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JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD OVER THE BUILDING AND CONSTRUCTION INDUSTRY

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Prior to June 1947 almost two million of the nation-wide total of fifteen million union members had little contact with the National Labor Relations Board because of the Board's refusal to exercise jurisdiction over the building and construction industry. This refusal to act was not grounded on a lack of power, but rather in the belief that an "assertion of jurisdiction would not effectuate the policies of the Act."[1] The Labor Management Relations Act of 1947,[2] commonly known as the Taft-Hartley Act, covered several phases of labor relations, such as secondary boycotts and jurisdictional disputes, which were not regulated by the Wagner Act,[3] yet the provisions relating to coverage under the commerce clause remained the same.[4] However, it was but a short time after the enactment of the Taft-Hartley Act until mention was being made of the "new interpretation of interstate commerce" being given this provision. Mr. Denham, General Counsel for the National Labor Relations Board, testifying before a House of Representatives subcommittee, took the position that the Act applies to almost every business enterprise in the nation.[5] Coupled with this position is his belief that in secondary boycott cases, exercise of this jurisdiction is mandatory.[6] Earlier statements by the General Counsel had caused this special subcommittee of the House Committee on Expenditures in the Executive Departments to hold hearings in connection with its "In-

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[1] Brown & Root, 51 N. L. R. B. 820 (1943); Johns Manville, 61 N. L. R. B. 1 (1945). *Cf.* Brown Shipbuilding Co., 57 N. L. R. B. 326 (1944) (jurisdiction accepted over construction workers regularly employed in a manufacturing plant).

[2] Pub. L. No. 101, 80th Cong., 1st Sess., 29 U. S. C. A. §141 *et seq.* (Supp. 1948).

[3] 49 STAT. 449 (1935), 29 U. S. C. A. §151 *et seq.* (1940).

[4] Section 10(a) of both the Wagner Act and the Taft-Hartley Act, 29 U. S. C. A. §160 (Supp. 1948), empowers the Board to "prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce," Section 9(c) provides for an election when "a question of representation affecting commerce exists." The terms "commerce" and "affecting commerce" are defined in Section 2(6) and 2(7).

[5] *Hearings before Subcommittees of the Committee on Education and Labor and the Committee on Expenditures in the Executive Departments on investigation to ascertain Scope of Interpretation by General Counsel of National Labor Relations Board of the Term "Affecting Commerce," as used in the Labor Management Relations Act, 1947*, 80th Cong., 2nd Sess. 18 (1948).

[6] *Id.* at 17.

vestigation to Ascertain Scope of Interpretation by General Counsel of National Labor Relations Board of the term 'Affecting Commerce' as used in the Labor Management Relations Act of 1947." The report of this subcommittee severely criticized the interpretation offered by the General Counsel.[7]

One of the first industries to be included in this broader coverage was the building and construction industry. After long behind-the-scenes conferences Mr. Denham announced in a speech to the Associated General Contractors on February 11, 1948 that the Board would extend its coverage to the industry.[8] The National Labor Relations Board had never elaborated on its decisions refusing to exercise jurisdiction over the industry, but presumably this refusal was because of the difficulty of applying the procedures established by the Wagner Act to industrial relations in the industry and because the Act was concerned with representation questions and employer unfair labor practices, areas in which building trades employees needed no assistance.

The major obstacle in applying the representation procedure of the Wagner Act to the building and construction industry was the short term employer-employee relationship which is typical in the industry. Construction jobs ordinarily last for only a few months and it is not uncommon for a worker to work for several employers in a single season. Because of the peripatetic employment practices in the industry, an election by workers presently employed would determine the bargaining agent for a group of employees almost entirely different from those voting in the election. Nor were the building trades workers particularly concerned over employer unfair labor practices. Workers in the industry were staunchly organized, approximately eighty percent being members of the nineteen American Federation of Labor building-craft unions, and ninety-five percent of those under union agreement worked in closed shops.[9] Non-union building trades workers are generally confined to the less populated areas. Strikes and boycotts have been singularly effective in the industry and the workers felt no need to resort to the relief afforded by the Wagner Act. Contractors have received some assistance from the unions in recruiting workers for jobs and in restraining certain contractors who seek to depress construction bids by offering lower wages. Because of these conditions the Board did not deem it imperative to intervene in labor disputes in the building and construction industry.

[7] H. R. Rep. No. 2050, 80th Cong., 2nd Sess. 5 (1948).
[8] 21 Lab. Rel. Ref. Man. 44 (1948).
[9] PETERSON, AMERICAN LABOR UNIONS 204 (1945). For a review of labor relations in the building and construction industry, see HABER, INDUSTRIAL RELATIONS IN THE BUILDING INDUSTRY (1930); HOW COLLECTIVE BARGAINING WORKS, TWENTIETH CENTURY FUND, Ch. 4 (1942); MONTGOMERY, INDUSTRIAL RELATIONS IN THE CHICAGO BUILDING TRADES (1927); RYAN, INDUSTRIAL RELATIONS IN THE SAN FRANCISCO BUILDING TRADES (1935).

The Taft-Hartley Act places an affirmative duty on the Board to act in cases of trade jurisdictional disputes[10] and secondary boycotts.[11] Further, the Act is intended to eliminate closed-shop contracts,[12] and it permits a union-shop contract only after an election is held under the supervision of the Labor Board.[13] Faced with these statutory restrictions unions have asserted that the building and construction industry is "local" and not within the power of Congress under the commerce clause. It is not easy to support such a contention in view of the many extensive projects in the industry, often involving the direct shipment in interstate commerce of millions of dollars worth of materials. It seems certain that some areas of the industry are subject to regulation under the Act. In fact, jurisdiction was exercised in a limited number of building and construction cases under the Wagner Act.[14] The areas of industry in which the Board exercised its powers were fairly well delineated under the Wagner Act, but the proposed broader coverage under the Taft-Hartley Act, including coverage of labor relations in the construction industry, calls for a new analysis of the Labor Board's jurisdiction.[15]

Development of Jurisdiction Under Court Decision

As has been previously noted,[16] the jurisdiction of the National Labor Relations Board extends over unfair labor practices and questions of representation which "affect commerce." According to some authorities this term was chosen with the deliberate intent of exercising

[10] 29 U. S. C. A. §160(k) (Supp. 1948).

[11] 29 U. S. C. A. §160(l) (Supp. 1948). The Labor Board and its General Counsel are presently engaged in a controversy over the question of the claimed discretionary power of the Board to dismiss cases when it believes an assertion of jurisdiction would not effectuate the policies of the Act. *Hearings before Committee on Labor and Public Welfare on S. 249*, 81st Cong., 1st Sess. 1026 (1949). A-1 Photo Service, 83 N. L. R. B. No. 86 (1949); Haleston Drug Store, Inc., 86 N. L. R. B. No. 125, CCH 9358. The Board contends that in spite of the rather pointed language in Section 10(l), it has discretionary power in secondary boycott cases. The language of 10(k) is even more pointed, providing the Board is "empowered and directed" to act. Judge Tamm of the United States District Court, District of Columbia, has ruled that the Labor Board must hear all jurisdictional dispute cases whenever a charge is made by an interested party. Parsons v. Herzog, 16 CCH Lab. Cas. No. 65,183 (1949).

[12] 29 U. S. C. A. §158(a)(3) (Supp. 1948).

[13] 29 U. S. C. A. §159(e) (Supp. 1948).

[14] NLRB v. Austin Co., 165 F. 2d 592 (7th Cir. 1947) (employees in a central office of company operating in several states); Isbell Construction Co., 27 N. L. R. B. 472 (1940) (road construction company doing some interstate work).

[15] Jurisdiction of the National Labor Relations Board has been a favorite subject for writers. Some of the better discussions are contained in the following articles: Nathanson, *The Wagner Act Decisions Studied in Retrospect*, 32 Ill. L. Rev. 196 (1937); Mueller, *Business Subject to the National Labor Relations Act*, 35 Mich. L. Rev. 1286 (1937); Comments, 6 Geo. Wash. L. Rev. 436 (1937), 47 Yale L. J. 1221 (1938), 37 Mich. L. Rev. 934 (1939), 37 Mich. L. Rev. 1328 (1939). See also, Fallon, *The Commerce Clause from the Schechter Case Through the 1944-45 Term*, 19 Temp. L. Q. 421 (1946); Stern, *The Commerce Clause and the National Economy*, 1933, 1946, 59 Harv. L. Rev. 645, 883 (1946).

[16] See note 4 *supra*.

the full power of Congress to regulate labor relations under the commerce clause,[17] and the Supreme Court has apparently accepted this interpretation of the provision.[18] Such an interpretation would make the question one of the power of Congress to regulate labor relations rather than a question of statutory construction.

At the outset the Labor Board's task of establishing jurisdiction was difficult; unless it could operate in the field of manufacturing its effectiveness would have been exceedingly limited. The Board was faced with the then recent decisions of the Supreme Court, one holding invalid a federal statute regulating hours and wages in the bituminous coal industry[19] and another striking down a NIRA regulation affecting commercial activities after interstate movement had ceased.[20] Prominent lawyers freely predicted the power of the Board did not extend to local production.[21]

The Board adopted a cogent method of presenting its cases to the courts to illustrate vividly that local production and commerce were intimately linked with interstate commerce and to deny Congress power over these employers would permit labor disputes in local industry to disrupt the flow of vast quantities of goods moving across state lines. The Board set up a Division of Economic Research whose duty it was to supply the economic facts and history of labor conditions in each industry involved in proceedings before the Board.[22] When the Board's jurisdiction was seriously challenged, a mass of evidence was presented.[23] This included information on the size of the industry, the respondent's position in the industry, the amount of production, the number of workers, the source of materials, distribution of goods and similar facts. The history of industrial relations in the industry and in respondent's business was set forth.

