

Marquette Law Review

Volume 45

Issue 3 *Winter 1961-1962*

Article 2

Select Aspects of the Wisconsin Employment Peace Act

Justin C. Smith

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Justin C. Smith, *Select Aspects of the Wisconsin Employment Peace Act*, 45 Marq. L. Rev. 338 (1962).

Available at: <http://scholarship.law.marquette.edu/mulr/vol45/iss3/2>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

SELECT ASPECTS OF THE WISCONSIN EMPLOYMENT PEACE ACT*

JUSTIN C. SMITH**

The sponsors¹ of the Wisconsin Employment Peace Act² viewed their efforts as "something more than the establishment of a penal code," that is, a mere deterrent³ to industrial strife. This article will treat those provisions of the act which do not speak to recognition of bargaining agent,⁴ the "all union shop,"⁵ or unfair labor practices,⁶ *per se*. Examination will be made of three more or less unrelated sections of Chapter 111 of the Wisconsin Statutes in an effort to contrast the stated purpose of the act with what it has accomplished in practice. Unlike the previous article,⁷ documentation for the author's conclusions must rest heavily on the results of his two-year field study of the act⁸ and less upon administrative decisions.

In their order of consideration, the sections are: (I) Declaration of Policy; (II) Mediation; (III) Arbitration; (IV) Prevention of Unfair Labor Practices; (V) Enforcement under the Act; (VI) Conclusions.

I. POLICY

The wording of the Peace Act is such that little latitude is left to the Wisconsin Employment Relations Board to determine policy. An appraisal of the act would seem to indicate that the legislature reserved to itself the making of policy by precise definitions and by detailed spelling out of the procedure to be followed under the act. Subsequent legis-

*This article is Part II of a two-part series. Part I appeared in Volume 45-2 of the Marquette Law Review.

**Professor of Law, Western Reserve University.

¹ See Smith, *Background and Events Leading up to the Passage of the Wisconsin Employment Peace Act*, 12 LAB. L. J. 23 (1961).

² WIS. STAT. ch. 111 (1959).

³ Statement by Milo K. Swenton, Executive Secretary of the Wisconsin Council of Agriculture, for the author, in the 1957 file in the Western Reserve Law Library.

⁴ WIS. STAT. §§111.06(1)(a), (b), (c) (1) (1959) and WIS. STAT. §111.06(2)(a) (1959).

⁵ WIS. STAT. §111.06(1)(c)(2) (1959).

⁶ WIS. STAT. §111.06(1), (2), (3) (1959).

⁷ Smith, *Unfair Labor Practices in Wisconsin*, 45 MARQ. L. REV. 223 (1961).

⁸ This article is a by-product of a two-year field study evaluating the impact that the Wisconsin Employment Peace Act has had on Wisconsin labor-management relations. The study centered around a series of confrontations with practitioners, judges, and spokesmen for labor and management. In order to achieve uniformity of response a pre-tested questionnaire was employed during the course of the eighty formal interviews which the author held. A copy of this questionnaire is appended to this article. Of those interviewed, four men were Wisconsin Supreme Court Justices, two were Circuit Court Judges, and approximately one-half were attorneys. Selection of those to be interviewed was influenced by a desire to determine the impact of the act throughout the state. Parenthetically, the author wishes to note that of the groups contacted attorneys for the most part proved to be the best informed.

latures have not seen fit to modify the basic provisions of the Peace Act as enacted in 1939. The reason for this policy is undoubtedly attributable to the fact that the Peace Act was the product of forces aligned with the Republican Party, which has remained in power since the passage of the legislation.⁹

The reason for the dearth of administrative decisions interpreting and expanding the act may also lie in the fact that under the statute the Board has neither the power to investigate unfair labor practices nor discretion to hear charges of such practices.

An appraisal of the administration of the Peace Act over the past twenty-two years indicates that the Board has followed closely the statutory direction set forth in Section 111.01, the Declaration of Policy.¹⁰ This section emphasizes four points, the first being that the public has an interest in labor-management relations. Although the Board has not made a clearly formulated statement of this principle, there is considerable evidence from an examination of its case by case approach that a recognition of the public's interest in labor disputes has guided it in reaching decisions.

When specifically questioned as to what the Board recognizes to be the public's interest in a labor dispute, a representative of the Board has suggested that, "The public may well have an interest in the erection of a public school building, the construction of which has been temporarily halted by picketing." Similarly a Board member suggested that, "The public has an interest in a strike situation in which violence has been introduced."

A second policy consideration enumerated in Section 111.01 is that: [Certain] employers, including farmers and farm co-operatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate consideration.

Here again, although there is no announced Board policy, the Board's position can be synthesized from situations in which it has acted. From a review of the Board decisions in this area and conversations with Board members and parties involved, it is learned that the Board has not given special consideration to this group of employers. In defense of the Board's position it should be stated that the act itself, although calling attention to the problems of this group, does not afford the Board any special power with which to act. Although the act does provide that unions representing employees working in this industry give the Board notice of intention to strike,¹¹ the Board is powerless to give special treatment to disputes arising out of the production and processing of

⁹ Smith, *supra* note 1.

¹⁰ *Supra* note 2.

¹¹ Wis. STAT. §111.11(2) (1959).

farm commodities. It may be fairly stated that the Board has been most diligent in its mediation activities among this class of employers.

A third statutory direction with respect to the formulation of policy may be found in the encouragement which Section 111.01 gives to collective bargaining. Here for the first time it is seen that the Board is given some latitude in the implementation of policy. Through an active mediation service and willingness to arbitrate matters, the Board has attempted to foster the collective bargaining process. Spokesmen for both labor and management have acknowledged with favor the Board's activities in this area.

The concluding point raised by Section 111.01 deals with the expeditious and impartial adjudication of the rights and obligations of parties to a labor dispute. Here again the act leaves little latitude to the Board in the adjudication of these disputes. In reviewing Board procedure, one sees but a single area in which the Board has followed this directive, that being in the handling of discharge cases. Here the Board has made it known that it will expedite the disposition of such cases in order that an improperly discharged employee will be returned to work as soon as possible, thereby restoring his regular income and at the same time reducing the employer's obligation in making him whole.

It is evident from the language of the act and from the statements of those associated with the act's passage¹² that the Peace Act was intentionally drafted to minimize the opportunity of the Board to exercise policy judgments. The reason for this position is to be found in the belief of those responsible for the legislation that the administrative discretion exercised by the Board's predecessor (WLRB) "exceeded the needs of the times." In the years since 1939, neither organized labor nor management has sought to materially add to the Board's discretion in the disposition of labor disputes. This lack of interest probably stems from a reluctance to leave the matter up to a body whose composition, and therefore disposition, is subject to change.¹³

SUMMARY

As noted before, the WEPA was drafted as a comprehensive labor code, that is, a self-contained body of law enacted for the purpose of insuring a degree of stability in labor-management relations. The wording of the declaration of policy contained in Section 111.01 itself bears a second reading.¹⁴ Thus the declaration of policy represents the desires of widely diversified interests which are partially incompatible. The act attempts to set up a workable compromise between these claims.

In addition to creating certain new rights, the act seeks to affirm

¹² Smith, *supra* note 1.

¹³ It should be noted, however, that the composition of the Board has remained relatively unchanged over the years. The most recent addition to the Board is Mr. Arvid Anderson, who was recently appointed to a six-year term.

