuses. But to guarantee economic freedom and assure economic progress Congress must face up to and remedy the enormous concentration of economic power now gripped by a few industrial and financial monopolies. Congress must further recognize that there are a number of services which our highly productive economy should provide and which can only be achieved through Federal action. Outstanding among these are health, housing, education, and social-security measures. It bodes

ill for the welfare and prosperity of the Nation as a whole that these welfare measures and antimonopoly legislation are neglected while one-sided, antilabor measures are advanced so forcefully by the majority.

We speak not as partisans of labor, but in the interest of the whole American people. It is because this bill in so many aspects trespasses upon the democratic rights and welfare of the whole American people that we oppose it in its present form.

ELBERT D. THOMAS.
JAMES E. MURRAY.
CLAUDE PEPPER.

25. (80th Congress, 1st Session, House of Representatives, Report No. 510)

U.S. CONGRESS CONFERENCE COMMITTEES, 1947, LABOR-MANAGEMENT RELATIONS ACT, 1947

JUNE 3, 1947.—Ordered to be printed

Mr. HARTLEY, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 3020]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 3020) to prescribe fair and equitable rules of conduct to be observed by labor and management in their relations with one another which affect commerce, to protect the rights of individual workers in their relations with labor organizations whose activities affect commerce, to recognize the paramount public interest in labor disputes affecting commerce that endanger the public health, safety, or welfare, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

SHORT TITLE AND DECLARATION OF POLICY

Section 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual

employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I—AMENDMENTS OF NATIONAL LABOR RELATIONS ACT

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

"FINDINGS AND POLICIES

"Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom

of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"DEFINITIONS

"Sec. 2. When used in this Act—

"(1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholders or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

"(4) The term 'representatives' includes any individual or labor organization.

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the Distict of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

"(8) The term 'unfair labor practice' means any unfair labor practice listed in section 8.

"(9) *The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.*

"(10) *The term 'National Labor Relations Board' means the National Labor Relations Board provided for in section 3 of this Act.*

"(11) *The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.*

"(12) *The term 'professional employee' means—*

"(a) *any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or*

"(b) *any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).*

"(13) *In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.*

"NATIONAL LABOR RELATIONS BOARD

"*Sec. 3 (a) The National Labor Relations Board (hereinafter called the 'Board') created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the*

Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

"(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially notice.

"(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of al moneys it has disbursed.

"(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecuting of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

"Sec. 4. (a) Each member of the Board and the General Counsel of the Board shall receive a salary of $12,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

"(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor

approved by the Board or by any individual it designates for that purpose.

"Sec. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

"Sec. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

"RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have 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 other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"UNFAIR LABOR PRACTICES

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) 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: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees' as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:

Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(3) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in

another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

"(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

"(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed terminatin or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subjection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if any when he is reemployed by such employer.

"REPRESENTATIVES AND ELECTIONS

"Sec. 9. (a) 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: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with

an organization which admits to membership, employees other than guards.

"*(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—*

"*(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or*

"*(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section (a 9);*

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"*(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).*

"*(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.*

"*(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.*

"*(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.*

"*(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and*

entered upon the pleadings, testimony, and proceedings set forth in such transcript.

"(e) (1) *Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9(a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.*

"(2) *Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.*

"(3) *No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.*

"(f) *No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—*

"(1) *the name of such labor organization and the address of its principal place of business;*

"(2) *the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;*

"(3) *the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;*

"(4) *the initiation fee or fees which new members are required to pay on becoming members of such labor organization;*

"(5) *the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;*

"(6) *a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract*

terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9(e)(1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelvemonth period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

"PREVENTION OF UNFAIR LABOR PRACTICES

"Sec. 10. (a) The Board is empowered as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such

cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

"(*b*) *Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723–B, 723–C).*

"(*c*) *The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affimative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports*

from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

"*(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.*

"*(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings*

as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

"(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

"(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order on the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes', approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101–115).

"(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

"(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary

relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

"(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

"(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b) (4) (D).

"INVESTIGATORY POWERS

"Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

"(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

"(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty of forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

"(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall

be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

"(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

"(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

"Sec. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

"LIMITATIONS

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

"Sec. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

"(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

"Sec. 15. Wherever the application of the provisions of section 272 of chapter 10 of the Act entitled An 'Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, and Acts amendatory thereof and supplementary thereto (U.S.C., title 10, sec. 672), conflicts with the application of the provisions of this Act, this Act shall prevail: Provided, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

"Sec. 16. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

"Sec. 17. This Act may be cited as the 'National Labor Relations Act'."

EFFECTIVE DATE OF CERTAIN CHANGES

Sec. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor prac-

tice prior thereto, and the provisions of section 8 (a) (3) and sections 8(b)(2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

Sec. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

Sec. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

TITLE II—CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECTING COMMERCE; NATIONAL EMERGENCIES

Sec. 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such

agreements, and other provisions designed to prevent the subsequent arising of such controversies.

Sec. 202. (a) There is hereby created an independent agency to be known as the Federal Mediation and Conciliation Service (herein referred to as the "Service", except that for sixty years after the date of the enactment of this Act such term shall refer to the Conciliation Service of the Department of Labor). The Service shall be under the direction of a Federal Mediation and Conciliation Director (hereinafter referred to as the "Director"), who shall be appointed by the President by and with the advice and consent of the Senate. The Director shall receive compensation at the rate of $12,000 per annum. The Director shall not engage in any other business, vocation, or employment.

(b) The Director is authorized, subject to the civil-service laws, to appoint such clerical and other personnel as may be necessary for the execution of the functions of the Service, and shall fix their compensation in accordance with the Classification Act of 1923, as amended, and may, without regard to the provisions of the civil-service laws and the Classification Act of 1923, as amended, appoint and fix the compensation of such conciliators and mediators as may be necessary to carry out the functions of the Service. The Director is authorized to make such expenditures for supplies, facilities, and services as he deems necessary. Such expenditures shall be allowed and paid upon presentation of itemized vouchers therefor approved by the Director or by any employee designated by him for that purpose.

(c) The principal office of the Service shall be in the District of Columbia, but the Director may establish regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this Act to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies. The Director shall make an annual report in writing to Congress at the end of the fiscal year.

(d) All mediation and conciliation functions of the Secretary of Labor or the United States Conciliation Service under section 8 of the Act entitled "An Act to create a Department of Labor", approved March 4, 1913 (U.S.C., title 29, sec. 51), and all functions of the United States Conciliation Service under any other law are hereby transferred to the Federal Mediation and Conciliation Service, together with the personnel and records of the United States Conciliation Service. Such transfer shall take effect upon the sixtieth day atfer the date of enactment of this Act. Such transfer shall not affect any proceedings pending before the United States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or by the Secretary of Labor. The Director and the Service shall not be subject in any way to the jurisdiction or authority of the Secretary of Labor or any official or division of the Department of Labor.

FUNCTIONS OF THE SERVICE

Sec. 203. (a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(*b*) *The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.*

(*c*) *If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.*

(*d*) *Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.*

Sec. 204. (*a*) *In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives in any industry affecting commerce, shall—*

(*1*) *exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;*

(*2*) *whenever a dispute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and*

(*3*) *in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute.*

Sec. 205. (*a*) *There is hereby created a National Labor-Management Panel which shall be composed of twelve members appointed by the President, six of whom shall be selected from among persons outstanding in the field of management and six of whom shall be selected from among persons outstanding in the field of labor. Each member shall hold office for a term of three years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and the terms of office of the members first taking office shall expire, as designated by the President at the time of appointment, four at the end of the first year, four at the end of the*

second year, and four at the end of the third year after the date of appointment. Members of the panel, when serving on business of the panel, shall be paid compensation at the rate of $25 per day, and shall also be entitled to receive an allowance for actual and necessary travel and subsistence expenses while so serving away from their places of residence.

(b) It shall be the duty of the panel, at the request of the Director, to advise in the avoidance of industrial controversies and the manner in which mediation and voluntary adjustment shall be administered, particularly with reference to controversies affecting the general welfare of the country.

NATIONAL EMERGENCIES

Sec. 206 Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

Sec. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper to ascertain the facts with respect to the causes and circumstanes of the dispute.

(b) Members of a board of inquiry shall receive compensation at the rate of $50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914; as amended (U.S.C. 19, title 15, secs. 49 and 50, as amended), are hereby made applicable to the powers and duties of such board.

Sec. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) *In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not be applicable.*

(c) *The order or orders of the court shall be subject to review by the appropriate circuit court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 29, secs. 346 and 347).*

Sec. 209. (a) *Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.*

(b) *Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.*

Sec. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

COMPILATION OF COLLECTIVE BARGAINING AGREEMENTS, ETC.

Sec. 211. (a) *For the guidance and information of interested representatives of employers, employees, and the general public, the Bureau of Labor Statistics of the Department of Labor shall maintain a file of copies of all available collective bargaining agreements and other available agreements and actions thereunder settling or adjusting labor disputes. Such file shall be open to inspection under appropriate conditions prescribed by the Secretary of Labor, except that no specific information submitted in confidence shall be disclosed.*

(b) *The Bureau of Labor Statistics in the Department of Labor is authorized to furnish upon request of the Service, or employers, employees, or their representatives, all available data and factual information which may aid in the settlement of any labor dispute, except that no specific information submitted in confidence shall be disclosed.*

EXEMPTION OF RAILWAY LABOR ACT

Sec. 212. The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

Sec. 302. (a) It shall be unlawful for any employer to pay or deliver, or agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees and money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such

employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employee, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to

notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U. S. C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., title 29, secs. 101–115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of

such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

RESTRICTION ON POLITICAL CONTRIBUTIONS

Sec. 304. Section 313 of the Federal Corrupt Practices Act 1925 (U. S. C., 1940 edition, title 2, sec. 251; Supp. V, title 50, App., sec. 1509), as amended, is amended to read as follows:

"Sec. 313. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. Every corportaion or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporatin or labor organization, as the case may be, in violation of this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both. For the purposes of this section 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

STRIKES BY GOVERNMENT EMPLOYEES

Sec. 305. It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations to participate in any strike. Any individual employed by the United States or by any such agency who strikes shall be discharged immediately from his employment, and shall forfeit his civil service status, if any, and shall not be eligible for reemployment for three years by the United States or any such agency.

TITLE IV

CREATION OF JOINT COMMITTEE TO STUDY AND REPORT ON BASIC PROBLEMS AFFECTING FRIENDLY LABOR RELATIONS AND PRODUCTIVITY

Sec. 401. There is hereby established a joint congressional committee to be known as the Joint Committee on Labor-Management Relations

(hereafter referred to as the committee), and to be composed of seven Members of the Senate Committee on Labor and Public Welfare, to be appointed by the President pro tempore of the Senate, and seven Members of the House of Representatives Committee on Education and Labor, to be appointed by the Speaker of the House of Representatives. A vacancy in membership of the committee shall not affect the powers of the remaining members to execute the functions of the committee, and shall be filled in the same manner as the original selection. The committee shall select a chairman and a vice chairman from among its members.

Sec. 402. The committee, acting as a whole or by subcommittee, shall conduct a thorough study and investigation of the entire field of labor-management relations, including but not limited to—

(1) the means by which permanent friendly cooperation between employers and employees and stability of labor relations may be secured throughout the United States;

(2) the means by which the individual employee may achieve a greater productivity and higher wages, including plans for guaranteed annual wages, incentive profit-sharing and bonus systems;

(3) the internal organization and administration of labor unions, with special attention to the impact on individuals of collective agreements requiring membership in unions as a condition of employment;

(4) the labor relations policies and practices of employers and associations of employers;

(5) the desirability of welfare funds for the benefit of employees and their relation to the social-security system;

(6) the methods and procedures for best carrying out the collective-bargaining processes, with special attention to the effects of industrywide or regional bargaining upon the national economy;

(7) the administration and operation of existing Federal laws relating to labor relations; and

(8) such other problems and subjects in the field of labor-management relations as the committee deems appropriate.

Sec. 403. The committee shall report to the Senate and House of Representatives not later than March 15, 1948, the results of its study and investigation, together with such recommendations as to necessary legislation and such other recommendations as it may deem advisable, and shall make its final report not later than January 2, 1949.