Court sanction of the Board's jurisdiction over industries which affect interstate commerce is based upon the same approach. To meet the strong challenge of the Board's jurisdiction in the first decision

[17] Sen. Rep. No. 573, 74th Cong., 1st Sess. 19 (1935). See also, H. R. Rep. No. 1147, 74th Cong., 1st Sess. 7 (1935); Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining*, 50 HARV. L. REV. 1071, 1090 (1937).

[18] NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1, 31 (1937); NLRB v. Fainblatt, 306 U. S. 601, 607 (1939); Polish National Alliance v. NLRB, 322 U. S. 643, 647 (1944); FTC v. Bunte Bros., 312 U. S. 349, 351 (1941). See also, NLRB v. Suburban Lumber Co., 121 F. 2d 829, 832 (3d Cir. 1941), *cert. denied*, 314 U. S. 693 (1941).

[19] Carter v. Carter Coal Co., 298 U. S. 238 (1936).

[20] A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935).

[21] Powell, *Fifty-Eight Lawyers Report*, 85 NEW REPUBLIC 119 (1937).

[22] See, NLRB Ann. Rep. 60 (1936); 2 NLRB Ann. Rep. 41 (1937); 3 NLRB Ann. Rep. 124 (1938); 4 NLRB Ann. Rep. 152 (1939); 5 NLRB Ann. Rep. 245 (1940).

[23] See, Ziskind, *The Use of Economic Data in Labor Cases*, 6 U. OF CHI. L. REV. 607, 624 (1939).

involving local production, the famous *Jones & Laughlin* case,[24] the Court took note of facts showing the respondent's business was a large integrated concern of national importance owning and operating several huge steel mills, connecting railroads, barges, ships and docks. The employer shipped vast quantities of raw materials and finished products in interstate commerce. The Court was convinced that labor relations in such a powerful organization should be subject to the control of Congress. Mr. Chief Justice Hughes stated:

> . . . The fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. . . . We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.[25]

The facts demonstrated a labor dispute in the central plant would "affect commerce in such a close and intimate fashion as to be subject to federal control."[26]

A similar factual analysis in the *Fruehauf Trailer* case[27] resulted in approval of the Board's exercise of jurisdiction over an employer operating a single factory employing 400 men producing annually trailers valued at $3,000,000 when it was established that 50 percent of his raw materials and 80 percent of his finished products crossed state lines. A slightly different approach was used in the *Friedman-Harry Marks* case[28] involving a small clothing manufacturer who employed 800 persons. In this case the Court placed special emphasis on statistics concerning the entire clothing industry. Information regarding the geographical location of the factories, the source of materials and the distribution of the finished product made it evident that the industry was one whose functioning was completely dependent upon interstate commerce. The history of labor relations in the industry revealed that collective bargaining had brought peace to a large segment of the industry; congressionally fostered collective bargaining could help to bring peace to other parts of the industry and thus free interstate commerce from burdens and obstructions caused by industrial strife.

The Court had thus far spoken in broad generalities, but those who were seeking to apply a mechanical test to determine the limits of the Board's power were stopped short by the decision in the *Santa Cruz Fruit Packing Co.* case.[29] Here the Court expressly negatived a mechanical test in applying the Wagner Act to a packer of fruits and vegetables

[24] NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937).
[25] *Id.* at 41-42. [26] *Id.* at 32.
[27] NLRB v. Fruehauf Trailer Co., 301 U. S. 49 (1937).
[28] NLRB v. Friedman-Harry Marks Clothing Co., 301 U. S. 58 (1937).
[29] Santa Cruz Fruit Packing Co. v. NLRB, 303 U. S. 58 (1938).

employing 1,200 persons and shipping 37 percent of his goods out of state. The Court set at rest argument based on what is "direct" and "indirect" and what is "remote," saying, ". . . the criterion is necessarily one of degree and must be so defined."[30] An employer hiring from 60 to 200 workers who processed into clothing materials never owned by the employer contended in the *Fainblatt* case[31] the size of his business excluded him from the Board's jurisdiction. The Court again examined the clothing industry as a whole, noting that small establishments predominated, averaging only about 32 employees each, yet the total production of the industry was a significant part of the nation's business. If small operators were not covered, the greater part of the industry would escape regulation. The success of collective bargaining in the clothing industry in some localities was strong support for extension of coverage of the Wagner Act.

The *Fainblatt* decision advanced the *de minimis* doctrine as a limitation of the Board's jurisdiction.[32] Under this theory the Board will have no power to act when the volume of commerce affected is so small it is regarded as *de minimis*, but the decision made no explanation of what volume would come within the maxim. In the *Bradford Dyeing Association* case[33] a processor of dyed goods sought exemption under this doctrine since his production amounted to only one percent of the national total. This argument was rejected; the ratio of his output to that of the entire industry was held not controlling.

The basic thread running through the series of Supreme Court decisions is that jurisdiction is based on a question of fact whether there is such a close and substantial relation to interstate commerce as to justify federal intervention. The Court has repeatedly emphasized that the industry as a whole will be viewed to determine whether disputes between employer and employee in the particular instance are within the power of Congress to regulate.[34] The integrated character of the national economy is basic in this approach. This principle will be useful in any examination of an industry heretofore unregulated, such as the building and construction industry.

Application of the economic approach in determining the Labor Board's jurisdiction has not produced a clear test for determining that jurisdiction, but the courts have carved out certain areas as coming within the Board's authority. Decisions of the Supreme Court would clearly justify the exercise of jurisdiction over almost all types of manufacturing, mining and processing where raw materials or finished

[30] *Id.* at 467.
[31] NLRB v. Fainblatt, 306 U. S. 601 (1939).
[32] *Id.* at 607. For further discussion of the *de minimis doctrine* as applied to Labor Board cases, see *infra* p. 28.
[33] NLRB v. Bradford Dyeing Association, 310 U. S. 318 (1940). The employer hired an average of about 700 employees during the preceding year.
[34] Polish National Alliance v. NLRB. 322 U. S. 643. 648 (1944)

products cross state lines. Lower federal courts have affirmed the exercise of jurisdiction in other areas. Public utilities which supply services to customers engaged in interstate commerce were found substantially to affect that commerce.[35] Insurance companies,[36] banks,[37] auto distributors,[38] retail lumber yards,[39] local transportation systems,[40] and cold storage plants[41] were found not to be immune from the Board's orders. Building maintenance employees in an office building whose tenants are engaged in interstate commerce are within the Act.[42] A few interstate connections made by a telephone exchange serving a small community caused it to be subject to the Board's jurisdiction.[43] A court affirmed jurisdiction over a labor dispute in one of a chain of retail grocery stores.[44] The Board's assertions of jurisdiction have been strongly contested by retail department stores, but Board decisions against them have been enforced by the courts.[45] Smaller retail stores now ponder the limits of the Board's authority in that field, especially in the case of secondary boycotts and union shop elections. It is important for the storekeeper to know whether or not he can safely sign a closed-shop contract with a union or discharge employees under a union security agreement.

The only unreversed decision of a circuit court of appeals denying the Board's jurisdiction is *NLRB v. Idaho-Maryland Mines Corp.*,[46] where it was held the Board had no jurisdiction over a corporation engaged in gold mining which purchased from local dealers supplies orig-

[35] Consolidated Edison Co. v. NLRB, 305 U. S. 197 (1938).

[36] Polish National Alliance v. NLRB, 322 U. S. 643 (1944); Phoenix Mutual Life Ins. Co., 167 F. 2d 983 (7th Cir. 1948).

[37] NLRB v. Bank of America, 130 F. 2d 624 (9th Cir. 1942), *cert. denied*, 318 U. S. 792 (1942).

[38] Williams Motor Co. v. NLRB, 128 F. 2d 960 (8th Cir. 1942).

[39] NLRB v. Suburban Lumber Co., 121 F. 2d 829 (3d Cir. 1941), *cert. denied*, 314 U. S. 693 (1941).

[40] NLRB v. Baltimore Transit Co., 140 F. 2d 51 (4th Cir. 1944), *cert. denied*, 321 U. S. 795 (1944).

[41] NLRB v. Security Warehouse and Cold Storage Co., 136 F. 2d 829 (9th Cir. 1943).

[42] Butler Bros. v. NLRB, 134 F. 2d 981 (7th Cir. 1943), *cert. denied*, 320 U. S. 789 (1943). Under the Fair Labor Standards Act, *compare* Borden Co. v. Borella, 325 U. S. 679 (1945) (building maintenance employees covered by the Act when 58 percent of the rentable space occupied by tenant engaged in interstate commerce) *with* 10 East 40th Street Building v. Callus, 325 U. S. 578 (1945) (building maintenance employees not covered by the Act when 48 percent of rentable space occupied by tenants engaged in interstate commerce).