¹⁴ *Supra* note 2.

other rights which both labor and management presume to have existed prior to the passage of the act. Here the statute immediately encountered difficulties. First, both labor and management are of the opinion that they have certain basic rights which are not dependent upon statutory recognition for survival. An example of these rights is management's assertion, "We have the right to manage our business as we see fit." Labor, on the other hand, counters, "We have a right to see that union standards are not undermined." Neither of these rights is mentioned anywhere in the statute, with the result that the Board has no statutory direction to recognize these propositions.

A second problem which the statute encounters turns on those rights of labor which the statute recognizes but which it restricts for the public interest. For example, the statute encourages organization and collective bargaining but limits the right of organized labor to use certain organizational techniques—those dangerous to the public, productive of violence, or beyond the scope of fair conduct.

Still a third problem, and one more difficult to evaluate, is posed by the statute's partial failure to recognize certain rights which are necessary for the survival of organized labor in specific industries. Most controversial is the failure of the statute to provide for adequate union security measures in the building trades, where, due to employee rotation and the industry's seasonal nature, it is impossible for organized labor to petition for authorization for the all-union shop.

At the time the act was passed, the means chosen to effectuate the policies of the statute were presumed to be sufficient. However, in drafting the statute there appears to have been some confusion between the ends sought and the means chosen. One sees this in the act's limitations on labor's organizational activities, while at the same time the act seeks to strengthen unionism through certain limitations on employers' conduct.

The act lays great stress on the collective bargaining process as a means by which labor-management relations may be advanced. Thus it envisions the adjustment of differences between labor and management over the bargaining table. However, the Peace Act does not come to grips with the situation where one of the parties may possess an upper hand and is unwilling to voluntarily modify its position.

II. MEDIATION

A. MEDIATION UNDER SECTION 111.11(1)

As one might expect, the act establishes certain responsibilities in the Board for mediation. Section 111.11(1) provides:

The board shall have the power to appoint any competent, impartial, disinterested person to act as mediator in any labor dispute either upon its own initiative or upon request of one of the parties to the dispute . . . but neither the mediator nor the board

shall have any power of compulsion in mediation proceedings. The board shall provide necessary expenses for such mediators as it may appoint . . . and prescribe reasonable rules of procedure for such mediators.

Through the intermittent use of outside parties, it was hoped that the Board would have men available to it with specialized knowledge of particular areas, who, because of vocational commitments, could serve only on an *ad hoc* basis. However, in practice the anticipation of the act's sponsors has not been realized, and for the most part those men selected by the Board for service in this area have not been acceptable to the parties. Therefore state mediation has been carried on almost exclusively by the executive secretary.

The fact that the statute does not limit the Board's responsibilities in this area to matters in which the public has demonstrated an interest is indicative of the fact that the parties responsible for the act's passage felt that "public mediation" should not be limited to a particular class of labor disputes.¹⁵

B. DUTIES OF A STATE MEDIATOR

The statute directs that the mediator shall bring the parties together voluntarily under such circumstances as will reduce conflict and will effect an orderly settlement of the dispute. Although the act does not direct the mediator to intervene as a conciliator, fact-finder, or arbitrator, it does imply that the mediator shall put in something more than just an appearance. Further, the act does not attempt to preclude the selection by the parties of a private mediator. Congress, in passing the Labor Management Relations Act of 1947, established the Federal Mediation and Conciliation Service for the purpose of minimizing industrial disputes in interstate commerce and charged that agency with duties roughly parallel to those of the Board under Section 111.11.

Section 203(b) of the L.R.M.A. provides:

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 to 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.* [Emphasis added.]¹⁶

While the suggestion has been made by a number of disinterested parties that the "federal service has been overly aggressive in assuming jurisdiction over disputes in their states," there is no evidence that such has

¹⁵ See discussion of public interest under "I. Policy."

¹⁶ Labor Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. §§151-66 (1952).

been the case in Wisconsin. In view of the amiable relationship which has existed between the "federal service" and the Board, there is no need to comment further on the subject other than to note that the majority of disputes involving interstate commerce are handled by the "federal service." This fact in turn means that a large share of the Board's mediation work-load comes from outside the metropolitan Milwaukee area.

C. SELECT ASPECTS OF THE WERB'S MEDIATION ACTIVITIES

In the past, the majority of the Board's mediation activities were handled by its executive secretary with support from a commissioner when the Board's work-load demanded the services of more than one individual. The expressed preference of the Board for its mediation activities to be handled by the executive secretary stemmed from the belief that (1) the parties might have had greater confidence in someone known to them and in one who continues to work in this field, and (2) there was danger in having this function handled by an individual, viz., the commissioner, who on a subsequent occasion might have been called upon to pass on charges growing out of an agreement which he assisted in negotiating.

Although early in its history the Board instituted a panel of mediators upon whom the parties to a dispute might draw, and has kept this panel current through additions and deletions. Interviews of both labor and management indicate that they "prefer the services of the Board or not at all." It therefore appears that the popularity of the executive secretary's mediation efforts stems not from the fact that they are offered without charge but that both labor and management desire his services.

The statutory authority of the Board to act in a given dispute is severely limited by the proviso, "but neither the mediator nor the Board shall have any power of compulsion in mediation proceedings." Further, neither the mediator nor the Board possesses under this subsection either the power of subpoena or the authorization to engage in "fact-finding activities." Many states, including the neighboring state of Michigan, have statutes providing the state's mediation service with the power to subpoena witnesses. Other states provide for the establishment of a fact-finding board if the parties are unable to make progress toward the settlement of a dispute. Surprising as it may seem, the absence of such powers does not appear to have materially handicapped the Board in carrying out the directives of Section 111.11. A review of the record of the Board's activities in this area indicates that since its inception the Board has avoided "using the press as a lever for the purpose of getting the parties to move." Similarly, "there is no evidence that the Board has ever resorted to using the governor's office to settle a dispute."

Apart from the agricultural-strike-notice proviso in Section 111.11

(2), the statute is silent as to when the Board shall intervene in a dispute. Past Board intervention in a given dispute was largely determined by the facts present at the time. In many instances, the initial request from one of the parties for mediation services is made in the form of a telephone call to the Board. Upon receipt of such a call, the executive secretary will, if both parties are not in agreement as to a date, attempt to set a date that will be agreeable. If, during the course of the first meeting, there is an indication that progress can be made, the mediator will schedule a subsequent meeting. On the other hand, if the mediator finds that his further participation would be premature or that the parties are not really in need of his services, he may choose to withdraw temporarily from the case. There is every indication that in its over-all approach the Board does not "attempt to negotiate the parties' agreement nor to intercede, should the parties encounter a temporary obstacle in the path of reaching an agreement."

The Board has not attempted to undertake what has been called "preventive mediation," that is, mediation designed to eliminate bottlenecks in collective bargaining. Although it is difficult to generalize as to just what constitutes preventive mediation, it may be summed up by stating that it presupposes something of a continuing relationship between the state's mediation effort and labor and management throughout the state. In view of the current demands on the Board's time, it would appear that such activities are not possible at the present time.