Sec. 404. The committee shall have the power, without regard to the civil-service laws and the Classification Act of 1923, as amended, to employ and fix the compensation of such officers, experts, and employees as it deems necessary for the performance of its duties, including consultants who shall receive compensation at a rate not to exceed $35 for each day actually spent by them in the work of the committee, together with their necessary travel and subsistence expenses. The committee is further authorized, with the consent of the head of the department or agency concerned, to utilize the services, information, facilities, and personnel of all agencies in the executive branch of the Government and may request the governments of the several States, representatives of business, industry, finance, and labor, and such other persons, agencies, organizations, and instrumentalities as it

deems appropriate to attend its hearings and to give and present information, advice, and recommendations.

Sec. 405. The committee, or any subcommittee thereof, is authorized to hold such hearings; to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Eightieth Congress; to require by subpena or otherwise the attendance of such witnesses and the production of such books, papers, and documents; to administer oaths; to take such testimony; to have such printing and binding done; and to make such expenditures within the amount appropriated therefor; as it deems advisable. The cost of stenographic services in reporting such hearings shall not be in excess of 25 cents per one hundred words. Subpenas shall be issued under the signature of the chairman or vice chairman of the committee and shall be served by any person designated by them.

Sec. 406. The members of the committee shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the committee, other than expenses in connection with meetings of the committee held in the District of Columbia during such time as the Congress is in session.

Sec. 407. There is hereby authorized to be appropriated the sum of $150,000, or so much thereof as may be necessary, to carry out the provisions of this title, to be disbursed by the Secretary of the Senate on vouchers signed by the chairman.

TITLE V

DEFINITIONS

Sec. 501. When used in this Act—

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) any any concerted slow-down or other concerted interruption of operations by employees.

(3) The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person", and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

SAVING PROVISION

Sec. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

SEPARABILITY

Sec. 503. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

And the Senate agree to the same.

That the House recede from its disagreement to the amendment of the Senate to the title of the bill, and agree at the same.

FRED A. HARTLEY, JR.,
GERALD W. LANDIS,
GRAHAM A. BARDEN,
Managers on the Part of the House.

ROBERT A. TAFT,
ALLEN J. ELLENDER,
IRVING M. IVES,
JOSEPH H. BALL,
Managers on the Part of the Senate.

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 3020) to prescribe fair and equitable rules of conduct to be observed by labor and management in their relations with one another which affect commerce, to protect the rights of individual workers in their relations with labor organizations whose activities affect commerce, to recognize the paramount public interest in labor disputes affecting commerce that endanger the public health, safety, or welfare, and for other purposes, submit the following statement in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report:

SHORT TITLE

The House bill provided that it was to be cited as the "Labor-Management Relations Act, 1947". The Senate amendment (sec. 504) provided that it was to be cited as the "Federal Labor Relations Act of 1947". The conference agreement adopts the short title of the House bill.

DECLARATION OF POLICY

The House bill (sec. 1 (b)) contained an over-all declaration of policy covering all of the various matters dealt with in the bill. There was no corresponding over-all declaration of policy in the Senate amendment. The conference agreement contains the declaration of policy of the House bill, with one omission. One of the policies declared in the House bill was to encourage the peaceful settlement of labor disputes affecting commerce by giving the employees themselves a direct voice in the bargaining arrangements with their employers. Since under the conference agreement the provisions relating to a secret ballot on the employer's last offer of settlement (as will be hereafter explained) are not made mandatory, this particular item has been omitted from the over-all declaration of policy in the conference agreement.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

Both the House bill and the Senate amendment in title I amended the National Labor Relations Act in numerous respects.

In amending section 1 of the National Labor Relations Act (the policy thereof) the House bill omitted from the present law all of the so-called findings of fact, some of which have been so severely criticized as being inaccurate and entirely one-sided. The Senate amendment rewrote the findings and policies contained in section 1 of the National Labor Relations Act so that those findings will not hereafter

constitute an indictment of all employers. At the same time the Senate amendment inserted in the findings of fact a paragraph to the effect that experience has demonstrated that certain practices by some labor organizations have the effect of burdening commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of commerce. Senate amendment further declared the elimination of such practices to be a necessary condition to the assurance of the rights herein guaranteed. Thus under the Senate amendment the findings and policies of the amended National Labor Relations Act are to be "two-sided." The conference agreement adopts the provisions of the Senate amendment in this respect.

DEFINITIONS

Section 2 of the National Labor Relations Act contains definitions of the terms used therein. Both the House bill and the Senate amendment amended section 2.

(1) *Person.*—In defining the term "person," the House bill added labor organizations to the definition contained in existing law in order that there might be no question but that labor organizations were to be considered as persons within the meaning of the new, amended act. The Senate amendment also added labor organizations to the definition of "person," but included in addition there to their officers and employees or members. Since officers, employees, and members of labor organizations are individuals, and the term "person" already is defined to include individuals, the conference committee deemed it unnecessary to include officers, employees, and members of labor organizations in specific terms, and thus the conference agreement adopts the definition of person contained in the House bill.

(2) *Employer.*—In defining the term "employer," the House bill changed the definition of existing law in the following respects:

(A) Under existing law "employer" is defined to include any person acting in the interest of an employer. The House bill changed this so as to include as an employer only persons acting as agents of an employer. This was done for the reason that the Board has on numerous occasions held an employer responsible for the acts of subordinate employees and others although not acting within the scope of any authority from the employer, real or apparent.

(B) The House bill excluded from the definition of "employer" instrumentalities of the United States.

(C) The House bill also excluded from the definition of "employer" all religious, charitable, scientific, and educational organizations not organized or operated for profit.

The Senate amendment changed the definition of "employer" contained in existing law in but two respects:

(A) The Senate amendments excluded from the definition of "employer" nonprofit corporations and associations operating hospitals.

(B) The Senate amendment also provided that for the purposes of section 9 (b) of the Labor Act (the section authorizing the Board to determine the appropriate collective bargaining

unit) the term "employer" was not to include a group of employers unless they had voluntarily associated themselves together for the purposes of collective bargaining.

The conference agreement follows the provisions of the House bill in the matter of agents of an employer, and follows the Senate amendment in the matter of exclusion of nonprofit corporations and associations operating hospitals. The other nonprofit organizations excluded under the House bill are not specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act. In the case of instrumentalities of the United States, the conference agreement limits the exclusion to wholly owned Government corporations and to Federal Reserve banks, the latter for the reason that such banks, by their issuance of currency and their acting as fiscal agents of the Treasury, perform a vital governmental function. The treatment in the Senate amendment of the term "employer" for the purposes of section 9 (b) is omitted from the conference agreement, since it merely restates the existing practice of the Board in the fixing of bargaining units containing employees of more than one employer, and it is not thought that the Board will or ought to change its practice in this respect.

(3) *Employee.*—The House bill changed the definition of "employee' contained in the existing law in several respects:

(A) Under the existing definition of "employee" the Board has treated employees striking for wages, hours, or working conditions differently from employees striking because of an alleged unfair labor practice on the part of the employer. In the former case the Board has said that the individual striker retains his status as an employee under the act only until he is replaced, whereas in the latter case the Board has said that the individual striker retains his status as an employee so long as the labor dispute is "current". This Board practice has had the effect of treating more favorably employees striking to remedy practices for which the National Labor Relations Act itself provides a peaceful administrative remedy, than employees who are striking merely to better their terms of employment. The House bill in the definition of employee provided in specific terms that these two classes of striking employees should be treated in the same fashion, i.e., they were to retain their employee status until replaced.

(B) The House bill excluded supervisors from the definition of "employee."

(C) The House bill also excluded from the definition of "employee" any individual engaged in "agricultural labor", as that term is defined for the purposes of the Social Security Act taxes.

(D) The House bill excluded from the definition of "employee" individuals having the status of independent contractors. Although independent contractors can in no sense be considered to be employees, the Supreme Court in *N. L. R. B.* v. *Hearst Publications, Inc.* (1944), 322 U. S. 111, held that the ordinary tests of the law of agency could be ignored by the Board in determining whether or not particular occupational groups were "employees" within the meaning of the Labor Act. Consequently it refused

to consider the question of whether certain categories of persons whom the Board had deemed to be "employees" were not in fact and in law really independent contractors.

(E) The House bill contained a clarifying provision to the effect that no individual was to be considered an employee for the purpose of the act unless he was employed by an employer as defined in the act.

In defining "employee", the Senate amendment followed the provisions of existing law with three exceptions:

(A) The Senate amendment excluded supervisors from the definition of "employee".

(B) The Senate amendment excluded "individuals employed in agriculture" as distinguished from the existing exemption of individuals employed as "agricultural laborers".

(C) The Senate amendment excluded individuals employed by any person subject to the Railway Labor Act (one of the categories of persons not treated as employers for the purposes of the act).

The conference agreement in general follows the provisions of the Senate amendment, with the following exceptions:

(A) Since the matter of the "agricultural" exemption has for the past 2 years been dealt with in the Appropriation Act for the National Labor Relations Board, the conference agreement does not disturb existing law in this respect.

(B) The conference agreement follows the provisions of the House bill in excluding from the definition of "employee" all individuals employed by persons who do not come within the definition of "employers," not limiting this exclusion, as did the Senate amendment, to employees of persons subject to the Railway Labor Act.

(C) The conference agreement does not contain the specific provisions of the House bill dealing with the status of "unfair labor practice" strikers. Since the different treatment of unfair labor practice strikers and economic strikers is simply a practice of the Board which the Board can change within the framework of the existing law, it was thought by the House managers that the Board should be given an opportunity to change this practice itself rather than needlessly complicating the definition of the term "employee."

In the *National Silver Company case* (71 N. L. R. B. 87) (1946), at least one member of the Board thought that the Board's policy should be to so use its powers as to encourage employees and their organizations to use the peaceful procedures under the act instead of resorting to the strike weapon. Such a policy would seem to be more in accord with the stated purpose of the act.

(D) The conference agreement follows the House bill in the matter of persons having the status of independent contractors.

(4) The terms "representative", "labor organization", "commerce", "affecting commerce", and "unfair labor practice" were the same in both the House bill and the Senate amendments. The conference agreement does not make any change in these definitions.

(5) The House bill omitted the definition which is contained in existing law of the term "labor dispute" since a definition of that term was not considered necessary under the structure of the House bill. The Senate amendment contained the definition contained in the existing law. The conference agreement follows the provision of the Senate amendment in this respect.

(6) The definitions in the House bill and in the Senate amendment relating to the Board and the administration of the act are hereafter discussed in connection with the explanation of the conference agreement dealing with section 3 of the National Labor Relations Act.

(7) The House bill contains a definition of the term "bargain collectively" for the purposes of the duties imposed on both parties in the amended section 8 of the Labor Act to bargain collectively with the other. By reason of a number of decisions of the Board, which in effect required an employer to make or offer concessions to show that he was bargaining in good faith, the House definition proposed an objective test for determining what constituted bargaining collectively. It required first that the parties follow the procedure specified in an agreement between the parties if such an agreement was in effect, and, if no such agreement was in effect, discussion between the parties at a stated number of meetings of the various proposals and counterproposals. If agreement was reached the agreement was to be put in writing. Neither party was to be required to reach an agreement, accept any proposal or counterproposal or submit counterproposals.

In addition, neither party was to be required, under his duty to bargain collectively, to discuss any matter other than those (which were set out in detail in the House bill) which the House considered to be within the proper scope of compulsory bargaining.

As part of the procedure of collective bargaining, the House bill required that the employees themselves, in a secret ballot, vote on the question of whether to reject the employer's last offer of settlement, and made it a violation of the duty to bargain to call a strike or lockout unless upon such ballot a majority of the employees eligible to vote were in favor of such rejection.

The Senate amendment did not, in the definition section, contain any definition of "collective bargaining", but did contain (sec. 8(d)) a provision stating what collective bargaining was to consist of for the purposes of section 8. It was stated as the performance of the mutual obligation of the parties to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or with respect to the negotiation of an agreement, or with respect to any question arising thereunder; and the execution of a written contract incorporating any agreement reached if desired by either party. This mutual obligation was not to compel either party to agree to a proposal or require the making of any concession. Hence, the Senate amendment, while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect as the House bill in this regard, since it rejected, as a factor in determining good faith, the test of making a concession and thus prevented the Board from determining the merits of the positions of the parties.

The Senate amendment also required, as part of the bargaining procedure, that no party to any collective bargaining contract should

terminate or modify the contract unless the party desiring such termination or modification (A) served a written 60-day notice of the proposed termination or modification on the other party, (B) offered to meet and confer with the other party with respect thereto, (C) notified the Federal Mediation and Conciliation Service (a new independent agency later discussed) within 30 days after such notice of the existence of the dispute, if agreement had not been reached by that time, and (D) continued in full force and effect, without strike or lock-out, all the terms and conditions of the existing contract for a period of 60 days after the notice of desired termination or modification was given or until the expiration date of the contract, whichever occurred later.