[43] NLRB v. J. G. Boswell Co., 136 F. 2d 585 (9th Cir. 1943). See also, NLRB v. Central Telephone Co., 115 F. 2d 380 (6th Cir. 1940).

[44] NLRB v. Hill Stores, Inc., 140 F. 2d 924 (5th Cir. 1944). *Cf.* Hom-ond Stores, 77 N. L. R. B. 647 (1948) (jurisdiction declined in a similar case).

[45] NLRB v. J. L. Hudson Co., 135 F. 2d 380 (6th Cir. 1943), *cert. denied*, 320 U. S. 740 (1943); NLRB v. M. E. Blatt Co., 143 F. 2d 268 (3d Cir. 1944), *cert. denied*, 323 U. S. 774 (1944); J. L. Brandeis & Sons v. NLRB, 142 F. 2d 977 (8th Cir. 1944), *cert. denied*, 323 U. S. 751 (1944).

[46] NLRB v. Idaho-Maryland Mines Corp., 98 F. 2d 129 (9th Cir. 1938). *Cf.* Groneman & Groneman v. I. B. E. W., 17 CCH Lab. Cas. No. 65,410 (10th Cir. 1949) where the court denied recovery in a building contractor's suit against a union on the grounds of *de minimis*.

inating outside the state and whose product moved out of the state after sale either to a local refinery or to the United States government. Though the Board did not request certiorari, it apparently doubted the correctness of the decision.[47] In *NLRB v. Sunshine Mining Co.*[48] the same court affirmed the Board's exercise of jurisdiction over a much larger mining corporation operating in a similar manner, selling its product to a local smelter. After years of interpretation, the courts have produced no real standard for determining coverage of small employers.

Jurisdiction as Conceived by the NLRB

In Board proceedings, movement of goods to or from the employer's business enterprise across state lines is regarded as an ample basis for jurisdiction and a mere statement of the value of these goods is usually deemed sufficient to meet a challenge of the Board's jurisdiction. Using the factual approach, the Labor Board has claimed for itself a wide area of coverage. Jurisdiction over a neighborhood newspaper was based on the fact that the newspaper published advertisements of nationally known products sold in local branch stores of large chain organizations and on the fact that the publisher's supplies were purchased and shipped from outside the state.[49] Jurisdiction over another local newspaper was based on a small out-of-state circulation and out-of-state purchases of supplies.[50] A cafeteria serving interstate passengers at a large airport was subject to the Board's authority.[51] Other employers subjected to Board orders include a non-profit trade school,[52] a detective agency,[53] local utilities,[54] a filling station and tire recapping plant,[55] a greenhouse,[56] an advertising service whose clients manufactured goods for interstate commerce,[57] house-to-house carriers of newspapers,[58] and a safe deposit company.[59] Recent significant develop-

[47] See, 4 NLRB Ann. Rep. 113 (1939).
[48] NLRB v. Sunshine Mining Co., 110 F. 2d 780 (9th Cir. 1940), *cert. denied*, 312 U. S. 678 (1941). Cf. Canyon Corp. v. NLRB, 128 F. 2d 953 (8th Cir. 1942).
[49] Southtown Economist, 72 N. L. R. B. 1393 (1947).
[50] Lebanon News Publishing Co., 37 N. L. R. B. 649 (1941) (about 300 of 17,500 subscribers were out of state).
[51] Air Terminal Services, Inc., 67 N. L. R. B. 702 (1946). Would a stoppage of operations interfere with the *flow* of interstate commerce, or would it only inconvenience the passengers?
[52] Henry Ford Trade School, 58 N. L. R. B. 1535 (1944) (repairing and manufacturing tools used in manufacture of interstate product).
[53] William J. Burns Detective Agency, 47 N. L. R. B. 610 (1943) (guards at a manufacturing plant).
[54] Indianapolis Water Co., 48 N. L. R. B. 1399 (1943).
[55] Lewis Tire Service Co., 62 N. L. R. B. 531 (1945).
[56] Bauske Bros., 38 N. L. R. B. 435 (1942).
[57] Sterling Advertising Agency, 42 N. L. R. B. 281 (1942).
[58] Pulitzer Publishing Co., 57 N. L. R. B. 1696 (1944).
[59] Bankers Safe Deposit Co., 56 N. L. R. B. 1071 (1944).

ments include assertions of jurisdiction over the building and construction industry[60] and retail auto dealers who have a franchise as a distributor.[61]

The Labor Board's conception of the limits of its power is best traced in the decisions refusing to assert jurisdiction. Even here there is very little to guide one, for the Board has rarely denied its power to act because of lack of jurisdiction under the power of Congress to regulate and protect interstate commerce. Customarily the Board will dismiss a proceeding on policy grounds, stating, "While we do not find that the operations of the company are wholly unrelated to commerce, in view of the essentially local character of the company's business, we do not believe that the policies of the Act will be effectuated by asserting jurisdiction in this case."[62] Consciously the Board has refused to draw a line of its authority lest it be hampered when it finds a need for exercise of its authority to its fullest extent. Rarely has the Labor Board boldly stated that it had no power over an employer. Singularly, one of the rare cases disclaiming jurisdiction involved two construction companies. In the *Amerada Petroleum Corporation* proceeding,[63] the Board found two construction companies engaged in construction and maintenance of oil wells and equipment who purchased all or substantially all their equipment locally, performed only a local maintenance function and were "not engaged in activities which affect commerce within the meaning of the Act."[64] The decision can be seriously doubted for it would seem that construction and maintenance of oil wells and equipment is necessary for the production of oil which moves in interstate commerce.

A survey of the cases in which the Board declined jurisdiction under the Wagner Act reveals the uncertainty which faces employers and unions. The decisions reveal no set pattern. For example, while asserting jurisdiction over several dairies[65] and cooperatives,[66] the Board dis-

[60] Ira A. Watson Co., 80 N. L. R. B. No. 91 (1948); United Brotherhood of Carpenters and Joiners, 81 N. L. R. B. No. 127 (1949); Samuel Langer, 82 N. L. R. B. No. 132 (1949); Denver Building Trades Council, 82 N. L. R. B. No. 137 (1949).

[61] Liddon White Truck Co., 76 N. L. R. B. 1181 (1948); Puritan Chevrolet Co., 76 N. L. R. B. 1243 (1948); M. L. Townsend, 81 N. L. R. B. No. 122 (1949).

[62] McDonald Cooperative Dairy Co., 58 N. L. R. B. 552, 553 (1944). In effect, this statement has been repeated in almost every case in which the Board declined jurisdiction. The Board has also frequently stated, "Aside from the issue as to whether the company is subject to the jurisdiction of the Board, we are of the opinion that the effect of the company's operations on interstate commerce is so unsubstantial that to assert jurisdiction in this case would not effectuate the policies of the Act." S. & R. Baking Co., 65 N. L. R. B. 351 (1946).

[63] Amerida Petroleum Corporation, 60 N. L. R. B. 1467 (1945).

[64] *Id.* at 1469.

[65] West Side Cooperative Creamery Association, 69 N. L. R. B. 546 (1946); Enid Cooperative Creamery Association, 58 N. L. R. B. 592 (1944).

[66] Rockingham Poultry Market Cooperative, 59 N. L. R. B. 486 (1944).

missed a complaint against a large cooperative dairy which had purchased in one year $38,000 in goods from outside the state.[67] The cooperative had shipped 20,000 pounds of powdered milk to points outside the state and had sold other products valued at $30,000 to agents of the federal government. These transactions amounted to roughly two percent of the company's business.

A petition involving a city bus company serving a limited part of the city's population and no industrial areas was dismissed in the *Chicago Motor Coach* case.[68] One factor in the decision was the availability of competing transportation several blocks away.[69] The Board refused to ground its jurisdiction on out-of-state purchases of motor fuel and supplies amounting to half a million dollars annually because these purchases were "incidental" to respondent's transportation business and if "controlling" weight were given to out-of-state purchases "even the smallest bus line or taxi company" would be subject to the Act unless it is "located in one of the petroleum producing states."[70] This reasoning fails adequately to explain the result. Availability of services by competitors was not important in the *Bradford Dyeing* case. A strike on a system serving thousands daily would strain other transportation systems operating in industrial areas. Respondent's competitors were covered by the Act.[71] Many decisions rest on out-of-state purchases of supplies and the Board does not recognize the possibility of line drawing to exclude small bus companies and taxis. One important implication of the case is that purchase of capital equipment is not as important in determining jurisdiction as are purchases involving a regular and continuous inflow of materials.[72]

A complaint against a bus company operating between Los Angeles and San Francisco was dismissed when it was shown that 83 persons or a total of one and one-half percent of the total passengers were on interstate journeys.[73] When no evidence was adduced showing a strike in a cafeteria in an aircraft plant would burden or obstruct commerce, a petition by workers in the cafeteria was dismissed.[74] The Board regarded the cafeteria as a business "local in character and one over which the Board does not customarily assert jurisdiction." The Board de-