The actual timing used by the Board is difficult to state. As indicated above, the appearance of the mediator may be determined by other demands being made on his time. Typically the state mediator will spend a day or two in the community, working with the parties, and if the impasse is not surmounted at that time, he will frequently reschedule a meeting within a week or two. "This lapse of time between meetings affords the parties time to rethink their positions and again places on them the burden of negotiating a mutually acceptable agreement." For the most part this procedure appears to be acceptable to the parties. A number of those interviewed indicated that from their experience the Board has displayed a marked degree of sophistication in intermittently assisting the parties in their attempt to reach an agreement.

D. THE RESPONSIBILITY OF THE STATE MEDIATOR FOR THE SIGNED AGREEMENT

Just as the statute is silent as to the timing of the mediator's appearance, it is likewise silent as to the responsibility of the mediator for the finished product of his efforts. It may be argued in theory that the declaration of policy set forth in Section 111.01 implies a higher standard of professional responsibility on the part of the state mediator than

can be expected of a private mediator who is retained only to satisfy the interests of the parties. Certainly it can be advanced that the presence of a representative of the state demands that, insofar as the mediator can ascertain, the signed agreement be not illusory to either of the parties and that it will contribute to industrial peace.

The question of the moral responsibility with which a state mediator may be charged is not easily evaluated, particularly under a statute such as the Peace Act. Section 111.11 does not imply that the function of the state mediator is such that he is responsible for writing an "insurance contract" for the parties. *The general consensus of those interviewed was that the duty to define is on the parties and not on the state mediator.* Counsel for labor and management are most emphatic on this point. Further, one attorney interviewed went on to state the "arts of trimming" the agreement are for counsel for the respective parties and not for a representative of the Board. Another attorney indicated that when it comes to "feathering the bird, I want to do it myself without any help from an outsider."

E. SUBSEQUENT INTERVENTION BY THE MEDIATOR

Two problems remain to be discussed. First, what is the responsibility of the mediator under the act for subsequent interpretation of the collective bargaining agreement which he has assisted in negotiating? Second, what are the implications arising out of the repeated use of the Board's mediation service?

In answer to the first question, under Section 111.10 the parties are free to call upon the Board to act or name arbitrators to hear any dispute arising out of an agreement. However, the Board is seldom called upon to aid in the construction of an agreement formally or informally, with the consequence that the parties seldom ask the Board's mediator to construe an agreement "upon which he has worked."

With respect to the second problem, that of the repetitious use of the mediator, a more difficult question is raised. Repeated use of the Board's mediation service certainly represents a potential danger spot. In commenting on this situation, a representative of the Board has stated:

While repetitive requests are flattering to the mediator and to the mediation service it has the danger, in my view, of lessening the incentive and the ability of the parties to settle their own disputes. Such an increasing role in mediation lends itself to political problems whereby labor and management may become more interested in influencing the selection of mediators than in preparing themselves for the collective bargaining responsibilities.¹⁷

This observation has been discussed with a number of individuals

¹⁷ A statement by Arvid Anderson, Commissioner, W.E.R.B., at the Association of State Mediation Agencies, 6th Annual Conference, July 16-18, 1957, reported in 80 LAB. L.J. 608 (1957).

conversant with the Board's mediation activities, and all are in agreement that such a possibility exists. However, since the ultimate success of any mediation effort is dependent upon the acceptance of the mediator by both parties, it is doubtful that any mediator associated with the interests of either side in a dispute would enjoy material success in executing his office.

F. ATTITUDE OF THE PARTIES TO THE BOARD'S MEDIATION EFFORT

During the course of the field study the following question was asked:

"What do you think of the Board's mediation function (Section 111.11)?"

The majority of those interviewed indicated that they felt this was one of the more positive aspects of the act. A representative comment was, "very effective outside of Milwaukee County—particularly in Northern Wisconsin." When questioned as to whether or not there is some real danger in having the state's mediation service be a part of W.E.R.B., the majority expressed the belief that this is not a real problem. The answer undoubtedly is to be found in the fact that the functions are mutually exclusive to a certain extent and, therefore, do not conflict with each other. It is only in the exceptional situation that the Board is called upon both to mediate a dispute and subsequently to hear unfair labor practice charges arising out of the same situation.

A number of observers have raised the question of labor's willingness to use the Board's offices for mediation in view of labor's outspoken criticism of the act. The answer apparently lies in the fact that the Peace Act is by no means new legislation, and as a result many of labor's initial misgivings about the act in its entirety have "shaken down" to acceptance or rejection of certain aspects of the act. Further, regardless of labor's stated attitude toward the act, the average local cannot long resist the temptation to use any segment of the act which will advance its position.

This is not to say that all of the individuals interviewed indicated complete acceptance of either mediation or the Board's activities in this area. Although several attorneys for management expressed the belief that labor often seeks to use the mediation provisions of the Peace Act prematurely, there was no indication that attorneys for either labor or management felt that such use proved to be detrimental in achieving an agreement.

G. THE STRIKE NOTICE PROVISIONS OF SECTION 111.11(2)

As a result of agriculture's experience in attempting to market its perishable farm commodities in the labor unrest of the late 1930's,¹⁸ there was incorporated into Section 111.11 the following provision:

¹⁸ Smith, *supra* note 1.

Where the exercise of the right to strike by employees of any employer engaged in the state of Wisconsin in the production, harvesting or initial processing (the latter after leaving the farm) of any farm or dairy product produced in this state would tend to cause the destruction of such product, the employees shall give to the board at least 10 days' notice of their intention to strike and the board shall immediately notify the employer of receipt of such notice. Upon receipt of such notice, the board shall take immediate steps to effect mediation. . . . In the event of the failure of the efforts to mediate, the board shall endeavor to induce the parties to arbitrate the controversy.

Oddly enough, the strike notice provision of the act proved to be one of the more controversial aspects covered by the field interviews. The question as framed on the interview sheet asked:

What is your feeling as to the desirability of the strike notice provision of the Act, covering the production, harvesting or initial processing of any dairy or farm products?

A representative sampling of the answers ranged from: "An essential provision," to, "It is not effective; you give notice and then call a strike when you please."

Despite this diversity of opinion, there is evidence that this provision has little effect on labor-management relations in the state's agricultural areas. In practice, unions tend to file their notice of an intention to strike at the beginning of negotiations with the covered industries. As one union spokesman put it, "Only the inexperienced get caught by not filing their strike notice." Further, there is evidence that in so doing unions tend to frighten the owners of small upstate co-operative creameries, with the result that the owners feel that a strike is impending unless an agreement is hastily reached. This fact is verified by a spokesman for the state's dairy interests.

The significance of Section 111.11(2) lies in the fact that it is widely commented upon by labor. Labor typically refers to it as "an example of act's one-sidedness and the preferential treatment the act confers on the state's farm interests."

Notwithstanding the record of this provision, many still look upon a strike notice provision as a panacea for all labor difficulties. However, after fully assessing its effect in practice, the author is of the opinion that the continuing value of this provision may be seriously questioned. Several spokesmen for the state's agricultural interests have informally expressed a similar belief in spite of the official position of agriculture.

SUMMARY

The over-all effect of Section 111.11(1) has been to afford to the parties, without charge, uniformly good mediation services when needed. This service does not purport to negotiate the parties' agreement for them, nor does it insure that the public interest will be advanced in all

instances through the process of collective bargaining. It offers a unique vehicle, as does all mediation work, for certain "missionary" work whereby the parties may be apprised of the advantages of true collective bargaining.

As indicated above, the strike notice provision of the act—Section 111.11(2)—is at best less than a success.