An employee who engaged in a strike within the 60-day period just described lost his status as an employee of the particular employer for the purposes of sections 8, 9, and 10 of the act.

The conference agreement, like the Senate amendment, does not contain a definition as such of "collective bargaining", but does, in section 8(d) of the amended Labor Act, contain provisions similar to those of the Senate amendment, with certain clarifying changes. One of the important changes is the inclusion of a provision indicating that the duty to bargain is not to be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. In addition, the conference agreement omits from the Senate amendment words that were contained therein which might have been construed to require compulsory settlement of grievance disputes and other disputes over the interpretation or application of the contract.

(8) *Supervisors.*—As heretofore stated, both the House bill and the Senate amendment excluded supervisors from the individuals who are to be considered employees for the purposes of the act. The House bill defined as "supervisors", however, certain categories of employees who were not treated as supervisors under the Senate amendment. These were generally (A) certain personnel who fix the amount of wages earned by other employees, such as inspectors, checkers, weighmasters, and time-study personnel, (B) labor relations personnel, police, and claims personnel, and (C) confidential employees. The Senate amendment confined the definition of "supervisor" to individuals generally regarded as foremen and persons of like or higher rank.

The conference agreement, in the definition of "supervisor," limits such term to those individuals treated as supervisors under the Senate amendment. In the case of persons working in the labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. The conference agreement does not treat time-study personnel or guards as supervisors, as did the House bill. Since, however, time-study employees may qualify as professional personnel, the special provisions of the Senate amendment (hereafter discussed)

applicable with respect to professional employees will cover many in this category. In the case of guards, the conference agreement does not permit the certification of a labor organization as the bargaining representative of guards if it admits to membership, or is affiliated with any organization that admits to membership, employees other than guards. The provision dealing with the certification of bargaining units for guards is dealt with in section 9(b) of the conference agreement, and the individuals who are to be considered as guards therein set forth.

(9) The House bill did not contain any definition of the term "professional employee," but section 9(f)(2) thereof gave professional personnel and other distinguishable groups of employees an opportunity to exclude themselves from larger bargaining units in which it was proposed that they be included. The Senate amendment accorded a similar treatment to professional employees and defined the term. This definition in general covers such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants. The conference agreement contains the same definition of "professional employee" as that contained in the Senate amendment, and accords to this category the same treatment which was provided for them in section 9(f)(3) of the House bill.

(10) Since the terms "sympathy strike," "illegal boycott," "jurisdictional strike," "monopolistic strike," and "featherbedding practice" do not appear as such in the conference agreement, the definitions of them are omitted and the treatment of the matters covered thereby are discussed in connection with the appropriate sections of the conference agreement.

(11) As heretofore stated, the conference agreement does not contain any definition of "agricultural laborer," "agriculture" or "agricultural labor." This matter has previously been discussed in connection with the definition of "employees" in the House bill, the Senate amendment, and the conference agreement.

(12) The conference agreement contains in the definition section a rule to be applied for the purpose of determining when a person is acting as an "agent" of another person so as to make such other person responsible for his acts. A provision having the same effect was contained in section 12 of the House bill, under which the Norris-LaGuardia Act was made inapplicable in connection with certain activities dealt with in that section. One of the provisions of that act which was thus made inapplicable was section 6 thereof, which provides that no employer or labor organization participating or interested in a labor dispute shall be held responsible for the "unlawful" acts of its agents except upon clear proof of actual authorization of the particular acts performed, or subsequent ratification thereof after knowledge. Hence, under the conference agreement, as under the House bill, both employers and labor organizations will be responsible for the acts of their agents in accordance with the ordinary common law rules of agency (and only ordinary evidence will be required to establish the agent's authority).

ADMINISTRATION

The House bill (secs. 3, 4, and 102) abolished the existing National Labor Relations Board, created a new board of three members, not more than two of whom were to be members of the same political

party, and limited the new Board to the performance of the quasi-judicial functions under the act. The investigating and prosecuting functions under the act were to be performed by an Administrator, a new independent office which was created by section 4 of the House bill. The Senate amendment (sec. 3 of the amended Labor Act) retained the existing Board but increased its membership to seven and provided that the Board could assign its duties to groups of not less than three members each. The conference agreement (sec. 3 (a)) retains the existing Board but increases its membership to five. Of the two additional members, who are to be appointed by the President, by and with the advice and consent of the Senate, one is to be appointed for a term of 2 years and one for a term of 5 years. The conference agreement does not make provision for an independent agency to exercise the investigating and prosecuting functions under the act, but does provide that there shall be a General Counsel of the Board, who is to be appointed by the President, by and with the advice and consent of the Senate, for a term of 4 years. The General Counsel is to have general supervision and direction of all attorneys employed by the Board (excluding the trial examiners and the legal assistants to the individual members of the Board), and of all the officers and employees in the Board's regional offices, and is to have the final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and the issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the Board. He is to have, in addition, such other duties as the Board may prescribe or as may be provided by law. By this provision responsibility for what takes place in the Board's regional offices is centralized in one individual, who is ultimately responsible to the President and Congress.

The House bill, in the section providing for the Administrator, provided that the regional directors and the chief regional attorneys were to be appointed by the President with the advice and consent of the Senate. It was believed that better administration will result in having responsibility lodged in one person rather than having it diffused through numerous regional directors and regional attorneys, and the conference agreement omits this provision.

Section 4 of the conference agreement provides that each member of the Board and the General Counsel of the Board shall receive a salary at the rate of $12,000 per annum. This section also provides that the Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions, with the exception that any attorney employed for assignment as a legal assistant to any Board member may, for such member, review transcripts and prepare such drafts. There was a provision in the House bill and also in the Senate amendment having the same effect. This section of the conference agreement also provides that no trial examiner's report can be reviewed either before or after its publication by any person other than a member of the Board or his legal assistant, and in addition trial examiners are prohibited from advising or consulting with the Board with respect to exceptions taken to their findings, rulings, or recommendations. A similar provision was contained in the Senate amendment, but there was no such provision in the House bill. The combination of the provisions dealing with the authority of

the General Counsel, the provision abolishing the Board's review division, and the provisions relating to the trial examiners and their reports effectively limits the Board to the performance of quasi-judicial functions.

Section 5 of the conference agreement is the same as section 5 of the existing National Labor Relations Act and also section 5 of the amended Labor Act in the Senate amendment. Section 5 of the amended Labor Act in the House bill had the same effect insofar as the Board was concerned, but its provisions were also applicable to the Administrator which, as heretofore stated, is not provided for in the conference agreement.

Section 6 of the conference agreement gives the Board general power to prescribe regulations necessary to carry out the provisions of the act. There was a similar provision in section 6 of the amended Labor Act in the House bill and also in the Senate amendment. The only change in this section from existing law is the insertion of the words "in the manner prescribed by the Administrative Procedure Act". This insertion appeared in the House bill but not in the Senate amendment. It is made to assure that the subsequent amendment of the National Labor Relations Act without changing this section will not supersede the general rules prescribed in the Administrative Procedure Act which are now applicable to the Board's powers to promulgate regulations.

RIGHTS OF EMPLOYEES

Both the House bill and the Senate amendment in amending the National Labor Relations Act preserved the right under section 7 of that act of employees to self-organization, to form, join, or assist any labor organization, and to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The House bill, however, made two changes in that section of the act. *First*, it was stated specifically that the rights set forth were not to be considered as including the right to commit or participate in unfair labor practices, unlawful concerted activities, or violations of collective bargaining contracts. *Second*, it was specifically set forth that employees were also to have the right to refrain from self-organization, etc., if they chose to do so.

The first change in section 7 of the act made by the House bill was inserted by reason of early decisions of the Board to the effect that the language of section 7 protected concerted activities regardless of their nature or objectives. An outstanding decision of this sort was the one involving a "sit down" strike wherein the Board ordered the reinstatement of employees who engaged in this unlawful activity. Later the Board ordered the reinstatement of certain employees whose concerted activities constituted mutiny. In both of the above instances, however, the decision of the Board was reversed by the Supreme Court. More recently, a decision of the Board ordering the reinstatement of individuals who had engaged in mass picketing was reversed by the Circuit Court of Appeals (*Indiana Desk Co.* v. *N.L.R.B.*, 149 Fed. (2d) 987) (1944).

Thus the courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act,

employees are not given any right to engage in unlawful or other improper conduct. In its most recent decisions the Board has been consistently applying the principles established by the courts. For example, in the *American News Company case* (55 N.L.R.B. 1302) (1944) the Board held that employees had no right which was protected under the act to strike to compel an employer to violate the wage stabilization laws. Again, in the *Scullin Steel case* (65 N.L.R.B. 1294) and in the *Dyson case* (decided February 7, 1947), the Board held that strikes in violation of collective bargaining contracts were not concerted activities protected by the act, and refused to reinstate employees discharged for engaging in such activities. In the second *Thompson Products case* (decided February 21, 1947) the Board held that strikes to compel the employer to violate the act and rulings of the Board thereunder were not concerted activities protected by the provisions of section 7. The reasoning of these recent decisions appears to have had the effect of overruling such decisions of the Board as that in *Matter of Berkshire Knitting Mills* (46 N.L.R.B. 955 (1943)), wherein the Board attempted to distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement.

By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the act.

In addition, other provisions of the conference agreement deal with this particular problem in general terms. For example, in the declaration of policy to the amended National Labor Relations Act adopted by the conference committee, it is stated in the new paragraph dealing with improper practices of labor organizations, their officers, and members, that the "elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." This in and of itself demonstrates a clear intention that these undesirable concerted activities are not to have any protection under the act, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible. Furthermore, in section 10 (c) of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity. Again, inasmuch as section 10 (b) of the act, as proposed to be amended by the conference agreement, requires that the rules of evidence applicable in the district courts shall, so far as practicable, be followed and applied by the Board, proof of acts of unlawful conduct cannot hereafter be limited to proof of confession or conviction thereof.

The second change made by the House bill in section 7 of the act (which is carried into the conference agreement) also has an important bearing on the kinds of concerted activities which are protected by

section 7. That provision, as heretofore stated, provides that employees are also to have the right to refrain from joining in concerted activities with their fellow employees if they choose to do so. Taken in conjunction with the provisions of section 8 (b) (1) of the conference agreement (which will be hereafter discussed), wherein it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in section 7, it is apparent that many forms and varieties of concerted activities which the Board, particularly in its early days, regarded as protected by the act will no longer be treated as having that protection, since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act.

UNFAIR LABOR PRACTICES

Both the House bill and the Senate amendment amended section 8 of the National Labor Relations Act by adding thereto unfair labor practices on the part of labor organizations. The practices which under existing law are treated as unfair labor practices on the part of the employer were changed in only two respects by the House bill and in only one respect by the Senate amendment, as will hereafter appear.

Neither the House bill nor the Senate amendment changed the first unfair labor practice on the part of an employer, namely, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in section 7. What these rights are has already been discussed. The conference agreement contains the provisions of the House bill and the Senate amendment in this respect.

The House bill amended section 8(2) of the present National Labor Relations Act—the provision making it an unfair labor practice for an employer to dominate the formation or administration of labor organizations—for the purpose of according some protection to labor organizations which were not affiliated with one of the national or international labor organizations. This provision of the House bill had the effect of permitting an employer to do the same kinds of things for independent unions which the Board has permitted him to do for the affiliated unions. The Senate amendment did not change the words of section 8(2) in existing law.

There were contained, however, in both the House bill and the Senate amendment—in the amendments to sections 9 and 10 of the Labor Act—provisions requiring the Board to treat independent unions in the same manner in which it treats unions which are affiliated with or constitute units of labor organizations national or international in scope. These provisions acted as a limitation on the power of the Board in holding activities to be unfair labor practices under section 8(a) (2) of the House bill and the Senate amendment. The Board has, for example, in the case of affiliated unions permitted employers to provide bulletin boards in their plants for the union's use, to give union officials preferred treatment in laying off workers and calling them back, and to allow shop stewards without losing pay to confer not only with the employer but with the employees as well, and to transact other union business in the plant. The Board has not permitted the employer to do the same things for nonaffiliated unions, and it was the purpose of the House provision to provide for equality of treatment in this respect.

Since this matter is adequately dealt with in the provisions in sections 9 and 10, the conference agreement omits the provisions of the House bill which amended section 8 (2) of the existing law, and adopts the provisions of the Senate amendment.