[67] McDonald Cooperative Dairy Co., 58 N. L. R. B. 552 (1944).
[68] Chicago Motor Coach Co., 62 N. L. R. B. 890 (1945). *Cf.* Duke Power Co., 77 N. L. R. B. 652 (1948) (dismissing a petition involving bus company in a small city); NLRB v. Baltimore Transit Co., 140 F. 2d 51 (4th Cir. 1943), *cert. denied*, 321 U. C. 696 (1944) (affirmed jurisdiction over a bus company serving an entire city where passengers are engaged in the production of goods that flow in interstate commerce).
[69] Chicago Motor Coach Co., 62 N. L. R. B. 890, 893 (1945).
[70] *Id.* at 893, footnote 9.
[71] Chicago Surface Lines, 58 N. L. R. B. 1140 (1944).
[72] *Cf.* Richter Transfer Co., 80 N. L. R. B. No. 186 (1948).
[73] Airline Bus Co., 64 N. L. R. B. 620 (1945).
[74] Consolidated Vultee Aircraft Corp., 57 N. L. R. B. 1680 (1944).

clined jurisdiction over a bakery, though substantial out-of-state purchases of raw materials were made, when it was shown that all or nearly all of the respondent's customers were within the state.[75] The effect of out-of-state purchases was regarded as "unsubstantial." The Board declined jurisdiction over a company having three plants in California manufacturing flour and feed from raw materials "overwhelmingly" originating within the state and selling all of its products for consumption in the state.[76] Employees of a casualty insurance company engaged in insuring a city transportation system were denied an election in the *St. Louis Public Service Co.* case.[77]

These Labor Board decisions have almost all been decided under the Wagner Act. As was previously noted,[78] the Taft-Hartley Act made no change in the provisions defining "commerce," but the enlarged subject matter regulated by the new act has resulted in a broader coverage. It is also true that many more decisions under the Taft-Hartley Act decline jurisdiction than was previously the case. In a recent twelve-month the Board dismissed over forty cases which reached the decision stage, each decision stating in effect that to assert jurisdiction would not effectuate the policies of the Act. Probably the major reason for this increase is the division of authority under the Taft-Hartley Act whereby the Board members have nothing to do with determination of policies for filing unfair labor practice complaints, whereas under the Wagner Act the over-all policies for instituting such proceedings were made by the Board. The General Counsel's opinion as to what will "effectuate the policies of the Act" obviously differs greatly from that of the members of the Board.[79] There has also been strong difference of opinion between Board members with reference to the desirability of asserting jurisdiction.

Since Board decisions dismissing proceedings on jurisdictional grounds have appeared in greater numbers under the Taft-Hartley Act as the General Counsel has put into practice his policy of extending the coverage of the Act to small businesses, the views of the Board on jurisdiction are further revealed. However, the Board continues to place dismissal on administrative discretion and not on a lack of power

[75] S. & R. Baking Co., 65 N. L. R. B. 351 (1946). *Cf.* NLRB v. McGough Bakeries Corp., 153 F. 2d 420 (5th Cir. 1946) (jurisdiction over a bakery affirmed). The cases are difficult to distinguish. See also, NLRB v. Schmidt Baking Co., 122 F. 2d 162 (4th Cir. 1941); NLRB v. Van De Kamp's Holland-Dutch Bakeries. 152 F. 2d 818 (9th Cir. 1946).

[76] Lacey Milling Co., 48 N. L. R. B. 914 (1943).

[77] St. Louis Public Service Co., 65 N. L. R. B. 775 (1946). *Cf.* Transit Casualty Co., 83 N. L. R. B. No. 128 (1949) in which the Board asserted jurisdiction over the same company after it had expanded its operations over twelve states.

[78] *Supra* p. 1.

[79] A-1 Photo Service, 83 N. L. R. B. No. 146 (1949).

to act. To some extent the Board has set a pattern, still somewhat uncertain, of operating on an industry basis, asserting jurisdiction in some industries and declining jurisdiction in others. For example, jurisdiction has been declined in several bakery cases when there were no substantial out-of-state shipments, though the out-of-state purchases of materials may have been quite large.[80] Laundries have generally escaped regulation by the Board[81] unless they operate in two states[82] or have some closer than ordinary connection with interstate commerce, such as supplying interstate carriers.[83] Proceedings involving building materials suppliers, such as suppliers of sand and gravel and ready-mix cement, are frequently dismissed on policy grounds though the "incidental" purchases of equipment and supplies from dealers who obtained them out of state may amount to large sums.[84] In general, the Labor Board has refused to assert jurisdiction over dairies unless they have some direct connection with interstate commerce.[85] A few recent decisions have dismissed proceedings involving small retail stores.[86] The retail store decisions are based on policy grounds and the proprietors are still at sea as to whether they can consent to a union-shop contract without an election supervised by the Labor Board.

Late decisions declining jurisdiction over several small manufacturing plants[87] may presage a significant change in the attitude of the Board or it may be that the Genral Counsel has brought complaints against smaller businesses to the Board for decision. Uncertainty has

[80] Fehr Baking Co., 79 N. L. R. B. No. 60 (1948) (raw materials valued at $1,470,000 originated out of state); Golden Crust Bakery, 80 N. L. R. B. No. 117 (1948) (out of state purchases amounted to $288,000 in one year). See note 75 *supra*.

[81] Red Star Industrial Service, 80 N. L. R. B. No. 135 (1948); J. Arthur Anderson Laundry, 83 N. L. R. B. No. 155 (1949).

[82] NLRB v. White Swan Co., 118 F. 2d 1002 (1941).

[83] New York Steam Laundry, 80 N. L. R. B. No. 242 (1948).

[84] Tampa Sand & Material Co., 78 N. L. R. B. 629 (1948); Texas Construction Material Co., 80 N. L. R. B. No. 187 (1948); Richter Transfer Co., 80 N. L. R. B. No. 186 (1948); Hanwalt Bros., 80 N. L. R. B. No. 196 (1948); Knoxville Sangravel Co., 80 N. L. R. B. No. 227 (1948); Miller Concrete Pipe Co., 83 N. L. R. B. No. 102 (1949). *Cf.* NLRB v. Suburban Lumber Co., 121 F. 2d 829 (3d Cir. 1941); *cert. denied*, 314 U. S. 693 (1941); J. H. Patterson Co., 79 N. L. R. B. No. 48 (1948) (cases exercising jurisdiction over lumber yards).

[85] Purity Creamery Co., 79 N. L. R. B. No. 132 (1948); Creamland Dairies, 80 N. L. R. B. No. 21 (1948); Eugene Farmers Creamery, Case No. 36-RC-50, October 12, 1948. Mr. Denham doubts the Board's power over a dairy producing and selling milk locally. Hearings, *supra* note 5 at 24.

[86] Sun Photo Co., 79 N. L. R. B. No. 174 (1948); Haleston Drug Stores, Inc., 82 N. L. R. B. No. 148 (1949) (chain of four retail drug stores); A-1 Photo Service, 83 N. L. R. B. No. 86 (1949); Bailey Slipper Shop, Inc., 84 N. L. R. B. No. 41 (1949). *Cf.* King Brooks, Inc., 84 N. L. R. B. No. 74 (1949) retail clothing store purchasing goods valued at $400,000 out of state held subject to Act).

[87] Screw Machine Products Co., 79 N. L. R. B. No. 47 (1948); Gabilan Iron & Machine Co., 80 N. L. R. B. No. 127 (1948); Advance Welding Works, 81 N. L. R. B. No. 30 (1949); Clayton Dorris Co., 78 N. L. R. B. 859 (1948); Warner Printing Co., 80 N. L. R. B. No. 33 (1948); Detroit Canvas Manufacturers Association, 80 N. L. R. B. No. 54 (1948).

clouded the question of coverage of retail automobile dealers. After asserting jurisdiction over a retail automobile dealer as late as 1941,[88] the Labor Board dismissed in 1947 a petition for certification involving a dealer who obtained his cars from a local assembly plant.[89] A year later the *Liddon White Truck Co.* case[90] reversed the trend and held, with a strong dissent by Chairman Herzog and Member Murdock, that the Act applied to a dealer whose autos were shipped from out of state. *Liddon White* and other recent decisions have made it plain that jurisdiction will be exercised where the dealer has a franchise for distribution of automobiles, even though the dealer purchases autos manufactured in the state and his sales are local,[91] since this is the terminus of interstate movement of most of the raw materials going into the automobiles.

An examination of the size of the establishments involved in Board orders further reveals the pattern of the Board's jurisdiction. In the *Fainblatt* case the Supreme Court held an employer covered by the Act who hired from sixty to two hundred workers and processed about one thousand dozen women's garments a month; jurisdiction over the entire clothing industry, down to the limits of the maxim *de minimis* included authority over this employer. The Third Circuit Court of Appeals held an employer hiring eleven employees in a lumber yard and purchasing outside the state materials valued at $150,000 subject to the Board's jurisdiction.[92] The Board asserted jurisdiction over an employer selling out of state one-half his locally purchased poultry products valued at $25,000.[93] Size of the establishments involved in Labor Board proceedings is disclosed in an NLRB summary showing that 37 percent of the unfair labor practice cases and 55 percent of the representation cases received by the Board during the fiscal year 1943 were in establishments employing less than 100 workers.[94]

Cases establishing the Board's jurisdiction can be contrasted sharply with other Board decisions dismissing petitions on jurisdictional or policy grounds. A cooperative dairy purchased goods valued at $40,000 and sold a large amount of goods outside the state, yet the Board dismissed the complaint.[95] Out-of-state purchases of gasoline and equipment in

[88] Newton Chevrolet Co., 27 N. L. R. B. 334 (1941).
[89] Herff Motor Co., 74 N. L. R. B. 1007 (1947).
[90] Liddon White Truck Co., 76 N. L. R. B. 1181 (1948).
[91] Puritan Chevrolet, Inc., 76 N. L. R. B. 1243 (1943); Adams Motors, Inc., 80 N. L. R. B. No. 236 (1948); Johns Bros., 84 N. L. R. B. No. 33 (1949) (Michigan dealer who sold cars manufactured intrastate). *Cf.* Bangor Auto Body Shop., 82 N. L. R. B. No. 76 (1949) (employer engaged in repair of vehicles and sale of auto parts who had no exclusive agency or franchise escaped regulation).
[92] NLRB v. Suburban Lumber Co., 121 F. 2d 829 (3d Cir. 1941).
[93] Fairmont Creamery Co., 73 N. L. R. B. 792 (1947).
[94] 8 NLRB Ann. Rep. 90 (1943).
[95] McDonald Dairy Co., 58 N. L. R. B. 552 (1944).

the *Chicago Motor Coach* case amounting to $500,000 were only "incidental" to its business of transportation and jurisdiction was declined.[96] In the *Fehr Baking Co.* case[97] raw materials valued at $1,470,000 originated out of state, yet the Board refused to act. The Board apparently believed it had reached or was nearing the limit of its authority when it dismissed a petition in the *Southwest Metals* case[98] declining to assert its authority over a small mine employing five men who produced annually ore valued at $7,000.