Although there is no formula by which respective provisions of the act can be measured, it is apparent from the results of this study that the mediation provisions of Section 111.11 have had only slightly less impact on labor-management relations than the unfair labor practice provisions.

III. ARBITRATION

A. THE BOARD'S RESPONSIBILITIES

Section 111.10 of the Peace Act sets forth the Board's duties with respect to the arbitration of disputes. That section provides:

Parties to a labor dispute may agree in writing to have the board act or name arbitrators in all or any part of such dispute, and thereupon the board shall have the power as to act.

Although the section goes on to provide that the Board shall appoint as arbitrators only competent, disinterested parties and that the proceedings shall be as provided for in Chapter 298,¹⁹ the statute affords the Board little other guidance in the performance of its office in this respect.

B. LANGUAGE OF WLRA SECTION 111.12(1)

In discussions of this section of the act with various persons responsible for the act's passage, it has become apparent that the brevity of this section was due to the fact that agriculture during the thirties was far from enthusiastic about labor arbitration. This fact undoubtedly explains why the Peace Act differs materially from its predecessor, the WLRA. Further, an analysis of the WLRA indicates that the difference is more than superficial. This may be seen from the fact that Section 111.12 of the WLRA²⁰ provided:

(1) The board shall have the power to act and to appoint any person, agent or agency to act as arbitrator in labor disputes, when parties agree to submit the whole or any part of the labor dispute to the arbitrator of the board or its appointees. A provision in a written agreement to submit to the arbitration of the board or its appointees, *when accepted by the board after the dispute has arisen, shall be valid and irrevocable as to the parties to the agreement*, save upon such grounds as exist at law or in equity for the revocation of any contract. [Emphasis added.]

This section also provided:

If any party fails to perform under such contract or submission, the board or its appointees may nevertheless in the direction of

¹⁹ WIS. STAT. ch. 298 (1953).

²⁰ WIS. LAWS 1937, ch. 51, WIS. STAT. §111.12(1) (1937).

the board proceed to hear the case *ex parte*, and the board or its appointees shall have the power to issue an award applicable to the submitting parties.²¹

In contrast to this, Section 111.10 of the Peace Act incorporates by reference the procedural aspect of the state's general arbitration statute, Chapter 298, which provides, in part:

A provision in any written contract to settle by arbitration a controversy thereafter arising out of such contract, or out of a refusal to perform in whole or in part thereof . . . shall be valid, irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract. . . .²²

C. LIMITED JURISDICTION OF BOARD

Thus the Peace Act, unlike its predecessor, does not guarantee that once the board has assumed jurisdiction over the matter, its jurisdiction continues until relinquished.

Hence, in practice a third party, not a party to the dispute, may exert pressure against one or both of the parties to the end that the matter may be withdrawn from arbitration.

A further difference is to be found in the two pieces of legislation. Under the Peace Act, Section 111.07(7), the parties are required to seek judicial relief or to file an unfair labor practice charge in the event of failure on the part of the other party to accept the award, while under the WLRA, Section 111.12, the following enforcement proceeding was provided for:

(3) When an award has been made by the board or in its name, the board shall file the award in the office of the clerk of the circuit court of Dane County. . . . Unless a petition to impeach the award . . . shall be filed in the office of the clerk of the circuit court of Dane County, the court shall enter judgment in accordance with the terms of the award, provided that no employees collectively, shall be compelled to render labor or services without their consent.²³

As can readily be seen, this subsection avoided the necessity of (1) the parties having to go into court to get an order enforcing an award, or (2) the Board having to take any steps to enforce its award.

Further restriction on impeaching an award under the WLRA included the requirement that the party initiating the impeachment proceedings do so within ten days after receiving notice of the award, and the requirement that the courts could sustain such a petition only on the following grounds:

(a) That the proceeding was not substantially in conformity with the provisions of the arbitration agreement or rules adopted for the conduct of the arbitration.

²¹ *Ibid.*

²² WIS. STAT. §298.01 (1959).

²³ WIS. LAWS 1937, ch. 51, WIS. STAT. §111.12(3) (1937).

(b) That the arbitrator or member of the board participating in the award was guilty of fraud or corruption; or *that a party to the award practiced fraud or corruption which affected the results. . . .* [Emphasis added.]²⁴

The WLRA, in contrast to the Peace Act, further provided that the court should not set aside an award for uncertainty but should suspend action, pending the award's resubmission to the Board for further action. By the same token, the reviewing court was not to set aside an award for mathematical or verbal mistakes, but rather should correct the award and treat it as having been filed correctly. The WLRA also provided that:

Where a petition for the impeachment of an award is granted, the award shall be vacated, and the court may in its discretion order the board to re-arbitrate the case in accordance with the terms of the original agreement unless the submitting parties agree upon some other course.

D. EXPERIENCE UNDER SECTION 111.12

During its short existence, from April 1937 to May 1939, the Wisconsin Labor Relations Board received sixty-three arbitration matters.²⁵ The Wisconsin Employment Relations Board on a year-to-year basis has received the following number of cases:²⁶

1939	8	1950	27
1940	7	1951	22
1941	9	1952	20
1942	6	1953	25
1943	3	1954	20
1944	4	1955	27
1945	5	1956	28
1946	6	1957	45
1947	7	1958	33
1948	17	1959	66
1949	15		

The marked upswing in cases heard by the Board in the last twelve years is significant in showing the parties' acceptance of the board's activities in this area.

The total number of employees involved in the disposition of an arbitration case is of limited significance, since a case involving a single employee may demand as much of the Board's time as one involving a hundred employees. This observation is substantiated in part by the fact that during the fiscal year 1954, the Board listed 512 employees as affected by arbitration matters closed by it during that period. During the fiscal year 1955 it listed only 71 employees so affected.

²⁴ *Ibid.*

²⁵ WIS. LRB CONCLUDING REP. (1939), on file with the State Historical Society, Madison, Wisconsin.

²⁶ Wisconsin Employment Relations Board, Annual Reports; the most recent is 22 WIS. ERB. ANN. REP. (1961).

A detailed examination of these statistics, coupled with observations made in the field, indicates that for the most part the Board's arbitration activities center around small locals and employers who find it feasible to use the Board rather than employ a private arbitrator.

E. USE OF OUTSIDE ARBITRATOR

The Board on the whole has been reluctant to appoint outside arbitrators to handle the limited number of disputes which come before it. In only five instances during the 1957-58 period and in only five during the 1958-59 period did the Board close arbitration cases by the appointment of an arbitrator who was neither a Board member nor a member of the staff of the WERB. In the 1959-60 period nine outside appointments were utilized in disposing of arbitration matters by the Board.

SUMMARY

While some question may be raised with respect to the desirability of state supported arbitration, there is every indication that this provision of the act has advanced labor-management relations in the state. By affording "free service" to the parties, particularly in disputes involving small employers and locals, the Board has an unprecedented opportunity to educate the parties to the value of arbitration. In many instances the need for arbitration has proved to be greatest among small employers and locals, where the degree of sophistication in labor matters is less than generally expected.

To this end the provisions of Section 111.10 may be regarded as a success and in keeping with the announced policy of the Peace Act.

IV. PREVENTION OF UNFAIR LABOR PRACTICES

Attention is next called to that section of the act which seeks to prevent the commission or continuation of unfair labor practices.²⁷ It should be noted that the act, by establishing statutory standards of conduct and by limiting the Board's investigative function, effectively precludes the recognition of new types of unfair labor practices.