Both the House bill and the Senate amendment, in rewriting the present provisions of section 8 (3) of the act, abolished the closed shop. The union shop and maintenance of membership, however, were permitted both under the House bill (sec. 8 (d) (4)) and under the Senate amendment (proviso to sec. 8 (a) (3)). The House bill and the Senate amendment differed in the required procedures for securing the union shop or maintenance of membership. These differences will be hereafter discussed. The conference agreement adopts the language of the Senate amendment in section 8 (a) (3) of the Labor Act with one clarifying omission. Under the provisions of the conference agreement an employer is permitted to enter into an agreement with a labor organization (not established, maintained, or assisted by any action defined as an unfair labor practice) whereby the employer agrees that he will employ only employees who on and after thirty days from the date of their employment (or from the date of the agreement, if that is later) are members of the labor organization concerned. This permission, however, is granted only if, upon the most recent election held under later provisions of the conference agreement (sec. 9 (e)), a majority of the employees in the bargaining unit in question eligible to vote have authorized the union to make such an agreement.

As a protection to the individual worker against arbitrary action by the union, it is further provided that an employer is not justified in discriminating against an employee with respect to whom the employer has reason to believe membership in the union was not available on the same terms as those generally applicable to other members, or with respect to whom the employer has reason to believe membership was denied or terminated for reasons other than failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. In determining whether membership was available on the same terms as those generally applicable to other members, it must be borne in mind that in some unions the dues and initiation fees of persons who became members many years ago may have been more or less than those currently in effect, or the terms or conditions of membership may have been different. The conference agreement hence does not contemplate availability of membership on the same terms as those applicable to all of the members, nor does it disturb arrangements in the nature of those approved by the Board in *Larus & Brother Co.* (62 N.L.R.B. 1075 (1945)).

Neither the House bill nor the Senate amendment changed the wording of the provisions of section 8 (4) of the existing act, and the conference agreement in section 8 (a) (4) follows the provisions of existing law. The same is true in the case of section 8 (5) of existing law which makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9 (a).

The Senate amendment contained a provision which does not appear in section 8 of existing law. This provision would have made it

an unfair labor practice to violate the terms of a collective bargaining agreement or an agreement to submit a labor dispute to arbitration. The conference agreement omits this provision of the Senate amendment. Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.

UNFAIR LABOR PRACTICES OF LABOR ORGANIZATIONS

Both the House bill and the Senate amendment defined, in a new section 8(b) of the National Labor Relations Act, unfair labor practices on the part of labor organizations and their agents. The House bill also made the unfair labor practices described unfair labor practices on the part of employees.

Under the House bill the following unfair labor practices were set forth:

(1) Intimidating practices to interfere with the exercise by employees of rights guaranteed in section 7 or to compel or seek to compel any individual to be a member of a labor organization.

(2) To refuse to bargain collectively with the employer.

(3) To call or participate in any strike or other concerted interference with an employer's operations, an object of which was to compel the employer to accede to the inclusion in a collective bargaining agreement of matters which under the House bill were not treated as within the proper scope of compulsory bargaining.

Under the new section 8(b) of the Senate amendment, the following unfair labor practices on the part of labor organizations and their agents were defined:

(1) To restrain or coerce employees in the exercise of rights guaranteed in section 7, or to restrain or coerce an employer in the selection of his representatives for collective bargaining or the adjustment of grievances. This provision of the Senate amendment in its general terms covered all of the activities which were proscribed in section 12(a)(1) of the House bill as unlawful concerted activities and some of the activities which were proscribed in the other paragraphs of section 12(a). While these restraining and coercive activities did not have the same treatment under the Senate amendment as under the corresponding provisions of the House bill, participation in them, as explained in the discussion of section 7, is not a protected activity under the act. Under the House bill, these activities could be enjoined upon suit by a private employer, specific provision was made for suits for damages on the part of any person injured thereby, and employees participating therein were subject to deprivation of their rights under the act. The conference agreement while adopting section 8(b)(1) of the Senate amendment, does not by specific terms contain any of these sanctions, but an employee who is discharged for participating in them will not, as explained in the discussion of section 7, be entitled to reinstatement. Furthermore, since in section 302(b), unions are made suable, unions that engage in these practices to the injury of another may subject themselves to liability under ordinary principles of law. Then, too, under the provisions of section 10(k) of the conference agreement the Board can seek a temporary injunction enjoining these practices pending its decision on the merits.

In applying section 8(1) of the existing law, the Board has not held to be unfair labor practices acts which constituted "interference" that did not also constitute restraint or coercion. Section 8(1) of the present law is written in broad terms, and only by long continued administrative practice has its scope been adequately and properly defined. Concern has heretofore been expressed as to whether such practice would carry over into a corresponding provision of the new section 8(b)(1), and presumably because of this concern the words "interference with" were omitted from the proposed new section. Omission of these words from the proposed new section was not, however, intended to broaden the scope of section 8(a)(1) as heretofore defined by the long-continued practice of the Board.

(2) To discriminate against an employee to whom membership in a labor organization has been denied or terminated on some ground other than nonpayment of dues or initiation fees. The purpose of this provision of the Senate amendment was obvious.

(3) To refuse to bargain collectively with an employer, provided the labor organization is the representative of his employees subject to section 9(a). This provision of the Senate amendment imposed upon labor organizations the same duty to bargain which under section 8(a)(5) of the Senate amendment was imposed upon employers. What bargaining consists of has already been discussed supra.

(4) To engage in, or induce or encourage the employees of any employer to engage in, a strike or a concerted refusal to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services in the course of their employment, if the purpose thereof was to force the doing of certain things. The proscribed purposes or objectives were described in clauses (A), (B), (C), and (D) of this provision of the Senate amendment.

Under clause (A) strikes or boycotts, or attempts to induce or encourage such action, were made unfair labor practices if the purpose was to force an employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. Thus it was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B. Similar it would not be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of, or does business with, employer B.

Clause (B) of this provision of the Senate amendment covered strikes and boycotts conducted for the purpose of forcing another employer to recognize or bargain with a labor organization that has not been certified as the exclusive representative. It is to be observed that the primary strike for recognition (without a Board certification) was not prohibited. Moreover, strikes and boycotts for recognition were not prohibited if the union had been certified as the exclusive representative.

Strikes and boycotts having as their purpose forcing any employer to disregard his obligation to recognize and bargain with

a certified union and in lieu thereof to bargain with or recognize another union were made unfair labor practices under clause (C).

Clause (D) covers strikes or boycotts having as their purpose forcing an employer to assign work tests to members of one union when he has assigned them to members of another union. If the employer against whom the strike or boycott was directed was failing to conform to a determination of the Board fixing the representation of employees performing the work tests, then the strike or boycott was not an unfair labor practice.

The matter covered by section 8(b)(4) in the Senate amendment were dealt within section 12 of the House bill and in the definitions of illegal boycott and jurisdictional strike.

The conference agreements adopts the provisions of the Senate amendment with clarifying changes, and with one addition to the category of unlawful objectives. Under the conference agreement a strike or boycott to force an employer or self-employed person to become a member of a labor organization will be treated in the same manner as other boycotts.

(5) To violate the terms of a colective bargaining agreement to submit a labor dispute to arbitration.

From the above description of the House bill and the Senate amendment dealing with unfair labor practices on the part of labor organizations and their agents, it is apparent the Senate amendment was broader in its scope than the corresponding provisions of the House bill. The conference agreement adopts the provisions of the Senate amendment with the following changes therein:

(1) Section 8(b)(2) is expanded so as to prohibit all attempts by a labor organization or its agent to cause an employer to discriminate against an employee in violation of section 8(a)(3). The latter section, as heretofore explained, prohibits an employer from discriminating against an employee by reason of his membership or nonmembership in a labor organization, except to the extent that he obligates himself to do so under the terms of a permitted union shop or maintenance of membership contract. This provision contained in the conference agreement would, for example, prevent a labor organization from seeking to compel an employer to hire only union foremen or to discharge foremen who were not members of the union, and in this respect it covers matters which, among others, were dealt with under section 12 of the House bill.

(2) A provision which was contained in the Senate amendment in section 8(b)(2), designed to prevent an employer from discriminating against an employee covered by a union shop agreement, who had been expelled from the union for activities in behalf of another representative, is omitted as unnecessary since there is nothing in the conference agreement which permits an employer to discriminate against an employee who has been expelled for this reason.

(3) Section 8(b)(4) of the conference agreement has been expanded to cover a matter which was covered by section 12 of the House bill, namely, concerted activity by a union or its agents to compel an employer or self-employed person to become a member.

(4) Two additional unfair labor practices are added which were not contained in the Senate amendment but were contained in

the House bill. The first would make it an unfair labor practice for a labor organization or its agents having in effect a permitted union shop or maintenance of membership agreement to require the payment of an initiation fee in an amount which the Board finds excessive or discriminatory under all the circumstances. A similar provision, though broader in its scope, was contained in section 8(c)(2) of the amended Labor Act in the House bill. It is also made an unfair labor practice for a labor organization or its agents to cause or attempts to cause an employer to pay any money or thing of value, in the nature of an exaction, for services which are not performed or not to be performed. This provision derives from the provisions of the House bill relating to "featherbedding" practices.

(5) Both the House bill and the Senate amendment contained provisions designed to protect the right of both employers and labor organizations to free speech. The conference agreement adopts the provisions of the House bill in this respect with one change derived from the Senate amendment. It is provided that expressing any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form, is not to constitute or be evidence of an unfair labor practice if such expression contains no threat of force or reprisal or promise of benefit. The practice which the Board has had in the past of, using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose gave rise to the necessity for this change in the law. The purpose is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination.

(6) Section 8 (d) (2) of the amended Labor Act in the House bill contains a provision which is found in section 8 (2) of the existing law and in section 8 (a) (2) of the Senate amendment and the conference agreement. This provides that an employer is not to be prohibited from permitting employees to confer with him during working hours without loss of time or pay. This contemplates payment not only to individual employees but also to employees acting in a representative capacity in conferring with the employer.

Section 8 (d) (3) of the amended Labor Act in the House bill provided that nothing in the act was to be construed as prohibiting an employer from forming or maintaining a committee of employees and discussing with it matters of mutual interest, if the employees did not have a bargaining representative. This provision is omitted from the conference agreement since the act by its terms permits individual employees and groups of employees to meet with the employer and section 9 (a) of the conference agreement permits employers to answer their grievances.

Section 8 (c) of the House bill contained detailed provisions dealing with the relations of labor organizations with their members. One of the more important provisions of this section—that limiting the initiation fees which a labor organization may impose where a permitted union shop or maintenance of membership agreement is in

effect--is included in the conference agreement (sec. 8 (b) (5)) and has already been discussed. The other parts of this subsection are omitted from the conference agreement as unfair labor practices, but section 9 (f) (6) of the conference agreement requires labor organizations to make periodic reports with respect to many of these matters as a condition or certification and other benefits under the act.

Section 8 (d) of the conference agreement (stating what constitutes collective bargaining) has been discussed supra in connection with the treatment of the definition of "collective bargaining", which was contained in the House bill.

REPRESENTATIVES AND ELECTIONS

Except in one respect, neither the House bill nor the Senate amendment made any change in the provisions of section 9 (a) of the existing act (excluding minor textual changes). That section of existing law provides that representatives designated or selected for the purpose of collective bargaining by a majority of the employees in a unit appropriate for that purpose are to be the exclusive representatives of all of the employees in such unit for collective bargaining. The existing law further provides that an individual employee or group of employees will have the right at any time to present grievances to their employer. But, as pointed out in the committee report on the bill in the House, this provision has not been construed by the Board as authorizing the employer to settle grievances thus presented.

Both the House bill and the Senate amendment amended section 9 (a) of the existing law to specifically authorize employers to settle grievances presented by individual employees or groups of employees, so long as the settlement is not inconsistent with any collective bargaining contract in effect. The Senate amendment contained a further proviso, however, to the effect that the bargaining representative be given opportunity to be present at the adjustment of such grievances.

The conference agreement follows the provisions of the Senate amendment.

Section 9 (b) of the existing law—under which the Board is given power to decide the unit which is appropriate for the purpose of collective bargaining—was amended both by the House bill and the Senate amendment. In the Senate amendment the limitations which were described on the Board's powers in establishing such units were contained in a proviso to section 9 (b), while in the House bill the applicable limitations were contained in section 9 (f).