This case survey discloses that the pattern of coverage is quite clear for a large area of the nation's industry. It also reveals that the question of coverage is quite unclear in the area of small employers, for example, those who employ from one to one hundred employees and whose interstate business amounts to less than $100,000 annually. The dilemma of the employer and employee in this area is illustrated by the checkered experience of the retail automobile dealers.[99] This dilemma is further heightened by the statements of Mr. Denham that he can "conceive very few businesses over which there is not at least technical jurisdiction."[100] One witness before a congressional subcommittee who had discussed the matter with Mr. Denham understood Mr. Denham's view to be that jurisdiction over a small tavern with two bartenders, selling locally produced beer, could be based on the fact that the hops used in brewing the beer were brought in from another state.[101] At the same investigation Mr. Denham stated that he was compelled by the statute to set the forces of government in action if interstate movement of more than a few dollars was involved,[102] but his testimony in full before the subcommittee reveals that Mr. Denham is as much at sea as the rest of us. This hearing also brought out the plight of the employees in the hotel industry. Under the Wagner Act they sought aid from the Labor Board, but their pleas were rejected. Now that the heavy hand of government regulation falls on unions under the Taft-Hartley Act, the General Counsel proposes to apply the Act in this industry. Also revealed at the hearing was the fact that both employers and employees in the hotel industry were desirous of retaining their former immunity.

Uncertain as it is, the most dependable guide of the exercise of

[96] Chicago Motor Coach Co., 62 N. L. R. B. 890 (1945).
[97] Fehr Baking Co., 79 N. L. R. B. No. 60 (1948).
[98] Southwest Metals, 72 N. L. R. B. 58 (1947).
[99] *Supra*, p. 13.
[100] *Hearings before Subcommittees of the Committee on Education and Labor and of the Committee on Expenditures in the Executive Departments, Investigation to Ascertain Scope of Interpretation by General Counsel of National Labor Relations Board of the Term "Affecting Commerce," as Used in the Labor Management Relations Act, 1947*, 80th Cong., 2nd Sess. 18 (1948).
[101] *Id.* at 3.
[102] *Id.* at 18.

jurisdiction by the Labor Board is that of industry-wide coverage, though even here many of the little fellows are screened out before the Board takes formal action. Another factor is the direction of movement of goods in interstate commerce. Though it is difficult to cite any particular decisions to support the statement, after reading many cases one has the feeling that the Board has placed greater emphasis on production for out-of-state shipment than on production for local consumption from materials originating in other states.

The case survey also reveals the sweeping authority the Board has exercised over local enterprises. The cases establish that no mechanical test is controlling, but at least some mechanical factors, such as size and volume of commerce affected, are weighed in determining whether or not a stoppage of the employer's operations by industrial strife would substantially interfere with the flow of interstate commerce. Questions of degree do not lend themselves to ready solution; the limits of this authority remain to be picked out from case to case. Thus far the decisions have only extended the concept of the Board's jurisdiction; the bounds of its power remain to be delineated.

Theories on Which Jurisdiction May Be Based

One can have little patience with the argument occasionally advanced that the building and construction industry as such is not covered by the Labor Relations Act.[103] It is sufficient to point to several well-known construction companies who operate in several states, carrying on an interstate business. Each project in a single state cannot be considered alone when a dispute arises with a large construction company. The projects often complement one another; workers are shifted as needed and plans usually move from a central office which directs work in certain regions. A labor dispute at one job might spread to the contractor's other projects. These facts would be enough to sustain jurisdiction.

Generally accepted theories of jurisdiction will warrant an exercise of power over much of the building and construction industry. The real problem is whether or not *all* the industry is covered, and if it is not covered where shall the line be drawn. There is no simple line drawing process except to set some arbitrary figure for the amount of interstate commerce handled by the firm involved, but the chance of establishing such a limit, other than by legislation, is not great. However, the delineation of the limits by the case-to-case method will permit the courts to hold that regulation of labor relations in some small construction projects, such as building a single small residence, is beyond the power of Congress. If such an area of exemption exists, it is the

[103] Brown & Root, 77 N. L. R. B. 1136 (1948).

belief of the author that the touchstone as to whether or not interstate commerce would be affected by a labor dispute within the meaning of the Act depends upon whether or not the labor dispute would spread from the immediate employer-employee relationship and engulf an even larger area of the industry. The discussion of the limitation will be on this basis.

A. Construction for Interstate Commerce

It is not difficult to establish jurisdiction of the Labor Board over labor disputes when the construction may be said to be "in commerce." Under the Fair Labor Standards Act[104] employees engaged in construction on interstate instrumentalities, such as railroads, highways, bridges, streets, navigable waterways and telephone companies, have been found to be "in commerce" and subject to the power of Congress to regulate wages.[105] It seems certain that they would be covered by the broader NLRA. Labor disputes in construction "for interstate commerce," such as original construction of highways, railroads, airports and related construction, would appear to fall within the broad category, "affecting commerce." Construction of new plants for the production of goods for interstate commerce and construction of new units in existing plants producing goods for interstate commerce could be covered on the theory that plant construction is requisite for subsequent production. Some construction companies would be subject to the Act on the ground they are "engaged in commerce." This could involve the actual shipment of goods across state lines or it might be the shipment of plans, specifications and other materials from a central office to construction projects located in several states.[106]

Chairman Herzog in a concurring opinion in the *Samuel Langer* case,[107] in which the Board exercised jurisdiction over a dispute concerning construction of a residence, thought the proper basis for jurisdiction over the dispute was the fact that the New York subcontractor was operating in New Jersey, making it an interstate transaction. This

[104] 52 Stat. 1060 (1938), 29 U. S. C. A. 201 *et seq.* (1947).

[105] Fitzgerald v. Pederson, 324 U. S. 720 (1944) (repairing railroad bridges); Overstreet v. North Shore, 318 U. S. 125 (1943) (repairing highway bridge); Walling v. McCrady Construction Co., 156 F. 2d 923 (3d Cir. 1946), *cert. denied*, 329 U. S. 635 (1946) (construction of roads, streets, bridges, telephone and railway facilities); Walling v. Patton Tulley Transportation Co., 134 F. 2d 945 (6th Cir. 1943) (construction of dikes and revetments on navigable waterway). The requirement of the FLSA that the employee be engaged "in commerce or in the production of goods for commerce," 29 U. S. C. A. §206(a) (1947), seriously limits coverage of the Act. See, Higgins v. Carr Brothers, 317 U. S. 572 (1943). Courts have refused to apply the Act to new construction of highways or industrial plants. Shannon v. Boh Bros. Construction Co., 8 So. 2d 542 (La. Ct. App. 1943); Kelly v. Ford, Bacon & Davis, 162 F. 2d 555 (3d Cir. 1947); Noonan v. Frisco Const. Co., 140 F. 2d 663 (8th Cir. 1943); Scholl v. McWilliams Dredging Co., 169 F. 2d 729 (2d Cir. 1948). Note, 60 Harv. L. Rev. 154 (1946).

[106] NLRB v. Austin Co., 165 F. 2d 592 (7th Cir. 1947).

[107] Samuel Langer, 82 N. L. R. B. No. 132 (1949).

basis for jurisdiction could apply in a good many situations especially where contractors are located near state lines and would normally operate in several states, even though the individual contract or construction project is quite small.

The same theory applied in the extreme case would justify an exercise of jurisdiction over an employer who moved *any* materials across state lines to a construction project, such as a contractor who himself made use of the channels of interstate commerce as distinguished from an employer who purchased his materials locally and had no connection with interstate movement. The analogy found in the FLSA cases may support this conclusion for that Act has been held applicable in the case of an employer who shipped in interstate commerce an almost minute quantity of goods.[108] The FLSA cases were situations where the goods were exported and it may be that less weight will be given to situations where the goods are imported for local consumption.

Jurisdiction based on construction for commerce, construction for instrumentalities of commerce and engaging in interstate commerce would cover the major portion of the building and construction industry, but it would also leave a large area of local construction untouched, such as the building of homes, schools and churches, when the goods were purchased by the contractor locally.