A. WHO MAY FILE

Section 111.07 of the Peace Act directs that any controversy arising out of an unfair labor practice *may* be submitted to the Board "in the manner and with the effect provided in this subchapter." However, the act goes on to provide that nothing in the act shall deprive the parties of their right to pursue either legal or equitable relief from such act in a court of competent jurisdiction.

Thus the Board is powerless to act until an alleged wrong is formally called to its attention, that is, a complaint must be filed with the Board. Under the administrative rules and regulations promulgated by the Board, the following procedure is provided:

²⁷ WIS. STAT. §111.07 (1959).

ERB 2.01. A complaint that a person has engaged or is engaging in an unfair labor practice may be submitted by any party in interest. Such complaint shall be in writing upon a form provided by the Board, the original being signed and sworn to. . . . Five additional copies of the complaint shall be filed.²⁸

In practice, however, the Board has accepted both oral complaints and complaints regular in form but not filed in a form provided by the Board. Complaints are generally preceded by a telephone conversation with a representative of the Board, wherein the complaining party explains the "situation" and requests advice regarding his rights. It has been the practice of the Board not to advise complainants of their "legal rights" under the act. Rather the Board will advise the party of the action taken on similar complaints filed in the past. By conducting itself in this manner the Board has avoided any criticism of pre-judging a complaint. If a complainant has filed a defective complaint, the Board will return it with the necessary forms and a recommendation that the party refile. In keeping with its responsibilities relative to the prevention of unfair labor practices, the Board has taken the position that it will look to substance rather than form.

B. WHAT MUST BE CONTAINED IN THE COMPLAINT

Other requirements set forth in the Board's administrative rules and regulations are that the complaint shall contain:

- (a) The full name and address of the person making the complaint. . . .
- (b) The full name and address of the person against whom the complaint is made. . . .
- (c) A clear and concise statement of the facts constituting the alleged unfair labor practice or practices. . . .²⁹

Thus it is necessary that the party or parties filing a complaint have some idea of the person or type of organization responsible for the unfair labor practice (in practice such information may be extremely difficult to obtain) plus such facts as are necessary to establish the visitations of an unfair labor practice or the impending visitation of such a practice. The initial burden is on the complaining party to make a substantial showing of a violation of the statute. Since the Board does not possess any investigative powers, the statutory requirement would appear to be that the showing be such that a Board member could find upon reading the complaint that there is a strong likelihood that an unfair labor practice has been or is about to be committed. In practice the Board has not attempted to pass on whether the facts, as alleged in the complaint, are such that there is a strong possibility that the party charged may be found guilty of an unfair labor practice.

²⁸ WIS. ADM. CODE, E.R.B. §2.01 (1961).

²⁹ WIS. ADM. CODE, E.R.B. §2.02 (1961).

When polled specifically as to what percentage of the complaints are rejected by the Board prior to a hearing or during the course of a hearing, a commissioner indicated recently that to his knowledge very few complaints had been rejected prior to hearing during the course of the last eight years, and that to the best of his knowledge only a limited number had been rejected during the course of the hearing during the same period.

It appears, therefore, that the Board in following the statutory direction for the prevention of unfair labor practices has adopted the broadest possible interpretation of a cause of action under the statute. Notwithstanding this position, the Board early in its existence let it be known that it would not lend its offices to "fishing expeditions" or to the harassment of parties to a labor dispute.

C. RATIONALE BEHIND SECTION 111.07

Organized labor, during the course of the hearings on Bill 154,A. (subsequently to be passed as the WEPA), was quick to sense the inherent dangers in a statutory scheme which (1) provided little or no restriction on the filing of unfair labor practice charges, and (2) did not provide the Board with investigative powers. Thus at the hearing on the bill before the Joint Finance Committee on April 12, 1939, organized labor suggested that the Board should be given investigative powers as a means of reducing the number of matters litigated before the Board. The draftsman of the bill, speaking for the Agricultural Council replied:

We sharply challenge the wisdom of the suggestion. Such a function destroys the judicial character of the Board.

It is bound to formulate opinions as a result of the investigation which will incapacitate it from fairly trying the issues upon hearing. The judicial functions of the board are of primary importance and must be preserved unimpaired. Furthermore, it is believed that complainants will be more careful to present only real grievances to the board, if they know that they must face a trial upon them than if the law permits them to present situations to the board for investigation which they either know to be without merit or which are based only upon surmise or suspicion.³⁰

During the course of the field interviews spokesmen for organized labor on numerous occasions expressed the belief that, in practice, charges of unfair labor practices may be filed too easily.

D. BOARD ORDERED HEARINGS

Once a complaint is filed and the Board has mailed a copy to all parties of interest and a hearing has been ordered, the disposition of the

³⁰ Memorandum by Walter Bender, Answers to Specific Objections to Bill No. 151A, presented at hearing before Joint Finance Committee on April 12, 1939, on file with the Wisconsin Council on Agriculture Co-operative, Madison, Wisconsin.

matter before the Board becomes relevant. In commenting on the method of disposition provided for in the act, the draftsman pointed out:

This section does not require detailed explanation. It prescribes the practice before the board. This practice is a combination of the practice now provided by the present law for use before the Labor Board and that obtained before the Industrial Commission in workmen's compensation cases. All lawyers are familiar with the main features of the system thus provided.

It should be noted, however, . . . (b) that it does not follow the present law in permitting the board to act as investigator, complainant and prosecutor, and then tender the board to the respondent as a fair and impartial judge of the controversy. The board has *judicial functions* only in respect to any labor dispute or other matter pending before it. The practice provided is such that any party can easily and at small expense have rights or obligations under this bill determined by it. [Emphasis added.]³¹

In regard to the first paragraph of the above quotation, a representative of the Board, familiar with practice before the WLRB and the WERB, has indicated that there is very little difference in the appearances which are made today and those which were made in the 1937 to 1938 period.

E. APPEARANCES

In commenting on the second paragraph of the above quotation, attention is called to the draftsman's concluding sentence wherein he states that "any party can easily and at small expense have rights or obligations under the bill determined by it." One of the salient points developed by the field study was the fact that appearances before the Board are such that both labor and management may appear without counsel. For this reason the act has been extremely popular with the business agents of small locals, who prefer to appear on behalf of a "brother" (vernacular for fellow union member) rather than calling in counsel for the international union.

F. ATTITUDE OF THE PARTIES

During the course of the field interviews, often over a cup of coffee with a business agent, the author frequently raised the following questions:

Do you (Mr. Business Agent) feel the Board's lack of investigative powers has hampered the Board in the prevention of unfair labor practices?

Do you feel that, in lieu of investigative powers, the act's purpose could better be effectuated by having an attorney (general counsel) associated with the Board for the purpose of assisting in the filing and the presentation of unfair labor practice charges before the Board?

³¹ Walter Bender, Commentary on Wisconsin Employment Peace Act, on file with the Wisconsin Employment Relations Board.

Surprisingly enough, the Board's lack of investigative powers caused little concern on the part of organized labor. The explanation for this attitude seems to lie in the fact that union leaders have little, if any, current difficulty in appearing before the Board. Several indicated that they "prefer to make their own case free from outside pressure."