Under section 9 (f) of the House bill the powers of the Board were circumscribed as follows:

> (1) With certain exceptions, the Board was prevented from certifying as the representative of employees of one employer a representative that had been certified as the representative of employees of a competing employer. It was this provision of the House bill which, among others, dealt with the question of industry-wide bargaining. It is omitted from the conference agreement.
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> (2) Under section 9 (f) (2) in the House bill provision was made, upon application of any interested person, for a separate ballot for any craft, department, trade, calling, profession, or

other distinguishable group, and the Board was directed to exclude any such group from the bargaining unit proposed to be established if less than a majority of the employees in it who cast ballots voted for the representative certified by the Board for the rest of the unit. The Board has heretofore, under the so-called "*Globe* doctrine" (3 N.L.R.B. 294 (1937)) provided for separate ballots for crafts and it sometimes applies the same principle to groups other than crafts. It also regularly excludes from larger units groups and individuals whose circumstances differ materially from those of the more numerous members of the unit. The provisions of section 9 (f) (2) of the House bill were designed to establish this principle in the law itself and broaden its application so as to give to groups of employees having common characteristics and interests different from those of the more numerous members of a proposed unit a greater freedom of choice in selecting their representatives than has heretofore been permitted.

The conference agreement, in section 9 (c) (2), covers in specific terms the matter of crafts and professional employees. In the case of the former the conference agreement provides that the Board cannot decide that a craft unit is inappropriate for collective bargaining on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation. In the case of the latter the Board cannot include both professional employees and employees who are not professional employees in the same unit, unless a majority of the professional employees vote for inclusion therein.

Neither the omission from the conference agreement of section 9 (f) (2) of the House bill, nor the particular limitations on the power of the Board under section 9 (b) of the conference agreement, are intended to indicate that only in the specified cases should the Board establish separate units or exclude employees from units for which it certifies representatives. It must be emphasized that one of the principal purposes of the National Labor Relations Act is to give employees full freedom to choose or not to choose representatives for collective bargaining. As has already been pointed out in the discussion of section 7, the conference agreement guarantees in express terms the right of employees to refrain from collective bargaining or concerted activities if they choose to do so. This additional guaranty—recognizing and protecting, as it does, the rights and interests of individuals and minorities—will, it is believed, through wise administration result in a substantially larger measure of protection of those rights when bargaining units are being established than has heretofore been the practice.

The conference agreement, in section 9 (b), contains one further provision covering a particular classification of employees who were dealt with in the House bill in the definition of "supervisor". Under that definition individuals employed for police duties came within the definition of "supervisor". The conference agreement represents a compromise on this matter. It provides that the Board cannot decide that any unit is appropriate for collective bargaining if it includes, together with other employees, any individual employed as a guard to enforce against

employees and other persons rules to protect property belonging to the employer or for which the employer is responsible, or to protect the safety of persons on the employer's premises. It is further provided that no labor organization can be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(3) Under section 9 (f) (3) in the House bill it was provided that, in determining whether a unit is appropriate for collective bargaining, the extent to which employees had organized should not be controlling. There was no comparable provision in the Senate amendment. The conference agreement, in section 9 (c), contains this provision of the House bill.

(4) Under the House bill, in section 9 (f) (4), it was provided that the Board was to apply the same regulations and rules of decision, in determining whether a question of representation affecting commerce exists, regardless of the identity of the person or persons filing the application or the kind of relief sought. It was further provided that employees were not to be denied the right to designate or select a representative of their own choosing by reason of an order of the Board with respect to such representative or its predecessor that would not have issued in similar circumstances with respect to a labor organization national or international in scope, or affiliated with such an organization. The Senate amendment, in section 9 (c) (2), contained a provision having the same purpose. Both the House provision and the Senate provision were directed to the practice of the Board in denying employees the right to vote for independent labor organizations in respect of which orders had been issued by the Board under section 8 (1) or 8 (2) finding employer domination, where under similar circumstances it did not apply the same rule to unions affiliated with one of the national labor organizations. Under the House bill and the Senate amendment the Board was directed to apply the same rules to both. The conference agreement, in section 9 (c) (2), contains a provision having the same purpose and effect.

(5) The House bill, in section 9 (f) (5), provided a new rule for run-off elections. A run-off was not permitted unless within 60 days following the first election a representative receiving votes in the first election furnished to the Board satisfactory evidence that it represented more than 50 precent of the employees in the bargaining unit in question. The run-off was to be between such representative and no representative. The Senate amendment, in section 9 (c) (3), directed that, where a run-off election was conducted, the ballot should provide for a selection between the two choices receiving the largest and second largest number of valid votes cast in the previous election. The conference agreement adopts the provisions of the Senate amendment.

(6) Under the House bill, in section 9 (f) (6), no labor organization could be certified if one or more of its national or international officers, or one or more of the officers of the organization designated on the ballot, was or ever had been a member of the Communist Party or by reason of active and consistent promotion

or support of the policies of the Communist Party could reasonably be regarded as being a member of or affiliated with such party, or believed in or was or ever had been a member of or supported any organization that believed in or taught, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The Senate amendment, in section 9 (h), contained a similar provision, differing from the House bill only in not imposing the requirement that an officer "never has been" one of the described individuals. The conference agreement, in section 9 (h), contains a provision directed to this problem covered by both the House bill and the Senate amendment, and provides that no investigation shall be made by the Board of any question affecting commerce concerning the representation of employees raised by a labor organization under section 9 (c), no union shop or maintenance of membership agreement petition can be entertained under section 9 (e) (1) (hereafter discussed), and no complaint can be issued pursuant to a charge made by labor organization under section 10 (b), unless there is on file with the Board an affidavit executed contemporaneously or within the preceding 12-month period by each officer of the labor organization in question and the officers of any national or international labor organization of which it is an affiliated or constituent unit, that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of, or support, any organization that believes in, or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code (prescribing penalties for false statements made to induce official action) are to be applicable in respect to such affidavits, and if an officer of a labor organization files a false affidavit with the Board, he will be subject to the penalties prescribed in section 35 A of the Criminal Code.

The "ever has been" test that was included in the House bill is omitted from the conference agreement as unnecessary, since the Supreme Court has held that if an individual has been proved to be a member of the Communist Party at some time in the past, the presumption is that he is still a member in the absence of proof to the contrary.

(7) Under the House bill, in section 9(f)(1), it was provided that no election could be directed in any bargaining unit or any subdivision thereof within which, in the preceding 12-month period, a valid election had been held, except upon a petition by employees requesting "de-certification" of a representative. The Senate amendment, in section 9(c)(3), contained a similar provision without the exception. The conference agreement adopts the provisions of the Senate amendment. The Senate amendment also contained a provision that employees on strike who were not entitled to reinstatement should not be permitted to vote unless the strike involved an unfair labor practice on the part of the employer. This provision is also included in section 9(c) of the conference agreement with the "unless" clause omitted. The inclusion of such clause would have had the effect of precluding the Board from changing its present practice with respect to the

treatment of "unfair labor practice" strikers as distinguished from that accorded to "economic" strikers.

(8) Under the House bill, in section 9(f)(8), it was provided that if a new representative were chosen while a collective bargaining agreement was in effect with another representative, certification of the new representative should not become effective unless such new representative became a party to such contract and agreed to be bound by its terms for the remainder of the contract period. Since the inclusion of such a provision might give rise to an inference that the practice of the Board, with respect to conducting representation elections while collective bargaining contracts are in effect, should not be continued, it is omitted from the conference agreement.

Both the House bill and the Senate amendment in section 9(c) of the amended Labor Act provided that petitions under section 9 could be filed by employees or labor organizations wishing an election to designate a representative, by employees or labor organizations wishing to provide for the "de-certification" of an existing representative, and by an employer to whom a representative has presented a claim requesting recognition as the representative for collective bargaining. Investigations of such petitions under the House bill were conducted by the Administrator provided in the House bill. Under the Senate amendment investigations were conducted by the Board. Both under the House bill and the Senate amendment if there was reasonable cause to believe that a question of representation affecting commerce existed a hearing was to be held. Under the Senate amendment it was provided that such hearing could be conducted by an officer or employee in the regional office who, when he reported to the Board with respect thereto, was prohibited from making any recommendations. Both the House bill and the Senate amendment provided that if the Board found upon the hearing that a question of representation existed a secret ballot should be held and the results thereof certified.

The conference agreement, in section 9(c), follows the provisions of the Senate amendment, most of which, as indicated, were also contained in the House bill. The remaining portions of section 9(c) of the conference agreement have already been discussed in connection with the treatment of the provisions which were contained in section 9(f) of the House bill.

Section 9(d) in the conference agreement, except for clerical changes, is the same as section 9(c) in the House bill, section 9(d) in the Senate amendment, and section 9(d) of existing law.

Section 9(g) in the House bill provided for the so-called "union shop" election. This provision, together with the provisions of section 8(d)(4) in the House bill, provided a somewhat different procedure for authorization of union shop and maintenance of membership contracts than did the Senate amendment. Under the House bill the employer had to agree to a union shop or maintenance of membership provision in the contract before an election with respect thereto could be held. An election under section 9(g) was for the purpose of authorizing such provision to be carried into effect. The petition for the election was required to be filed under oath and had to state that the agreement of the employer was not secured, either directly or indirectly, by means of a strike or a threat thereof. The provisions of the agreement providing for a union shop could be carried out only if upon a secret

ballot taken a majority of all of the employees in the bargaining unit in question voted in favor thereof, and the election was effective only for the period of the contract in which the union shop agreement was included, or for 2 years if the contract was for a longer period. Under the Senate amendment (sec. 9(e)) the "union shop" election was to be held for the purpose of authorizing the labor organization to make a union shop or maintenance of membership agreement with the employer and did not have the effect of preventing strikes to secure such an agreement. Like the House bill, the agreement was exempted from the general prohibitions of section 8(a)(3) (prohibiting discrimination by reason of membership or nonmembership in labor organizations) only if a majority of the employees eligible to vote had authorized the labor organization in question to make such an agreement. Under the Senate amendment, once this authorization had bee given, it continued in effect until, upon a secret ballot conducted as a result of the filing of a "de-authorization" petition, a majortiy of the employees eligible to vote had not voted in favor of the authorization. As in the case of the representation elections, the Senate amendment in section 9(e) provided that no election in respect of the union shop could be conducted in any bargaining unit or any subdivision thereof within which, in the preceding 12-month period, a valid election had been held.

The conference agreement (sec. 9(e)) follows the pattern of the Senate amendment with two clarifying changes. The conference agreement requires that the petition for the election (which includes a "de-authorization" petition) must be filed by or on behalf of not less than 30 percent of the employees in the bargaining unit. The conference agreement further provides that the Board can order an election under these provisions only if no question of representation exists. The particular problem dealt with in this latter clarification was provided for in the House bill by the requirement that only certified bargaining agents could make union shop agreements and petition for elections to authorize their execution.

Section 9 (f) of the Senate amendment required labor organizations to file certain information and financial reports with the Secretary of Labor in order to be eligible for certification or have charges processed in their behalf. It was further provided that copies of the financial report be furnished to all members of the labor organization. Provision was made that such information be kept current by annual reports.

The House bill (sec. 303) also contained a provision requiring reports by labor organizations, but did not make the filing of such reports a condition of certification or other benefits.

The conference agreement (sec. 9 (f) and (g)) adopts the provisions of the Senate amendment with three changes therein. *First*, the filing of the information and reports is made a condition of eligibility for requesting a union shop election, in addition to eligibility for filing petitions for representation and eligibility for making changes. *Second*, it is provided that not only the particular labor or international labor organization of which it is an affiliate or constituent unit, must file the required information and reports. *Third*, there are added to the matters, with respect to which information must be filed, detailed statements of, or reference to, the provisions of the

organization's constitution and bylaws, showing the procedure followed with respect to most of the matters which were covered in section 8 (c) in the House bill (the section dealing with the relations between labor organizations and their members).

PREVENTION OF UNFAIR LABOR PRACTICES

Both the House bill and the Senate amendment in section 10 provided, as does section 10 of the present act, for the prevention of unfair labor practices. The House bill, by reason in part of division of functions between the Board and the Administrator provided for therein, completely recast the procedure in section 10. It also made a number of other important changes, as did the Senate amendment. The treatment under the conference agreement of the provisions in the House bill relating to the Administrator have already been discussed. The other matters dealt with in section 10 of the House bill and the Senate amendment are treated as follows:

(1) The House bill omitted from section 10 (a) of the existing law the language providing that the Board's power to deal with unfair labor practices should not be affected by other means of adjustment or prevention, but it retained the language of the present act which makes the Board's jurisdiction exclusive. The Senate amendment, because of its provisions authorizing temporary injunctions enjoining alleged unfair labor practices and because of its provisions making unions suable, omitted the language giving the Board exclusive jurisdiction of unfair labor practices, but retained that which provides that the Board's power shall not be affected by other means of adjustment or prevention. The conference agreement adopts the provisions of the Senate amendment. By retaining the language which provides the Board's powers under section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies.