B. Master Contracts and Membership in Councils and Associations

More than any other industry the building and construction industry has developed pyramiding organizations to deal with labor relations. Contractors have formed local, state and national organizations, a part of whose function is to aid the employers with their labor problems. Unions are organized in much the same fashion. Locals in various trades have organiezd councils which may have jurisdiction over a municipal area or over several counties. State organizations have been formed, and the nineteen building trades unions in the American Federation of Labor have formed the Building Trades Department which has considerable authority over the unions throughout the nation. It is well known that one of the chief functions of the councils and the Building Trades Department is to handle jurisdictional disputes. It is also very common to have master contracts between employer associations and the unions or councils. The master contract may cover a city or the entire nation.[109]

[108] Mabee *et al.* v. White Plains Publishing Co., 327 U. S. 178 (1946).

[109] The bricklayers have a national agreement with the tile and the terrazzo contractors' associations. In the New York area the nineteen building trades unions have a master contract with all the contractors' associations. Frequently contractors who are not members of associations sign agreements identical with the master contracts.

When it appears that the particular labor dispute in a local situation will spread to other employers and their employees because it involves a master contract or because of the relationship within an organization, a very small employer and his employees might be covered who would not otherwise be subject to the Act. Here again it would be important to examine the facts to determine the likelihood that the dispute will spread, causing a substantial effect on interstate commerce. One can easily imagine a strike stopping construction in an entire city from a dispute over a master contract. A general strike in the clothing industry helped convince the Supreme Court of the necessity for coverage of the entire industry.[110]

In *Bott v. Glazier's Union Local No. 27*[111] attempts of a union to enforce a by-law that all glazing must be done on the job caused a city wide dispute with a contractor's association. When a local building trades council made demands on a contractors' association for a union-shop contract without a union-shop election as required by the Taft-Hartley Act, the resulting labor dispute was broad enough to warrant an exercise of jurisdiction.[112] In other situations the labor dispute might involve a secondary boycott, a sympathetic strike or any other joint action on the part of either associated unions or associated contractors which would substantially interfere with interstate commerce. Due to the extensive organization of the industry, jurisdiction on this theory would cover a major portion of the industry and a very small construction job would be covered when there is a strong possibility the dispute will spread.

C. Industry-Wide Coverage to Effectuate the Policies of the Act

The declaration of policy expressed by Congress in Section 1 of the National Labor Relations Act[113] implies a broad coverage of the remedial portion of the Act. Congress expressed concern over labor disputes which obstruct interstate commerce and tend to aggravate business depressions by depressing wage rates. Congress also gave utterance to solicitude over disputs arising out of differences of wages, hours, or other working conditions. Execution of this broad policy would require national coverage to provide uniformity and to assure equality of bargaining power between the employer and employees, and equality of bargaining power between employees in the various industries which might have a broad effect upon the national economy.

[110] NLRB v. Friedman-Harry Marks Clothing Co., 301 U. S. 58, 74 (1937).
[111] Bott v. Glazier's Union Local No. 27, 15 CCH Lab. Cas. No. 64,859 (N. D. Ill. 1948).
[112] California Association of Employers v. Building and Construction Trades Council of Reno, 15 CCH Lab. Cas. No. 64,570 (D. Nev. 1948).
[113] 61 Stat. 136 (1947), 29 U. S. C. A. 151 (Supp. 1948).

No decision has based jurisdiction on the full import of this argument, but the theory in a slightly different aspect has been used a number of times as a basis for asserting jurisdiction over small concerns. Coverage here invariably has been based on the argument that relatively small employers must be covered or else the major portion of the industry will escape regulation, and this approach was accepted by the Supreme Court in the clothing industry cases.[114] Experience in the clothing industry evidenced that costly industrial strife had been materially diminished by the use of collective agreements. A general strike in New York had affected thousands of employees employed by hundreds of small manufacturers. Evidence showed that clothing manufacturers employed an average of only about thirty-two employees each. These facts were sufficient to convince the Court that effectuation of the policies of the Act would require coverage of small local producers. The smaller of the two clothing concerns to appear before the Court was in the *Fainblatt* case where from sixty to two hundred employees were involved. Employers and employees in even smaller concerns could still question jurisdiction. However, the clothing industry is particularly dependent on interstate commerce and almost complete coverage is indicated by the decisions.

The same idea was expressed in the *Polish National Alliance* case when Mr. Justice Frankfurter declared:

> Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far reaching in its harm to commerce.[115]

In the *Mandeville Island Farms* case, involving prosecution of a group of processors of sugar beets who were charged with violation of the Sherman Act, Mr. Justice Rutledge stated in much the same terms:

> Congress' power to keep the interstate market free of goods produced under conditions inimical to the general welfare, *United States v. Darby*, 312 U. S. 100, 115, may be exercised in individual cases without showing any specific effect upon interstate commerce, *United States v. Walsh*, 331 U. S. 432, 437-438; it is enough that the individual activity when multiplied into a general practice is subject to federal control, *Wickard v. Filburn*, or that it contains a threat to the interstate economy that requires preventive regulation. *Consolidated Edison Co. v. Labor Board*, 305 U. S. 197, 221-222.[116]

[114] NLRB v. Friedman-Harry Marks Clothing Co., 301 U. S. 58 (1937); NLRB v. Fainblatt, 306 U. S. 601 (1939).

[115] Polish National Alliance v. NLRB, 322 U. S. 643, 648 (1944).

[116] Mandeville Island Farms v. American Crystal Sugar Co., 334 U. S. 219, 236 (1948).

The decisions have also relied heavily on *Wickard v. Filburn*[117] where the commerce power was found to support application of the penalty provisions of the Agricultural Adjustment Act of 1938 to that part of a farmer's wheat crop grown for consumption, involving 239 bushels of wheat and a $117 penalty. The reasoning advanced was that local production and consumption must be regulated because it is a material factor in the national grain market.

It is submitted that *Wickard v. Filburn* is not authority for extending jurisdiction of the Labor Board to situations in the building and construction industry involving only a few hundred dollars. It is believed a labor dispute in the building industry will have quite a different and less far reaching effect on interstate commerce than that found in the case of the production of wheat for local consumption. Surplus wheat grown on a farm for local consumption remains a potential source of supply for the interstate markets if the price is high enough to draw it into commerce; it is the most variable factor in the source of supply for the wheat market. For this reason it was essential that this potential market supply be regulated, else the whole regulatory process of the statute would fail to accomplish its purpose. If the market price is high, the practice of selling wheat grown for home consumption is widespread. A work stoppage on a small construction project can be examined in the same light and unless it is found that the labor dispute might spread to other jobs and thus have a substantial effect on commerce, the single project should be considered alone. The analysis of both situations rests on the likelihood that the practice will spread. In building projects, this likelihood would vary greatly from case to case. The criterion is the same; what is the potential effect of this situation on interstate commerce.

Briefs in construction cases submitted by the General Counsel's office have invariably based their principal argument on this theory and the courts and the Labor Board have generally accepted the argument as a basis for application of the Taft-Hartley Act.[118] However, a court

[117] Wickard v. Filburn, 317 U. S. 111 (1942).

[118] United Brotherhood of Carpenters v. Sperry, 170 F. 2d 863 (10th Cir. 1948) employees of contractors induced to strike when contractor erected prefabricated houses produced by non-union manufacturer); Shore v. Building & Construction Trades Council, 173 F. 2d 678 (3d Cir. 1949) (A subcontract for electrical work on a job of constructing an $80,000 open air theater was awarded to a non-union contractor. The council caused union men employed by the general contractor and other subcontractors to walk off the job. The general contractor did a gross business of $460,000 and purchased $250,000 worth of equipment annually, most of it coming from local dealers. The subcontractor did a gross business of $30,000 annually and purchased locally supplies valued at $15,000); Slater v. Denver Building and Construtcion Trades Council, —— F 2d ——, 16 CCH Lab. Cas. No. 65,237 (10th Cir. 1949), *reversing* 81 F. Supp. 490 (D. Colo. 1948) (Injunction issued against a council which placed a manufacturer of soda fountains, who imported and exported over $100,000 worth of goods, on an unfair list and called strikes on projects where his employees installed fountains).

issuing an injunction against a union or concern involving a small job may find itself in an anomalous position if the Labor Board later exercises its administrative discretion and dismisses a complaint on the ground that an assertion of jurisdiction would not effectuate the policies of the Act. This situation occurred recently when a proceeding before the Board was dismissed after the Third Circuit Court of Appeals had affirmed a district court decision issuing an injunction.[119] This situation will probably not arise again if Mr. Denham succeeds in establishing his argument that the Board cannot exercise administrative discretion in secondary boycott cases,[120] for the General Counsel would guide both phases of the proceeding.

Jurisdiction based on industry-wide coverage would blanket the entire country. A labor dispute on a construction job of minor importance would be typical of hundreds of other situations which taken together would have a far-flung effect. To hold the Board powerless over small contractors would leave a major part of the industry unregulated and the policies and practices in the industry non-uniform. Evidence will show that it is a huge industry made up largely of small concerns using large quantities of materials which have moved in interstate commerce.[121] Workers in other industries affected by labor disputes in the construction industry include those in transportation, lumber mills, stone quarries, cement factories, glass factories, steel mills and many others. A total cessation of operations in the building industry would see the economy of our country seriously dislocated. It is on this ground Mr. Denham would blanket the entire industry.