In regard to the proposal for the establishment of an office of "general counsel" a similar attitude was displayed. For the most part labor spokesmen indicated that they prefer "things as they currently are" with freedom to use the Board when they so desire and, conversely, freedom to be left alone when it serves their purpose.

Representatives of management have been explicit in indicating that they wish no part in a revision of the act either to afford the Board investigative powers or for the establishment of an office of "general counsel." A spokesman for the Wisconsin Council of Agriculture Cooperatives, the organization responsible for the Peace Act, shared the same attitude as that of management. This attitude is summed up in the statement of a vice-president for one of the state's larger manufacturers who stated, "parties should fight their own battles and be willing to pay their own way."

SUMMARY

Two phases of the problem of preventing unfair labor practices have been treated in this section: (1) the lack of investigative power, and (2) the disposition of charges as they are called to the Board's attention. It would appear that labor and management are at odds as to any revision of the act which would afford the Board broad investigative powers. Others interviewed, aligned with neither labor nor management, felt that the ability of labor and management to withdraw behind a cloak of secrecy *may* lead to questionable practices. That is, a charging party may at any juncture ask the Board to dismiss an unfair labor practice charge, and the Board's jurisdiction over the parties terminates. Oftentimes the party against whom charges are filed is in a position to exert sufficient pressure on the charging party to make a settlement attractive. There is always the possibility that these settlements may directly contravene the purpose of the act and jeopardize the rights of the employees in the bargaining unit. While it would appear that in the aggregate both labor and management should be afforded considerable latitude in the settlement of their differences, some urge that the Board should have discretionary authority to initiate charges of unfair labor practices and to continue to exercise jurisdiction over the parties in instances where the complainant seeks a dismissal.

Others have suggested a possible expansion of the Board's authority to deal with unfair labor practices. It was suggested that Section 111.07 (14)³² be amended to extend the statutory limitation on the right of a

³² WIS. STAT. §11.07(14) (1953).

party to seek redress from an unfair labor practice from "one year from the date of the specific act" to one year from the date at which the party became aware that an act had been committed. In view of the current complexity in labor relations, particularly in the area of collective bargaining agreements, it would appear desirable to liberalize the statutory period for the bringing of unfair labor practice charges.

V. ENFORCEMENT UNDER THE ACT

Four sections of the act may logically be grouped together, as they encompass the enforcement provisions of the act. They are Sections 111.08³³ and 111.09,³⁴ which provide respectively for the presentation of an annual financial report by unions to their members and for the promulgation by the Board of certain rules and regulations; section 111.12,³⁵ which enumerates the role of the Attorney General and district attorneys in seeking judicial enforcement of Board orders; and section 111.14,³⁶ which provides for sanctions against any individual impeding or interfering with a member of the Board or officer of the Board.

A. UNION FINANCIAL REPORT TO MEMBERS

Section 111.08 provides that each member of a labor organization acting as a representative for the purpose of collective bargaining shall distribute yearly a detailed financial statement of its receipts and disbursements to the members. It is to be noted that only members are entitled to this statement and that it is to be made available to *each individual* member. Should the collective bargaining representative fail to comply with the requirements of this section, any member of such organization may petition the Board for an order directing the union to comply; such order is enforceable in the same manner as any other Board order. Legislation designed to inform union membership of the financial standing of their organization is by no means new. The British Trade Union Act of 1871³⁷ had as one of its objectives the providing of similar information to union membership. This act, commonly referred to abroad as the "British Trade Union Disclosure Law" was passed fifteen years before the formation of the American Federation of Labor in 1886. Thus, statutory precedent for the inclusion of such a provision in labor legislation is not lacking.

In practice, this particular provision of the act has had little effect on labor-management relations in Wisconsin. One labor spokesman interviewed expressed the opinion that the presence of this particular requirement in the Peace Act has prevented the passage of more drastic

³³ WIS. LAWS 1939, ch. 57, WIS. STAT. §111.08 (1953).

³⁴ WIS. LAWS 1939, ch. 57, WIS. STAT. §111.09 (1953).

³⁵ WIS. LAWS 1939, ch. 57, WIS. STAT. §111.12 (1953).

³⁶ WIS. LAWS 1939, ch. 57, WIS. STAT. §111.14 (1953).

³⁷ Trade Union Act, 1871, 34 & 35 Vict., ch. 31, §§1-24, as amended. See CITRINE, TRADE UNION LAW (1950).

disclosure legislation in Wisconsin.³⁸ Organized labor has not expressed any dissatisfaction with this particular provision.

B. THE PROMULGATION OF ADMINISTRATIVE RULES AND REGULATIONS BY THE BOARD

The delegation of certain rule making powers to the Board has not been the subject of controversy since the passage of the Peace Act. Prior to the passage of the act, management went on record as stating that this section was too ambiguous, while labor took the opposite position. The act's draftsman, in defending Section 111.09, stated:

As already stated, a bill such as this embodies general principles and leaves their specific application to the Board and the courts. But the bill [Section 111.09] does give to the Board broad rule making powers. Acting under such powers, the Board can and doubtless will render specific many things which properly are covered by general language in the bill.³⁹

In practice, the Board, apart from the promulgation of its "Rules and Regulations,"⁴⁰ has not sought through administrative pronouncements to clarify or interpret the act apart from dictum contained in its decisions.

C. DUTIES OF THE ATTORNEY GENERAL AND DISTRICT ATTORNEYS
Section 111.12 provides:

Upon the request of the board, the attorney general or the district attorney of the county in which a proceeding is brought before the circuit court for the purpose of enforcing or reviewing an order of the board shall appear and act as counsel for the board in such a proceeding and any proceeding to review the action of the circuit court affirming, modifying or reversing such an order.⁴¹

By and large, owing to the specialized nature of labor law, the state's district attorneys have played a minor role in enforcing the Peace Act. However, this is not to say that judicial review of board orders is the exception.⁴²

The Attorney General's office, on the other hand, has worked closely with the Board, both in an advisory capacity and in representing the Board before the courts. Organized labor has long been at odds with the Attorney General's office for its activities in enforcing Board orders. Labor attorneys, during the course of field interviews, repeatedly urged "greater diligence on the state's part in enforcing back pay awards."

³⁸ For developments on the national scene some twenty years later, see Labor Management Reporting and Disclosure Act, 73 Stat. 519 (1959).

³⁹ Bender, *supra* note 30.

⁴⁰ WIS. ADM. CODE E.R.B.

⁴¹ WIS. LAWS 1939, ch. 57, WIS. STAT. §111.12 (1953).

⁴² 22 WIS. E.R.B. ANN. REP. 55, 2d Annual Rep. Note that in the period from 1939 to 1960, 219 Circuit Court cases reviewing Board orders were disposed of through trial, settlement, or dismissal.

Notwithstanding labor's criticism of the Attorney General's office, it appears that the Board has enjoyed considerable success in seeking enforcement of its orders before the court as a result of the efforts of the Attorney General's office.

D. PENALTY

Section 111.14 provides for sanctions against any individual impeding or interfering with a member of the Board or officer of the Board. This particular section which provides for a maximum penalty in the amount of \$500 or imprisonment in the county jail for a year or both has not been invoked to date. In questioning one Board member regarding this section, only one example was cited of reluctance on the part of either labor or management to cooperate.

SUMMARY

The inclusion of the four sections discussed above has had very little direct effect on labor-management relations in Wisconsin.