(2) The Senate amendment contained a proviso at the end of section 10(a) authorizing the Board to cede jurisdiction over any cases in any industry to State and Territorial agencies, subject to two conditions: (*a*) That it can cede jurisdiction in cases arising in mining, manufacturing, communications, and transportation only when the employer's operations are predominantly local in character, and (*b*) that it may cede jurisdiction only if the applicable provisions of the State or Territorial statute and the rules of decision thereunder are consistent with the corresponding provisions of the National Act, as interpreted and applied by the Board and by the courts. The House bill contained no provision corresponding with the proviso of section 10(a) of the Senate amendment. The conference agreement adopts this proviso.

(3) Section 10(b) of the amended act under the House bill contemplated that, in unfair practice cases, the Administrator would investigate charges, issue complaints, and prosecute cases. The Senate amendment did not contain comparable provisions. As previously noted, the conference agreement contemplates that these duties will be performed under the exclusive and independent direction of the General Counsel of the Board, an official appointed by the President by and with the advice and consent of the Senate.

(4) The House bill provided that a person complained of in an unfair labor practice case would have 20 days to answer the complaint and required the Board to give not less than 15 days' notice of hearings. The Senate amendment made no change in existing law in these respects. The conference agreement contains the provisions of the Senate amendment and of existing law in these respects.

(5) The House bill provided, in section 10(b), that no complaint should issue stating a charge of an unfair labor practice that occurred more than 6 months before the charge was filed, or based on a charge that was filed more than 6 months before the complaint issued. The Senate amendment also provided that no complaint should issue based upon any unfair labor practice occurring more than 6 months before the filing of the charge and the service of a copy of the charge upon the person against whom the charge was made, except in cases of veterans, who received special treatment.

The provision of the House bill that required that the complaint issue within 6 months after the filing of the charge was designed to forestall the accumulation of back-pay claims by reason of delay in prosecuting cases. Heretofore this delay has been confined chiefly to one regional office of the Board, and the Board, itself, has had the practice in the past of mitigating such claims when it was responsible for delay. Since it is anticipated that the increased membership of the Board and other changes in the administrative provisions of the act will expedite the Board's business, the conference agreement omits the provision of the House bill respecting the time within which a complaint must issue after a charge is filed, and retains the language of the Senate amendment that requires that charges be filed, and notice thereof be given, within 6 months after the acts complained of have taken place.

(6) The House bill provided, in section 10 (b), that proceedings before the Board should be conducted, so far as practicable, in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure. The Senate amendment retained the language of the present act, which provides that the rules of evidence prevailing in the courts shall not be controlling. The reason for this provision in the House bill was explained in full in the committee report on the bill. If the Board is required, so far as practicable, to act only on legal evidence, the substitution, for example, of assumed "expertness" for evidence will no longer be possible. The conference agreement in section 10 (c) contains this provision of the House bill.

(7) In section 10 (c) the House bill provided that the Board should base its decisions upon the "weight of the evidence". The Senate amendment retained the present language of the act, permitting the Board to rest its orders upon "all the testimony taken". The conference agreement provides that the Board shall act only on the "preponderance" of the testimony—that is to say, on the weight of the credible evidence. Making the "preponderance" test a statutory requirement will, it is believed, have important effects. For example, evidence could not be considered as meeting the "preponderance" test merely by the drawing of "expert" inferences therefrom, where it would not meet that test otherwise. Again, the Board's decisions should show on their face that the statutory requirement has been met—they should indicate an actual weighing of the evidence, setting forth the reasons

for believing this evidence and disbelieving that, for according greater weight to this testimony than to that, for drawing this inference rather than that. Immeasurably increased respect for decisions of the Board should result from this provision.

(8) In section 10 (c) both the House bill and the Senate amendment incorporated language with respect to the Board's remedial orders in cases of unfair labor practices by labor organizations. The House bill provided that, in addition to ordering respondents to cease and desist from unfair practices, the Board could order employers to take affirmative action to effectuate the purposes of the act, including reinstatement with back pay for employees (a provision appearing in the present act), and could also order representatives and employees to take affirmative action, and deprive them of rights under the act for not more than 1 year. The Senate amendment did not contain the provision specifically authorizing the Board to deprive representatives and employees who engage in unfair practices of rights under the act, but did contain a provision authorizing the Board to require a labor organization to pay back pay to employees when the labor organization was responsible for the discrimination suffered by the employees.

The House bill, by implication, limited the Board in its choice of remedial orders in cases of unfair labor practices by representatives not involving back pay, by specifying but one type of order that the Board might issue. The conference agreement therefore omits this provision of the House bill. As previously stated, employees are subject to the prohibitions of section 8(b), only when they act as agents of representatives, but in these and other cases, when they are disciplined or discharged for engaging in or supporting unfair practices, they do not have immunity under section 7. The language in the Senate amendment without which the Board could not require unions to pay back pay when they induce an employer to discriminate against an employee is included in the conference agreement.

(9) To prevent discrimination by the Board to the disadvantage of independent unions and representation plans, the House bill and the Senate amendment both included in section 10(c) of the amended act, in substantially similar terms, a provision to the effect that no order of the Board should require or forbid any action by an employer with respect to any labor organization that in similar circumstances would not be required or forbidden with respect to a labor organization national or international in scope, or affiliated with such an organization. In the past the Board has made findings of violation of section 8(2) in cases involving independent unions, committees and representation plans upon much weaker evidence than it has required in cases involving affiliated unions, and it has ordered employers to take far more drastic action with respect to independent organizations than with respect to affiliated organizations. The conference agreement adopts the language of the Senate amendment, which requires equal treatment for both affiliated and nonaffiliated organizations. The language of the Senate amendment and the conference agreement in this respect is directed at orders under section 8(a)(1) and section 8(a)(2). This specification is not intended to imply that independent and affiliated unions can or should be treated differently under other provisions. Rather, the language covers the specific abuse which has come to the attention of Congress. It does not invite others.

(10) The House bill also included, in section 10(c) of the amended act, a provision forbidding the Board to order reinstatement or back pay for any employee who had been suspended or discharged, unless the weight of the evidence showed that the employee was not suspended or discharged for cause. The Senate amendment contained no corresponding provision. The conference agreement omits the "weight of evidence" language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence, and simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause. Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause (see *Wyman-Gordon* v. *N.L.R.B.*, 153 Fed. (2) 480), will not be entitled to reinstatement. The effect of this provision is also discussed in connection with the discussion of section 7.

(11) The House bill provided that in proceedings under section 10 a proposed report and recommended order would be filed by the person conducting the hearing on behalf of the Board, and that the recommended order would become final if not excepted to within 20 days. The Senate amendment did not contain any comparable provision. The conference agreement adopts the language in section 10(c) in the House bill in this respect.

(12) Section 10(d) in the House bill and in the Senate amendment contained the language of the present section 10(d) of the act, concerning modification and setting aside by the Board of its findings and orders. The conference agreement includes this language without change.

(13) Section 10(e) in the House bill provided that the Administrator would apply to the courts for orders enforcing the Board's orders, and then only in cases where the person against whom the order was directed failed to comply with it or thereafter violated it. The Senate amendment followed the present language of the act, which permits the Board to petition for enforcement, but does not require it to do so. The conference agreement adopts the language of the Senate amendment.

(14) Under the language of section 10(e) of the present act, findings of the Board, upon court review of Board orders, are conclusive "if supported by evidence." By reason of this language, the courts have, as one has put it, in effect "abdicated" to the Board (*N.L.R.B.* v. *Standard Oil Company*, 138 Fed. (2d) 885 (1943). See also: *Wilson & Co.* v. *N.L.R.B.* (126 Fed. (2d) 114 (1942), *N.L.R.B.* v. *Columbia Products Corp.* (141 Fed. (2d) 687 (1944), *N.L.R.B.* v. *Union Pacific Stages, Inc.* (99 Fed. (2d) 153). In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact (*N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111; *N.L.R.B.* v. *Packard Motor Car Co.*, decided March 10, 1947), or when they rested only on inferences that were not, in turn, supported by facts in the record (*Republic Aviation* v. *N.L.R.B.*, 324 U.S. 793; *Le Tourneau Company* v. *N.L.R.B.*, 324 U.S. 793).

As previously stated in the discussion of amendments to section 10(b) and section 10(c), by reason of the new language concerning the rules of evidence and the preponderance of the evidence, presumed expertness on the part of the Board in its field can no longer be a factor in the Board's decisions. While the Administrative Procedure Act is generally regarded as having intended to require the courts to examine decisions of administrative agencies far more critically than has been their practice in the past, by reason of a conflict of opinion as to whether it actually does so, a conflict that the courts have not resolved, there was included, both in the House bill and the Senate amendment, language making it clear that the act gives to the courts a real power of review.

The House bill, in section 10(e), provided that the Board's findings of fact should be conclusive unless it appeared to the reviewing court (1) that the findings were against the manifest weight of the evidence, or (2) that they were not supported by substantial evidence.

The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evidence on the record considered as a whole. The provisions of section 10(b) of the conference agreement insure the Board's receiving only legal evidence, and section 10(c) insures its deciding in accordance with the preponderence of the evidence. These two statutory requirements in and of themselves give rise to questions of law which the courts will hereafter be called upon to determine—whether the requirements have been met. This, in conjunction with the language of the Senate amendment with respect to the Board's findings of fact—language which the conference agreement adopts—will very materially broaden the scope of the courts' reviewing power. This is not to say that the courts will be required to decide any case de novo, themselves weighing the evidence, but they will be under a duty to see that the Board observes the provisions of the earlier sections, that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. The language also precludes the substitution of expertness for evidence in making decisions. It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in *N.L.R.B.* v. *Nevada Consol. Copper Corp.* (316 U.S 105) and in the *Wilson*, *Columbia Products*, *Union Pacific Stages*, *Hearst*, *Republic Aviation*, and *Le Tourneau*, etc., cases, supra, without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into section 10(e) of the amended act.

(15) The House bill in section 10(f) of the amended Labor Act made it possible for employees and labor organizations, as well as employers, to obtain court review of certifications by the Board of exclusive bargaining representatives, and enabled employers to obtain such review without going through an unfair practice case under section 8(5). The Senate amendment did not contain any corresponding provision. The conference agreement omits this provision of the House bill.

(16) The conference agreement makes the same change in section

10(f) concerning the conclusiveness of the Board's findings as is made in section 10(e).

(17) Sections 10 (g), (h), and (i) of the present act, concerning the effect upon the Board's orders of enforcement and review proceedings, making inapplicable the provisions of the Norris-La Guardia Act in proceedings before the courts, were unchanged either by the House bill or by the Senate amendment, and are carried into the conference agreement.

(18) The Senate amendment, in a new section 10(j), gave to the Board general power, upon issuing a complaint alleging an unfair labor practice, to petition the appropriate district court for temporary relief or restraining order, and gave the courts jurisdiction to grant such relief or restraining order. The House bill contained no comparable provision. The conference agreements adopts this provision of the Senate amendment.

(19) The Senate amendment also contained a new section 10(k), which had no counterpart in the House bill. This section would empower and direct the Board to hear and determine disputes between unions giving rise to unfair labor practices under section 8(b)(4)(D) (jurisdictional strikes). The conference agreement contains this provision of the Senate amendment, amended to omit the authority to appoint an arbitrator. If the employer's employees select as their bargaining agent the organization that the Board determines has jurisdiction, and if the Board certifies that union, the employer will, of course, be under the statutory duty to bargain with it.

(20) Section 10(l) of the Senate amendment directed the Board to investigate forthwith any charge of unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b) of the conference agreement, with deals with certain boycotts and with certain strikes to force recognition of uncertified labor organizations and which has been discussed in connection with that section of the conference agreement. It directed the representative of the Board who makes the investigation, if he found that a complaint should issue, to petition the appropriate district court of the United States for injunctive relief pending the final adjudication of the Board with respect to such matter, and gave the courts jurisdiction to enjoin the practices complained of. The Senate amendment provided that a similar procedure, when appropriate, should apply to charges under section 8(b)(4)(D) of the conference agreement. As stated above, the House bill, in section 12, provided for injunctions at the request of private persons, rather than by the Board, in cases like these. The conference agreement adopts the procedure of the Senate amendment. The power of the Board under this provision will not affect the availability to private persons of any other remedies they might have in respect to such activities.