D. Volume of Interstate Commerce

The great majority of decisions affirming the jurisdiction of the National Labor Relations Board have been based on the volume of commerce moving across state lines to or from the concern involved. This

[119] Shore v. Building & Construction Trades Council, 15 CCH Lab. Cas. No. 64,837 (W. D. Pa. 1948), *affirmed*, 173 F. 2d 678 (3d Cir. 1949); Petredis and Fryer, 85 N. L. R. B. No. 45 (1949). On the other hand, the Board has asserted jurisdiction when a court found the parties were not within the coverage of the Act. Sperry v. Denver Building & Construction Trades Council, 77 F. Supp. 321 (D. Colo. 1948); Gould & Preisner, 82 N. L. R. B. No. 137 (1949).

[120] See note 11 *supra*.

[121] In 1946 construction amounted to over ten billion dollars. In that year thirteen states accounted for approximately 64 percent of lumber production and accounted for only 26 percent of new construction activity. On the other hand, states which accounted for approximately 74 percent of new construction accounted for 36 percent of lumber production. U. S. Dept. of Commerce, Construction and Construction Materials, Dollar Construction Estimates, 1915-1946, pp. 36-42; Construction and Consrtuction Materials, Construction Materials, 1915-1946, pp. 37, 43-45. In 1939, the latest year for which statistics are available, 53 percent of the contractors did an annual business of less than $5,000 for each establishment. In the same year over 20 percent of the construction was done by contractors each doing less than $50,000 worth of business annually. U. S. Dept. of Commerce, Sixteenth Census of the United States: 1940, Vol. IV, p. 17.

basis of jurisdiction has become so clear that decisions of both the courts and the Labor Board regard it as sufficient in most cases to establish jurisdiction by merely stating the value of goods moving across state lines which would be affected by a work stoppage in the particular situation.

The Supreme Court has said the limit of the Board's jurisdiction based on the volume of interstate commerce is governed by the maxim *de minimis*,[122] but the court has offered no standard by which to apply the rule. Whether or not the common law rule of "a few dollars or less" applies to this type of case remains for a case denying jurisdiction on this ground;[123] there remains ample breadth of decision to exempt many employers and unions from application of the Act by reason of the small volume of commerce affected.

Several federal district courts have issued injunctions in building and construction cases when they found the volume of commerce affected was large enough to justify application of the Act. In *Barker v. Local 1796, United Brotherhood of Carpenters and Joiners*,[124] the strike involved alterations of a retail store, but the fact that it was one of a small chain of stores could have caused the dispute to have spread to other localities. *California Association of Employers v. Building and Construction Trades Council of Reno*[125] involved all union projects in the Reno area. Out-of-state purchases of materials for local construction valued at over $100,000 were sufficient to warrant jurisdiction in *Cranefield v. Bricklayers Union*.[126] Unions were enjoined from committing unfair labor practices in *LeBaron v. Los Angeles Building and Construction Trades Council* in connection with construction of a $38,000,000 power plant.[127] A court found it had jurisdiction in a case involving a contractor, employing about twenty persons, whose gross annual receipts were $100,000 though he purchased only $25,000 worth of materials out of state.[128] Jurisdiction is doubtful here unless it could be shown the dispute might spread to other projects. Two unreversed cases have denied jurisdiction over the union or employer involved. Judge Symes of the Colorado District Court found he had no jurisdiction over a union in a case in which over $45,000 worth of materials

[122] NLRB v. Fainblatt, 306 U. S. 601, 607 (1939).

[123] NLRB v. Suburban Lumber Co., 121 F. 2d 829 (3d Cir. 1941) (common law rule of *de minimis* applied in a case affirming jurisdiction).

[124] Barker v. Local 1796, United Brotherhood of Carpenters and Joiners, 14 CCH Lab. Cas. No. 64,333 (M. D. Ala. 1948).

[125] California Association of Employers v. Building and Construction Trades Council of Reno, 15 CCH Lab. Cas. No. 64,570 (D. Nev. 1948).

[126] Cranefield v. Bricklayers Union, 15 CCH Lab. Cas. No. 64,603 (W. D Mich. 1948).

[127] LeBaron v. Los Angeles Building and Construction Trades Council, 84 F. Supp. 629 (S. D. Cal. 1949).

[128] Sperry v. Building & Construction Trades Council of Kansas City, 15 CCH Lab. Cas. No. 64,836 (D. Kans. 1948).

originated out of state and sales and services out of state amounted to $7,000.[129] The decision may have little weight since it was based on the "coming to rest" doctrine of the *Schechter* case[130] which is now somewhat discounted. The case of *Mills v. Plumbers Union*,[131] denying jurisdiction over installation of air conditioning equipment in a bottling plant in a small town in Missouri, carries very little authority since it was based on decisions under the Fair Labor Standards Act and the court failed to take into account the limited coverage of that Act.[132]

The Tenth Circuit Court of Appeals affirmed jurisdiction over a dispute involving a manufacturer of prefabricated dwellings whose shipments into and out of the state were over $150,000.[133] When an injunction was issued in a case involving construction of an $80,000 open air theater, the decision was affirmed on appeal[134] though the case may be difficult to justify unless it could be shown the dispute would spread to other contracts held by the various subcontractors working on the same project. An employer who manufactured and installed soda fountains was protected from union unfair labor practices when the evidence showed he transported in interstate commerce materials valued in excess of $150,000.[135] Installations were made in several states. Installation by non-union men would likely cause work stoppages of other contractors on numerous jobs where the installations were being accomplished. Of the two cases in which Judge Symes denied jurisdiction, the General Counsel appealed the *Slater* case[136] involving interstate commerce valued at $150,000 and did not appeal the *Sperry* case[137] where the interstate business amounted to only $57,000. These figures may have some significance in judging the volume thought necessary to sustain an appeal, though other factors may have influenced the decision not to carry the latter to the appellate court.

Since the decision was made to exercise jurisdiction over labor disputes in the building and construction industry, several disputes at large construction projects have been the subject of Board action.[138]

[129] Sperry v. Denver Building & Construction Trades Council, 77 F. Supp. 321 (D. Colo. 1948). And see Groneman & Groneman v. I. B. E. W., 17 CCH Lab. Cas. No. 65,410 (10th Cir. 1949).

[130] A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935).

[131] Mills v. Plumbers Union, 83 F. Supp. 240 (W. D. Mo. 1949).

[132] See Note 105 *supra*.

[133] United Brotherhood of Carpenters v. Sperry, 170 F. 2d 863 (10th Cir. 1948).

[134] Shore v. Building and Construction Trades Council, 173 F. 2d 678 (3d Cir. 1949).

[135] Slater v. Denver Building and Construction Trades Council, —— F. 2d ——, 16 CCH Lab. Cas. No. 65,237 (10th Cir. 1949).

[136] Slater v. Denver Building & Construction Trades Council, 81 F. Supp. 490 (D. Colo. 1948).

[137] Sperry v. Denver Building & Construction Trades Council, 77 F. Supp. 321 (D. Colo. 1948).

[138] Brown & Root, 77 N. L. R. B. 1136 (1948); Guy F. Atkinson, 84 N. L. R. B. No. 12 (1949).

In two important cases the Board asserted jurisdiction over relatively small projects. In the *Ira A. Watson* case[139] the alleged unfair labor practice occurred when a supplier of wall and floor coverings in remodeling a home used non-union workmen, causing employees of other contractors to walk off the job. Though this job was a small one, the supplier had a chain of stores in seven states. The Board was justified in considering his entire volume for the dispute might have spread to other stores and other jobs. In the *Samuel Langer* case[140] the subcontractor against whom the alleged unfair labor practice was leveled did an annual business of $24,000 and purchased $5,000 worth of materials from points outside the state. The immediate union ban was aimed at his $325 subcontract on a $15,000 residence construction project. Jurisdiction can more easily be based on the fact that the subcontractor was operating in two states or on the possibility that the dispute would spread to other projects.

Dismissal of two proceedings involving disputes in the building and construction industry was based on administrative discretion. A complaint against an employer in the *Walter J. Mentzer* case,[141] alleging the discharge of an employee was an unfair labor practice, was dismissed because of the small volume of the employer's business. He was a small plastering contractor who employed from two to six men, had a gross annual income of $33,000, and who purchased locally materials valued at $11,000, some of which had originated outside the state. The case seems correct. No particular project was involved which might cause the dispute to spread and the dispute was between a non-union worker and an employer. Though the non-union worker should not be discriminated against, the fact that he does not have fellow union members to come to his support lessens the possibility of a wide-spread dispute. It is said that the General Counsel's Office suspects the real basis for the decision is the *de minimis* rule, but the Board does not wish to limit itself by placing the decision on that ground. The small volume of interstate commerce resulting from construction of an $80,000 drive-in theater caused the Labor Board to dismiss a complaint alleging a secondary boycott against a subcontractor in the *Petredis and Fryer* case.[142] Practically all the materials were purchased locally. The same facts might have justified an exercise of jurisdiction on the possibility the dispute would spread, since a general contractor and several subcontractors were affected by the dispute.