VI CONCLUSIONS

Some difficulty is experienced in communicating the attitudes of the parties interviewed with respect to the act's overall effectiveness and what importance is to be attached to those sections specifically covered in this article. In total, approximately 200 individuals conversant with Section 111 were contacted, of which 80 were formally interviewed.⁴³ Although no two individuals polled expressed the same opinion on all phases of the act or its effectiveness, by virtue of the fact that field interviews progressed over a two year period, certain conclusions may be drawn.

A. GENERAL EVALUATION OF THE ACT'S EFFECTIVENESS

In an attempt to evaluate the act's effectiveness, this question was asked:

Do you think that the Act has helped, retarded, or had no effect on labor-management relations, bearing in mind the three major interests mentioned by the Act—(a) the public, (b) the employee and (c) the employer?⁴⁴

In response to this question, management generally felt that the act contributed materially to labor-management peace by reducing strikes and strike violence by generally balancing the interests of the parties, and by engendering a sense of responsibility on the part of labor as well as management. Labor attorneys and labor leaders were considerably less enthusiastic and even disagreed among themselves as to whether or not the act had been beneficial. A number believed that at least part of the act had in fact retarded labor-management relations, stating that the all-union shop provision has in some instances forced labor to resort to violence in order to survive in the economic market. In addition to a

⁴³ See questionnaire appended.

⁴⁴ Question 2(a), appended.

question on the general effect of the act, questions were posed as to the effect of the act on specific individuals. Employers understandably feel more secure under the present act than under the labor-oriented Wisconsin Labor Relations Act. Management generally believed that workers, too, felt more secure since they were given speedy relief and ease of appearance. There was no agreement on the issue among one representative of labor. Comments varied from agreement with management's position to an out-and-out avowal that, "Employees are less secure in that it is more difficult to prove unfair labor practice charges under the WEPA than under the national act."

A sub-question sought to determine if the public, individual employee, and employer had benefited from the act:

How has he (the public, the individual employee and the employer) benefited?

Management spokesmen uniformly felt that the act had benefited all three interests, stemming from (1) impartial holdings, (2) uniform treatment, and (3) no calendar problems. Management also stated that proceedings under state law were often more advantageous than actions under the federal act. The reason, these spokesmen believed, sprang from the more flexible interpretation that the state Board gave to the WEPA in contrast to interpretations of the Taft-Hartley Act⁴⁵ by the NLRB. Management representatives found it beneficial to "have the fight between defined parties" (arising from the limitations set on organizational activities by the WEPA).⁴⁶ Management was also quick to point out that "unions may now prosecute their own unfair labor practice charges." One spokesman hit on what was perhaps the real reason for these benefits when he observed, "By virtue of organized labor's maturity in this state, attributable in part to the act, employers are willing to recognize and deal with unions." Labor personnel again voiced diverse views. Typical were these two comments: "Employees have benefited from the act by virtue of the fact that they have obtained prompt service in the scheduling of representation elections,"⁴⁷ and, "I

⁴⁵ Labor Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. §§151-66 (1952).

⁴⁶ Contrast Section 111.02(8) of the WEPA defining a labor dispute as, any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute, with Section 13(c) of the Norris-LaGuardia Act which defines the term labor dispute as including any controversy concerning terms or conditions of employment or concerning the association or representation of persons negotiating, fixing, maintaining, changing, or seeking to change terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

⁴⁷ Wis. Stat. §111.05 (1959).

do not know of anyone other than an [unorganized] employer who has benefited."

In sum it would appear significant that both management and a major segment of labor are in agreement that the act has reduced some of the strife interest in labor-management relations. Interestingly enough, both the answers elicited in response to the questionnaire and the answers volunteered in confidence agreed on this point. Both parties expressed general interest in knowing the rights and obligations accruing to their organizations under the WEPA and both expressed a very real desire to avoid administrative and judicial review of their conduct.

B. SHOULD THE ACT BE REPEALED?

Question 14 of the questionnaire asked:

Should the Act be repealed? If not, should it be modified? If the latter, what amendments do you feel are necessary, in order of importance?⁴⁹

Over eighty per cent of those interviewed favored either a retention of the Peace Act or at least some form of state regulation of labor-management relations. Even those at odds with the philosophy of the act suggested that there is "grave danger" in leaving the regulation of labor-management relations exclusively in the hands of the federal government. Representatives of management, with one or two notable exceptions, were for the most part satisfied with the WEPA as it now exists.

Spokesmen for organized labor, particularly during the concluding phase of the field study suggested:

Perhaps the time is up for us to again turn our attention to state legislation.

Both labor and management attorneys were agreed that "states should be allowed to act in those instances in which the NLRB declines to act."

Labor's position may be summarized as a demand for "positive state action to reaffirm labor's right to organize and bargain collectively." Management's position, on the other hand, may be stated:

We believe that state legislation in this area offers a unique vehicle for the settlement of industrial strife; every effort should be made to preserve the state's right to act affirmatively in this area.

Thus it appears that both parties, faced with possible abandonment of the field by the state,⁵⁰ overwhelmingly favor the retention of some form of state labor legislation.

⁴⁸ Current statutory resolution of the "no man land" of the late fifties is to be found in Labor-Management Reporting and Disclosure Act, 73 Stat. 519 (1959).

⁴⁹ *Supra* note 43.

⁵⁰ For the subsequent solution to the preemption problem, see National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29, U.S.C. §§151-68 (1952).

C. MEDIATION AND ARBITRATION

Turning next to mediation, the parties expressed a belief that both the act and the Board's efforts in this area have served the cause of labor-management peace.

Since the Board plays a lesser role in the area of arbitration, no single conclusion attests the feelings of the parties. Organized labor did during the course of the field interviews suggest that the act be "revised in such a manner as to preclude the adjustment of grievances between an employer and individual employees in a collective bargaining unit," particularly when such adjustments are in conflict with a collectively bargained agreement. This situation arises most frequently when a plant has just been organized and the grievance process is in a developmental stage.

No concrete proposals were volunteered by spokesmen for organized labor in the interviews. However, a "tightening up of the act" in this respect might well afford organized labor the protection to which it feels it is entitled. Section 111.05 (1) might well be amended to conform with the appropriate section of the NLRA:

However, no employer shall enter into any adjustment of individual grievances the subject of which is covered by a valid collective bargaining agreement unless (a) such adjustment is consistent with the terms of such agreement and (b) the affected union has an opportunity to be present at the time such grievance is presented and adjusted.⁵¹

The effect of this modification would assure the majority representative the same protection as is afforded by the NLRA.

D. PREVENTION OF UNFAIR LABOR PRACTICES

In view of the fact that the prevention of unfair labor practices implies affirmative action the author would like to step outside the self imposed limitations of this article and comment on problems arising out of Sections 111.02(6) and 111.06(e) and 111.06(2)(j).⁵²

Both problems are admittedly statutory as opposed to investigatory and adjudicative. However, both are critical and, as we shall see, are important in different ways.

1. Determination of the Collective Bargaining Unit, Section 111.02(6).

The most important deficiency in the act itself which this study has suggested lies in restrictions placed on the Board in the determination of the collective bargaining unit. Section 111.02(6) of the WEPA provides:

The term "collective bargaining unit" shall mean all of the employees of one employer (employed within the state) except that where a majority of such employees engaged in a single

⁵¹ *Ibid.*

⁵² WIS. LAWS 1939, ch. 57, WIS. STAT. ch. 111 (1953).

craft, division, department or plant shall have voted by secret ballot as provided in section 111.05(2) to constitute such group a separate bargaining unit they shall be so considered. . . .