INVESTIGATORY POWERS

Section 11 of the existing National Labor Relations Act contains provisions authorizing the Board to conduct hearings and investigations and to subpena witnesses. Also, it provides for enforcement of subpenas and provides for the manner in which complaints, orders, and other processes of the Board shall be served.

The Senate amendment, in section 11, made no change in the provisions of existing law. The House bill, in section 11, made several changes in addition to those made necessary by the division of functions under the House bill between the Board on the one hand and the Administrator on the other. *First*, the subpena power in connection with investigations was limited to investigations under section 9. *Second*, it was required that upon application of any party, subpenas be issued to him as a matter of course, and a procedure was established whereby a person subpenaed could move to quash the subpena if the evidence covered thereby did not relate to any matter under investigation or in question or if it did not describe with sufficient particularity the evidence whose production was required. *Third*, a provision in existing law under which the several departments and agencies of the Government are required to furnish to the Board, when directed by the President, records, papers, and information in their possession relating to any matter before the Board was omitted.

The conference agreement follows the provisions of existing law and the Senate amendment with the addition thereto of provisions requiring the issuance of subpenas as a matter of course on the request of any party, as was provided in the House bill.

The Senate amendment did not make any change in section 12 of the existing National Labor Relations Act making it unlawful to impede any member of the Board or any of its agents in the performance of their duties under the act. This provision of existing law was omitted from the House bill. The conference agreement contains this provision of existing law.

UNLAWFUL CONCERTED ACTIVITIES

The House bill, in a new section 12 of the National Labor Relations Act, set forth certain activities which were treated as unlawful. Persons engaging in them were made subject to civil suit for damages on the part of persons injured thereby. It was provided that the Norris-La Guardia Act should be inapplicable in respect of any action or proceeding involving any such activity, and any person who was found to have engaged in any such activity was to be subject to deprivation of rights under the act to the same extent as a person under the House bill found to have engaged in an unfair labor practice under section 8(b) or 8(c).

The activities which were treated as unlawful under this section were:

(1) By use of force or violence or threats thereof, preventing or attempting to prevent individuals from quitting or continuing their employment or from accepting or refusing employment; or by the use of force, violence, physical obstruction, or threats thereof, preventing or attempting to prevent any individual from entering or leaving an employer's premises; or picketing an employer's premises in numbers or in a manner otherwise than should be reasonably necessary to give notice of the existence of a labor dispute; or picketing or besetting the home of any individual in connection with a labor dispute.

(2) Picketing an employer's premises where the employer was not involved in a labor dispute with his employees.

(3) Authorizing, participating in, or assisting any sympathy strike, jurisdictional strike, monopolistic strike, sit-down strike, or illegal boycott, or any strike to compel an employer to accede to featherbedding practices, or any strike having as an objective compelling an employer to recognize for collective bargaining an uncertified representative or having as an objective the remedying of practices for which an administrative remedy was provided by the act, or having as an objective compelling an employer to violate any law.

(4) Any conspiracy or common arrangements between competing employers to fix or agree to terms or propose terms of employment where the employees of such competing employers were not permitted under the bill to designate a common representative.

Many of the matters covered in section 12 of the House bill are also covered in the conference agreement in different form, as has been pointed out above in the discussion of section 7 and section 8(b)(1) of the conference agreement. Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee for any such reason is protected in specific terms in section 10(c). Furthermore, under section 10(k) of the conference agreement, the Board is given authority to apply to the district courts for temporary injunctions restraining alleged unfair labor practices temporarily pending the decision of the Board on the merits.

The provisions of section 12 treating "monopolistic strikes" as unlawful concerted activities involved the matter of industry-wide bargaining, and this subject matter has been omitted from the conference agreement.

LIMITATIONS

Section 13 of the existing National Labor Relations Act provides that nothing in the act is to be construed so as to either interfere with or impede or diminish in any way the right to strike. Under the House bill, in section 12(c), a provision was included to the effect that except as specifically provided in section 12 nothing in the act should be so construed. Under the Senate amendment, in section 13, section 13 of the existing law was rewritten so as to provide that except as specifically provided for in the act, nothing was to be construed so as either to interfere with or impede or diminish in any way the right to strike. The Senate amendment also added one other important provision to this section, providing that nothing in the act was to affect the limitations or qualifications on the right to strike, thus recognizing that the right to strike is not an unlimited and unqualified right. The conference agreement adopts the provisions of the Senate amendment.

Section 14 of the Senate amendment contained a provision to the effect that nothing in the act was to be construed so as to prohibit supervisors from becoming or remaining members of labor organizations, but that employers should not be compelled to consider in-

dividuals defined as supervisors as employees for the purposes of any law, either national or local, relating to collective bargaining. There was nothing in the Senate amendment which would have the effect of prohibiting supervisors from becoming members of a labor organization, and the first part of this provision was included presumably out of an abundance of caution. The House bill had a similar policy on the power of State agencies, as was explained in the House committee report in the discussion of section 10(a). The conference agreement adopts the provisions of the Senate amendment.

Under the House bill there was included a new section 13 of the National Labor Relations Act to assure that nothing in the act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement in any State where the execution of such agreement would be contrary to State law. Many States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal. It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. Neither the so-called "closed shop" proviso in section 8(3) of the existing act nor the union shop and maintenance of membership proviso in section 8(a)(3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy. To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14(b), contains a provision having the same effect.

Under the Senate amendment section 15 of the existing law, which relates to the relationship between the National Labor Relations Act and the reorganization provisions of the Bankruptcy Act, was rewritten to bring it up to date, the Bankruptcy Act having been amended in material respects since the original enactment of the National Labor Relations Act. This provision was not contained in the House bill. The conference agreement adopts the provisions of the Senate amendment.

Sections 14 and 15 of the House bill on the one hand and sections 16 and 17 of the Senate amendment on the other were the same as sections 16 and 17 of the existing law. These provisions are included in the conference agreement as sections 16 and 17.

EFFECTIVE DATE

Section 102 of the House bill contained provisions designed to facilitate the change-over from the old act to the amended act. This section of the House bill also abolished the existing National Labor Relations Board, but the treatment of this provision in the House bill by the conference agreement has already been discussed.

The amended act was not to take effect until 30 days after the date upon which a majority of members of the proposed new Board qualified and took office, or 90 days after the date of the bill's enactment, whichever occurred first. After the effective date proceedings under the old act were to continue under the amended act only if they could have been maintained if initiated under the amended act, and a similar

policy was described with respect to proceedings to enforce orders of the old Board.

Provision was also made for the effect of the amended act upon existing "closed shop" and other compulsory unionism agreements, and for the effect of the amended act upon existing certifications. These matters are discussed below in connection with the discussion of sections 102 and 103 of the Senate amendment.

The Senate amendment did not contain any postponed effective date—that is to say, the amended act was to become effective upon the bill's enactment. Section 102 of the Senate amendment provided that the amended act performed prior to the date of the bill's enactment which did not constitute an unfair labor practice prior thereto. It further provided that the new section 8(a)(3) (containing the union shop proviso in place of the "closed shop" proviso of existing law) should not make an unfair labor practice the performance of any obligation entered into prior to the date of the bill's enactment unless the agreement was renewed or extended subsequent thereto.

Section 103 of the Senate amendment provided that the amended act should not affect any certification of representatives or determination as to appropriate collective bargaining units made under existing law until 1 year after the date of certification or (if in respect to the certification a collective bargaining contract was entered into prior to the bill's enactment) until the end of the contract period or until 1 year after the date of enactment, whichever first occurred.

The conference agreement, in section 104, provides that the amendments made to the National Labor Relations Act shall take effect 60 days after the date of the bill's enactment, but authority is given to the President to appoint the two additional members of the Board and to appoint the General Counsel of the Board within this 60-day period.

Section 102 of the conference agreement provides that the amended act shall not be deemed to make an unfair labor practice any act which was performed prior to the date of the bill's enactment which did not constitute an unfair labor practice prior thereto. In the case of section 8 (a) (3) and section 8 (b) (2) of the amended act, it is specifically provided that the performance of any obligation under a collective bargaining agreement entered into prior to the date of the bill's enactment, or (in the case of an agreement for a period of not more than 1 year) entered into on or after such date of enactment but prior to the effective date, shall not constitute an unfair labor practice unless the agreement was renewed or extended subsequent thereto.

Section 103 of the conference agreement, relating to the effect of the amendments upon existing certifications, is the same (with clarifying changes) as section 103 of the Senate amendment.

TITLE II—CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECTING COMMERCE; NATIONAL EMERGENCIES

Title II of both the House bill and the Senate amendment contained provisions creating a new independent conciliation service, and also provisions for the treatment of strikes affecting the national health or safety. Under the House bill the new service was to be known as

the Office of Conciliation. Under the Senate amendment it was to be known as the Federal Mediation Service. Both bills provided for a Director to be the head of the new service, to be appointed by the President, by and with the advice and consent of the Senate, and to receive compensation at the rate of $12,000 per annum. Both the House bill and the Senate amendment transferred all of the existing functions of the United States Conciliation Service in the Department of Labor to the new independent agency created.

Since the conference agreement in general follows the provisions of the Senate amendment with respect to this service, the Senate amendment in this regard will be described, with changes therefrom made by the conference agreement noted. Section 201 of the Senate amendment contained a statement of policy which also appears unchanged in the conference agreement.

Section 202 of the Senate amendment created an independent agency to be known as the Federal Mediation Service and to be operated by a single official, called the Director, to be appointed by the President, with the advice and consent of the Senate. The functions of the existing Conciliation Service were transferred to the Director, the transfer to take effect upon the sixtieth day after the date of the bill's enactment. The only change made by the conference agreement in this section of the Senate amendment is in the name of the new service. Under the conference agreement the new service is to be known as the Federal Mediation and Conciliation Service.

Section 203 of the Senate amendment described the functions of the new service and emphasized the duty of the Service to interfere only where a dispute threatened to cause a substantial interruption of interstate commerce. It provided that if the parties could not be brought to direct settlement by conciliation or mediation the Service was authorized to seek to induce the parties to submit the dispute to voluntary arbitration. Provision was made for the payment by the United States of not to exceed $500 as a contribution to the cost of an arbitration proceeding. The conference agreement, in section 203, does not mention arbitration as such but provides that if the parties cannot be brought to settlement by conciliation and mediation the Service shall seek to induce them voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion. The failure or refusal of either party to agree to any procedure suggested by the Director is not to be deemed a violation of any duty or obligation imposed, and the conference agreement omits the provision contained in the Senate amendment relating to the contribution by the United States to defray the costs of arbitration proceedings.

One important duty of the Director which was not included in the Senate amendment is included in the conference agreement and is derived from the provisions of the House bill providing for a secret ballot by employees upon their employer's last offer of settlement before resorting to strike. Under the conference agreement it is the duty of the Director, if he is not able to bring the parties to agreement by conciliation within a reasonable time, to seek to induce them to seek other means of settling the dispute, including submission to the employees in the bargaining unit of the employer's last offer of settlement for refusal or for approval or rejection in a secret ballot. While the vote on the employer's last offer by secret ballot is not compulsory as it was in the House bill, it is expected that

this procedure will be extensively used and that it will have the effect of preventing many strikes which might otherwise take place.

Section 204 of the Senate amendment stated that it should be the duty of employers and employees, and their representatives, to exert every reasonable effort to settle their differences by collective bargaining, and, if this should fail, to utilize the assistance of the Mediation Service. This provision is also included in section 204 of the conference agreement, but there has been omitted therefrom language which appeared in the Senate amendment which indicated that the parties were under a duty to submit grievance disputes to arbitration.

Section 205 of the Senate amendment created an advisory committee for the new Service composed of management and labor representatives. This group was called "The National Labor-Management Panel". The panel was to be composed of 12 members, all appointed by the President, and it was made their duty, at the request of the Director, to advise in the avoidance of industrial controversies in the manner in which mediation and voluntary arbitration should be administered. Section 205 of the conference agreement follows the provisions of the Senate amendment, except that specific reference to "voluntary arbitration" is omitted.

NATIONAL EMERGENCIES

Sections 203 to 206, inclusive, of the House bill gave the President, through the district courts of the United States, power to deal with strikes that resulted in or imminently threatened to result in the cessation or substantial curtailment of interstate or foreign commerce in essential public services. Provision was made for mediation of the dispute after the injunction had issued, and for a secret ballot of the employees on their employer's last offer of settlement if mediation did not result in an agreement. If the employer's last offer was rejected by the employees, provision was made for the convening by the chief justice of the United States Court of Appeals for the District of Columbia of a special advisory settlement board to investigate the dispute and to make recommendations for its settlement. Another secret ballot by the employees was provided on the question whether they desired to accept the recommended settlement. At the conclusion of the proceedings provided for, the Attorney General was directed to move the court to discharge the injunction and the injunction was to be discharged. These provisions were not to apply to any person or dispute subject to the Railway Labor Act.

Sections 206 to 210, inclusive, of the Senate amendment contained provisions dealing with this same problem. The Senate amendment was limited in its application to threatened or actual strikes or lockouts affecting an entire industry engaged in trade, commerce, transportation, transmission, or communications among the several States, and the power to invoke these emergency provisions was lodged in the Attorney General rather than in the President. The conference agreement in general follows the provisions of the Senate amendment, with changes therein which will be hereafter noted.

Section 206 of the Senate amendment authorized the Attorney General, whenever he deemed that a threatened or actual strike or lock-out affecting an entire industry would imperil the national health or safety, to appoint a board of inquiry to inquire into the issues involved in the dispute. The board of inquiry was directed to investi-

gate the matter and make a report to the Attorney General. The report was to include a statement of facts and a statement of the respective positions of the parties, but was not to contain any recommendations. Under section 206 of the conference agreement the authority is lodged in the President rather than in the Attorney General, and the report which the board of inquiry is to make is to include each party's statement of his own position. Like the provisions of the Senate amendment, the report of the board of inquiry cannot contain any recommendations. Furthermore, under the conference agreement the authority of this section may be invoked not alone when an entire industry is involved but where a substantial part of an entire industry is involved.

Section 207 of the Senate amendment provided for the composition of the board of inquiry, their compensation, and their powers to compel testimony. This section appears unchanged as section 207 of the conference agreement.

Section 208 of the Senate amendment authorized the Attorney General, upon receiving the report of the board of inquiry, to apply to the appropriate district court for an injunction enjoining the strike or lock-out, and the court was authorized to issue the injunction if it found that the strike or lock-out affected the entire industry and would imperil the national health or safety. The Norris-LaGuardia Act was made inapplicable. Section 208 of the conference agreement follows the provisions of the Senate amendment except that, as heretofore stated, the authority is lodged in the President rather than in the Attorney General, and the injunction can issue if the strike or lock-out affects an entire industry or a substantial part thereof.

Section 209 of the Senate amendment provided that, after the district court had issued an injunction, it should be the duty of the parties to make every effort to adjust and settle their differences with the assistance of the new Federal Mediation Service. Neither party was to be under any duty to accept, either in whole or in part, any proposal of settlement made by the Service. Furthermore, after an injunction had issued, the Attorney General was directed to reconvene the board of inquiry. At the end of a 60-day period (unless the dispute had been settled in the meantime) the board of inquiry was directed to report to the President the current position of the parties and the efforts which had been made for settlement. Such report was to be made public. Within the succeeding 15 days a secret ballot was to be taken of the employees of each employer involved in the dispute on the question of whether they desired to accept the final offer of settlement made by their employer. The conference agreement, in section 209, follows the provisions of the Senate amendment, with the authority lodged in the President rather than the Attorney General, and with the requirement that the board of inquiry include in its report a statement by each party of his own position. It is provided in the conference agreement that the employees vote on the employer's offer as stated by him.

Section 210 of the Senate amendment provided that upon certification of the results of the balloting under section 209 the injunction was to be discharged, and a full and comprehensive report of the whole matter was to be made to Congress. This provision is also included in the conference agreement, with only textual changes to conform this section to the policy of lodging the authority in the President rather than the Attorney General.

Section 211 of the Senate amendment contained a provision requiring the Bureau of Labor Statistics to maintain a file containing copies of collective agreements and arbitration awards, which would be made available to the public unless involving information received in confidence. There was no comparable provision in the House bill. The conference agreement contains the provisions of the Senate amendment with minor clarifying changes.

Section 212 of the Senate amendment contained a provision stating that title II was not to be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act. As previously noted, a similar provision, more restricted in scope, was contained in section 205 of the House bill. The conference agreement adopts the provision of the Senate amendment.

TITLE III

Section 301 of the House bill contained a provision amending the Clayton Act so as to withdraw the exemption of labor organizations under the antitrust laws when such organizations engaged in combinations or conspiracies in restraining of commerce where one of the purposes or a necessary effect of the combination or conspiracy was to join or combine with any person to fix prices, allocate costs, restrict production, distribution, or competition, or impose restrictions or conditions upon the purchase, sale, or use of any product, material, machine, or equipment, or to engage in any unlawful concerted activity (as defined in sec. 12 of the National Labor Relations Act under the House bill). Since the matters dealt with in this section have to a large measure been effectuated through the use of boycotts, and since the conference agreement contains effective provisions dealing with boycotts themselves, this provision is omitted from the conference agreement.

SUITS BY AND AGAINST LABOR ORGANIZATIONS

Section 302 of the House bill and section 301 of the Senate amendment contained provisions relating to suits by and against labor organizations in the courts of the United States. The conference agreement follows in general the provisions of the House bill with changes therein hereafter noted.

Section 302(a) of the House bill provided that any action for or proceeding involving a violation of a contract between an employer and a labor organization might be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such contract affected commerce, or the court otherwise had jurisdiction. Under the Senate amendment the jurisdictional test was whether the employer was in an industry affecting commerce or whether the labor organization represented employees in such an industry. This test contained in the Senate amendment is also contained in the conference agreement, rather than the test in the House bill which required that the "contract affect commerce".

Section 302(b) of the House bill provided that any labor organization whose activities affected commerce should be bound by the acts of its agents and might sue or be sued as an entity in the courts of the United States. Any money judgment in such a suit was to enforceable only against the organization as an entity and against its assets and

not against any individual member or his assets. The conference agreement follows these provisions of the House bill except that this subsection is made applicable to labor organizations which represent employees in an industry affecting commerce and to employers whose activities affect commerce, as later defined. It is further provided that both the employer and the labor organization are to be bound by the acts of their agents. This subsection and the succeeding subsections of section 301 of the conference agreement (as was the case in the House bill and also in the Senate amendment) are general in their application, as distinguished from subsection (a).

Section 302 (c) of the House bill contained provisions describing the venue of suits to which labor organizations were parties and section 302 (d) provided for the manner of service of process upon labor organizations. These provisions of the House bill appear unchanged as section 301 (c) and (d) of the conference agreement.

Section 302 (e) of the House bill made the Norris-LaGuardia Act inapplicable in actions and proceedings involving violations of agreements between an employer and a labor organization. Only part of this provision is included in the conference agreement. Section 6 of the Norris-LaGuardia Act provides that no employer or labor organization participating or interested in a labor dispute shall be held responsible for the unlawful acts of their agents except upon clear proof of actual authorization of such acts, or ratification of such acts after actual knowledge thereof. This provision in the Norris-LaGuardia Act was made inapplicable under the House bill. Section 301 (e) of the conference agreement provides that for the purposes of section 301 in determining whether any person is acting as an agent of another so as to make such other person responsible for his actions, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

Section 302 of the Senate amendment contained a provision making it unlawful for any employer to pay any money or thing of value to any representative of his employees employed in an industry affecting commerce, or for any such representative to accept from the employer any money or other thing of value, with certain specified exceptions. The two most important exceptions are (1) those relating to payments to a representative of money deducted from the wages of employees in payment of membership dues in a labor organization if the employer has received from each employee on whose account the deductions are made a written assignment not irrevocable for a period of more than one year or beyond the termination date of the applicable collective agreement, and (2) money paid to a trust fund established by the representative for the sole and exclusive benefit of the employees of such employer and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents). Such a trust fund had to meet certain requirements. Among these requirements were that the fund be held for the purpose of paying for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, or life insurance, more, the detailed basis on which the payments were to be made had

to be specified in a written agreement with the employer and the employees and employers had to be equally represented in the administration of the fund. Provision was made for the breaking of deadlocks on the administration of the fund, and the agreement covering the fund had to contain provisions for annual audit, and a statement of the results of the audit were to be made available for inspection by interested persons.

Violations of this section of the Senate amendment were made punishable by a fine of not more than $10,000 or by imprisonment for not more than one year, or both.

Saving provisions were included to protect existing contracts between employers and employees.

The conference agreement adopts the provisions of the Senate amendment with minor clarifying changes.

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

Section 303 of the Senate amendment contained a provision the effect of which was to give persons injured by boycotts and jurisdictional disputes described in the new section 8(b)(4) of the National Labor Relations Act a right to sue the labor organization responsible therefor in any district court of the United States (subject to the limitations and provisions of the section dealing with suits by and against labor organizations) to recover damages sustained by him together with the costs of the suit. A comparable provision was contained in the House bill in the new section 12 of the National Labor Relations Act dealing with unlawful concerted activities. The conference agreement adopts the provisions of the Senate amendment with clarifying changes.

RESTRICTIONS ON POLITICAL CONTRIBUTIONS

Section 304 of the House bill contained a provision placing on a permanent basis the provisions which were contained in the War Labor Disputes Act, whereby labor organizations were prohibited from making political contributions to the same extent as corporations. In addition, this section extended the prohibition, both in the case of corporations and labor organizations, to include expenditures as well as contributions. Moreover, expenditures and contributions in connection with primary elections and political conventions were made unlawful to the same extent as those made in connection with the elections themselves. There was no comparable provision in the Senate amendment. The conference agreement adopts the provisions of the House bill, with one change. Under the conference agreements expenditures and contributions in connection with primary elections, political conventions, and caucuses are made unlawful to the same extent as those made in connection with the elections themselves. As a clarifying change the definition of a labor organization has been set forth in full rather than incorporating the provision of the National Labor Relations Act.

STRIKES BY GOVERNMENT EMPLOYEES

Section 207 of the House bill made it unlawful for any employee of the United States to strike against the Government. Violations of this section were to be punishable by immediate discharge, forfeiture of all rights of reemployment, forfeiture of civil-service status, and

forfeiture of all benefits which the individual had acquired by virtue of his Government employment. The conference agreement, in section 305, makes it unlawful for any individual employed by the United States or any agency thereof (including wholly owned Government corporations) to participate in any strike against the Government. Violations are to be punishable by immediate discharge and forfeiture of civil-service status, if any, and the individual is not to be eligible for employment by the United States for 3 years.

TITLE IV—CREATION OF JOINT COMMITTEE TO STUDY AND REPORT ON BASIC PROBLEMS AFFECTING FRIENDLY LABOR RELATIONS AND PRODUCTIVITY

Title IV of the Senate amendment created a joint congressional committee consisting of seven members of the Senate Committee on Labor and Public Welfare to be appointed by the President pro tempore of the Senate, and seven members of the House of Representatives Committee on Education and Labor to be appointed by the Speaker. The committee was directed to conduct a survey of the entire field of labor-management relations with particular emphasis upon particular described subjects. The committee was to make a report not later than February 15, 1948, containing the results of the studies, together with its recommendations as to necessary legislation and such other recommendations as it might deem advisable. Authority was granted to hire technical and clerical personnel and to request details of personnel from Federal and State agencies. The committee was granted subpena power and authority to conduct hearings whether or not Congress was in session. An appropriation of $150,000 was authorized to enable the committee to perform its functions.

Title IV of the conference agreement adopts the above provisions of the Senate amendment with one change. The committee is directed to make its final report not later than January 2, 1949.

TITLE V

Section 501 of the Senate amendment contained definitions of terms used in titles II, III, and IV. It should be noted that none of the terms defined, however, have any application to the amendment to section 313 of the Federal Corrupt Practices Act since section 313 of the Corrupt Practices Act is not a part of "this Act".

Section 502 of the Senate amendment contained a provision that nothing was to be construed to require an individual employee to render labor or service without his consent, or to make the quitting of his labor by an individual employee an illegal act. It was further provided that the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at their place of employment should not be deemed a strike under the act.

Section 503 of the Senate amendment contained the usual separability provision.

Sections 501, 502, and 503 of the Senate amendment are contained in the conference agreement with the same section numbers.

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