Section 111.05(2) in turn provides:

Whenever a question arises concerning the determination of a collective bargaining unit as defined in section 111.02(6), it shall be determined by secret ballot, and the board, upon request, shall cause the ballot to be taken in such a manner as to show separately the wishes of the employees in any craft, division, department or plant as to the determination of the collective bargaining unit.

In contrast with the rigid direction of the WEPA, Section 9(b) of the NLRA provides:

The Board shall decide in each case whether . . . the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or sub-division thereof. . . .⁵³

Thus under the WEPA the Board is directed to determine that all of the employees of the employer are the appropriate bargaining unit unless there is a showing that there are separate crafts or divisions within the plant, in which case the matter shall be determined by a secret ballot. In contrast, the NLRB under Section 9(b) may administratively determine the appropriate collective bargaining unit, with or without the holding of an advisory craft election.⁵⁴

In practice several problems face the Board as a result of the direction of Section 111.05(2) which may be best illustrated by an example. Representation elections are initiated under the WEPA by a petition directed to the Board, which is followed by a hearing to determine the appropriate bargaining unit. At the hearing an employer, confronted by a craft union, invariably alleges that the appropriate unit is all of his employees including clerical and maintenance employees. The employer's purpose in so doing is to secure as many votes against the union as possible by including in the balloting employees having little in common with the petitioning craft union.

Unless the union can support its demands for less than all of the employees of the employer, the Board has no discretion but to order an election based on a bargaining unit composed of all of the employees of the employer. Should the union lose the election as a result of the Board's determination that the appropriate bargaining unit encompasses more than the group of workers for which the union petitioned, the policy of the act has not been effectuated. On the other hand, should the union win the election, it may well find itself representing employees having little or nothing in common with the majority of its membership.

⁵³ *Supra* note 43, at 9(b).

⁵⁴ See *Globe Mach. & Stamping*, 3 N.L.R.B. 294 (1937).

In view of the Board's past experience in directing representation elections, it would appear feasible that the act be amended in such a manner as to afford the Board authority to determine the appropriate collective bargaining unit. Such an amendment might well adopt the language of the NLRA,⁵⁵ and afford the Board discretion in the holding of an advisory craft election.

2. Unfair Labor Practices Associated with the Commission of a Crime or Misdemeanor

Organized labor has long been at odds with Section 111.06(2)(j) dealing with unfair labor practices arising out of the commission of a crime or misdemeanor. During the course of the field interviews organized labor repeatedly pointed to this section and its implication "that they [labor] engage in criminal activity." The fact that management may be held in violation of the act under charges of similar conduct⁵⁶ does not alter their position.

Board experience under Sections 111.06(1)(e) and (2)(j) would seem to warrant either their repeal or a revision of these provisions to clarify the Board's authority to act on complaints brought to its attention. A review of the Board's activities indicates a justifiable reluctance to find a party guilty of a violation in the absence of a clear showing of physical violence. It would appear that barring repeal, the most acceptable solution to this problem would be a revision of both subsections to make it an unfair labor practice to commit a crime or misdemeanor in connection with any labor dispute, provided that the Board shall act only upon those crimes or misdemeanors which have been established by a court of competent jurisdiction.

SUMMARY

This article has attempted to survey some of the less controversial aspects of the act against the backdrop of what its proponents intended. To the extent that this survey may be summarized three observations come to the fore. First, legislation alone does not produce labor-management peace regardless of the level at which it is imposed. Thus, proponents of state labor legislation as a panacea for industrial strife attribute to local action a role which it is incapable of fulfilling.

Second, labor-management relations may be likened to a stream wherein seasonal "highs and lows" may be recorded while at the same time undercurrents often remain obscured. Thus, periodic soundings of the effect of legislation are advisable, for there is evidence that the impact of state labor legislation diminishes directly in proportion to the passage of time since its enactment. Presence of "legislation on the book" is no assurance of conformity of conduct with statutory standards.

⁵⁵ *Supra* note 43, at 9(b).

⁵⁶ See Smith, *supra* note 7, at 255.

Third, labor and management are today, even in a semi-industrialized environment, sophisticated partners in the industrial community. Hence the challenge facing labor legislation is in advancing a relationship as opposed to keeping the "industrial peace." This would seem to suggest the need for periodic revision of labor legislation, particularly at state levels where change is politically possible and adjustment may be tailored to experience.

APPENDIX

Field Interview Sheet

Date of Interview _____

Mr. _____

attorney _____

other _____

Experience with Act _____

1. What was the need for the Wisconsin Employment Peace Act to begin with, and what was it designed to accomplish?
 - a. What was wrong with the Wisconsin Labor Relations Act?
 - b. Why did Wisconsin act in 1939, while Congress did not until 1947?
2. Do you think that the Act has helped, retarded, or had no effect on labor management relations, bearing in mind the three major interests mentioned by the Act?
 - a. the public, (b) the employee, and (c) the employer?
 - b. Is he more secure? How?
 - c. How has he benefited?
3. The Wisconsin Employment Peace Act is stricter on the whole in regulating union activities than the Taft-Hartley Act, yet the latter was enacted by an Republican Congress which apparently could have passed a far stricter piece of legislation than the W.E.P.A. Why was the W.E.P.A. more drastic?
4. What does organized labor, or particular segments, think of the Act? What does management, or particular segments, think of the Act?
 - a. The representation provisions?
 - b. The unfair labor practices provisions?
 - c. The union security provisions?
 - d. The administration of the Act by the Board and courts?
5. In March of 1939, Joseph A. Padway, spokesman for organized labor, stated, "It's one thing to pass a law and it's another to have it obeyed!" Do you feel that either labor or management or both together have effectively subverted the Act, boycotted the Wisconsin Employment Relations Board, etc.?
6. From your experience, do you feel that the administration of the Act has effectuated the policy set forth in the statute?
7. Do you feel that additional sanctions, civil or criminal, would strengthen the Act and its administration?
8. Do you feel that the Act is realistic in limiting a labor dispute to a controversy between an employer and the majority of his employees in a collective bargaining unit?
9. One of labor's strongest objections to the Act is that the Board may declare a closed shop contract terminated if it finds a union will not accept a qualified employee of an employer. Do you feel that this objection is valid? Why, or why not?
10. The Act provides that it is an unfair labor practice to violate the terms of a collective bargaining agreement. Are you of the opinion that our present system of administrative review is sound or do you feel that a violation is a proper matter for the courts in the first instance? How important are the Board's duties in this respect?
11. The Act provides that the commission of a crime or misdemeanor, *e.g.*, violence, in any labor controversy is an unfair labor practice, thereby providing

for a summary remedy rather than waiting for the process of criminal law. Do you feel that this has advanced the public interest? Or protected employers? Or employees?

12. What is your feeling as to the desirability of the strike notice provision of the Act, covering the production, harvesting, or initial processing of any dairy or farm products?
13. Does the division between federal and state jurisdictions present any practical problems to employers or unions in Wisconsin?
14. Should the Act be repealed? If not, should it be modified? If the latter, what amendments do you feel are necessary, in the order of importance?
15. What do you think of the Board's mediation function (§111.11)?