[139] Ira A. Watson, 80 N. L. R. B. No. 91 (1948).
[140] Samuel Langer, 82 N. L. R. B. No. 132 (1949).
[141] Walter J. Mentzer, 82 N. L. R. B. No. 39 (1949).
[142] Petredis and Fryer, 85 N. L. R. B. No. 45 (1949). *Cf.* Shore v. Building & Construction Trades Council, 173 F. 2d 678 (3d Cir. 1949) issuing an injunction under the same facts.

To determine the volume of commerce affected by a labor dispute within the meaning of the Taft-Hartley Act, consideration must be given to the "coming to rest doctrine" for small contractors customarily purchase all their supplies from local dealers who have obtained them in other states. One must remove the shadow of the *Schechter* case,[143] which held that interstate commerce had ended when the product came to rest after crossing state lines, and Congress had no power to regulate wages and hours of those who handled the goods after that time. If the Court's decision on this point has any life, it may rise to negate jurisdiction of the Labor Board over some employers and unions in the building and construction industry.

The "coming to rest" doctrine was raised as a defense in the *J. L. Brandeis & Sons* and in the *M. E. Blatt* cases,[144] both involving retail department stores where the employer contended his substantial out-of-state purchases came to rest in the store or warehouse. The Eighth Circuit Court of Appeals reasoned:

> If when selling at the store stops purchasing outside the state also stops, it is fair to say that the latter is the effect of the former. . . . In determining its own jurisdiction the Board properly considered the possible effect of labor strife in the store upon the flow of merchandise purchased and shipped from outside the state to maintain the constantly diminishing stock offered for retail.[145]

Without mentioning the *Schechter* case, both decisions rejected the "coming to rest" doctrine. The construction industry presents a closer case than that involved in the retail store, for construction materials will come to rest in a lumber yard and then move to a construction site after a change of ownership. However, the same reasoning is applicable. The flow of materials in interstate commerce to the warehouses of the materials suppliers depends upon the consumption of materials in the construction industry, though the effect may not be as immediate as in the case of a dispute which stops production of goods intended for interstate shipment.

The *Schechter* case has not been expressly overruled, but there are many decisions inconsistent with the "coming to rest" doctrine. The doctrine has been considerably weakened by the case of *Wickard v. Filburn*[146] for there no movement across state lines was involved in growing grain for consumption on the farm where it was grown. If the power of Congress extends over such local production and con-

[143] A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935).
[144] J. L. Brandeis & Sons v. NLRB, 142 F. 2d 977 (8th Cir. 1944), *cert. denied*, 323 U. S. 751 (1944); NLRB v. M. E. Blatt Co., 143 F. 2d 268 (3d Cir. 1944), *cert denied*, 323 U. S. 774 (1944).
[145] J. L. Brandeis & Sons v. NLRB, *supra* note 144 at p. 981.
[146] Wickard v. Filburn, 317 U. S. 111 (1942).

sumption, certainly the fact that goods after having moved in interstate commerce are stored for a time in a warehouse awaiting a purchaser should not terminate the power of Congress. The *Mandeville Island Farms* case[147] also lends support to this view. In that case price fixing of sugar beets by processors who purchased from farmers was held a violation of the Sherman Act though the beets came to rest at a processing plant after the purchase and were changed into a different form before being shipped in interstate commerce. The "coming to rest" doctrine has received some recognition in a Fair Labor Standards Act case holding employees of a wholesaler were not covered by the Act when goods were purchased by customers for shipment from a local warehouse.[148] However, the holding is based on the limited statutory coverage and is not a measure of the power of Congress.

Several avenues are available for disposing of the *Schechter* case. It could be limited to its precise facts, the regulation of hours and wages, and not apply the doctrine to a statute regulating unfair labor practices, representation procedure, secondary boycotts and jurisdictional disputes. But there is no reasonable distinction on this basis. The case could be flatly overruled. This is unlikely to occur since previous cases have ignored the doctrine when it could have been overruled. That part of the decision in the *Schechter* case based on the commerce clause was unnecessary; the strongest ground for the decision was on the unconstitutional delegation of power. By considering the court's statement on the commerce power as dictum, a case requiring a square decision on the point could make short work of the prior pronouncement. In any event, it is doubtful if the courts will apply the "coming to rest" doctrine to limit the jurisdiction of the National Labor Relations Board.

History of Industrial Relations in the Building Trades

Appropriate for consideration is the history of industrial strife in the building and construction industry. Chief Justice Hughes has stated that, "Interstate commerce itself is a practical conception . . . (and) interference with that commerce must be appraised by judgment that does not ignore actual experience."[149] Mr. Justice Frankfurter expressed much the same idea in the *Polish National Alliance* case when he said, "When the conduct of an enterprise affects commerce among the states is a matter of practical judgment not to be determined by abstract notions. The exercise of this practical judgment the Constitution entrusted primarily and very largely to the Congress, subject to the latter's control by the electorate."[150]

[147] Mandeville Island Farms v. American Crystal Sugar Co., 334 U. S. 219 (1948).

[148] Walling v. Jacksonville Paper Co., 317 U. S. 564 (1943). See also, Higgins v. Carr Brothers Co., 317 U. S. 572 (1943).

[149] NLRB v. Jones & Laughlin, 301 U. S. 1, 41-42 (1937).

[150] Polish National Alliance v. NLRB, 322 U. S. 643, 650 (1944).

Collective bargaining is wide-spread and serves a useful purpose in the building and construction industry; it should be continued and protected. Though the industry is already highly organized, certain areas are in need of protection. Failure of the Board to exercise jurisdiction over the industry before 1947 does not establish that no protection is needed. Furthermore, the Taft-Hartley Act enters a new field of regulation when it covers jurisdictional disputes and secondary boycotts, disputes which are peculiarly prevalent in the building trades, and the new regulations have special significance for the industry. A factual examination of industrial relations in the building trades under the Taft-Hartley Act would also be useful in exercising this "practical judgment," but such a survey is beyond the realm of this paper. This experience gives added weight to argument for regulation of labor disputes in an industry so dependent upon movement of goods in interstate commerce.

Legislative History of the Taft-Hartley Act

Several NLRB decisions have made use of the legislative history of the Taft-Hartley Act in supporting decisions applying the prohibitions in cases involving the building and construction industry.[151] The fact that the Act shows special concern for disputes typical of the industry is the basis for this reasoning.[152] True, it lends support to coverage of some of the industry, but there is no intimation that the entire industry must be included. Mr. Denham's view is that small as well as large employers are entitled to protection of the Act against unfair union practices. During the debates in Congress Senator Ball said the small businessman who employs from fifty to one hundred employees is the one who chiefly needs protection from secondary boycotts and jurisdictional strikes.[153] Supplemental views of four members of the Senate Committee on Labor and Education pointed out that it is the small employers, often with less than 50 employees and farmers or farm truckers who are in the main victims of secondary boycotts and jurisdictional disputes.[154]

Statements by members of Congress also indicate an intention to limit application of the Act. Senator Taft has remarked several times since enactment of the statute that it should not apply to the entire building and construction industry.[155] The special subcommittee of the House of Representatives which investigated Mr. Denham's plan of

[151] Ira A. Watson Co., 80 N. L. R. B. No. 91 (1948); United Brotherhood of Carpenters and Joiners of America, 81 N. L. R. B. No. 127 (1949).
[152] See, Sen. Rep. No. 105, 80th Cong., 1st Sess. 22, 54 (1947); 93 Cong. Rec. 3329-3330, 3534, 4255, 4323, 5040, 5143, 7506 (April-June 1947).
[153] 93 Cong. Rec. 5040 (May 9, 1947).
[154] Sen. Rep. No. 105, 80th Cong., 1st Sess. 54 (1947).
[155] 93 Cong. Rec. A3579 (June 8, 1947).

extensive coverage under the Act thought small mercantile or industrial enterprises doing a local business should not be brought within the terms of the Act.[156] The so-called "watchdog" committee set up by the Labor Management Relations Act of 1947 also believed that small local businesses, retail service establishments, should not be subject to the Act.[157] These statements by Members of Congress who helped draft the provisions may be important in interpreting the Act, but they would carry little weight in determining the constitutional limits of the commerce power. In any case post-legislative statements would be of little value. The legislative history is quite conflicting, but there is no doubt of a great deal of sentiment in Congress that small concerns should be exempt. However, the sentiments become mixed when protection of small employers from secondary boycotts is at stake.[158]

Theories on Which Jurisdiction May Be Limited

Decisions of the courts are not very helpful in determining the limits of the power of the Labor Board. The cases have served only to extend the concept of the Board's jurisdiction and the application of the Labor Management Relations Act of 1947. In view of the sweeping language of the cases, it is somewhat difficult to determine just what means might be used to limit the Board's jurisdiction. It is submitted that two theories will be advanced in this delineation of power: one, the maxim *de minimis*, and the other the gradual shaping of the boundary between state and federal control of labor relations.

A. The *de Minimis* Rule

The *de minimis* doctrine as limiting the coverage of the National Labor Relations Act originated in the *Fainblatt* case[159] when the Court recognized that commerce of small volume would not fall within the operation of the Act. The standard has little meaning at present for no decision denying jurisdiction has used it as a measure. The doctrine is used in defending almost every case challenging coverage and the term is frequently mentioned in discussions of the power of the Board, yet Judge Clark in the *Suburban Lumber Company* case[160] is the only one who has given real meaning to the term as applied to the Labor Board cases. He would give it the common-law meaning of "matters of a few dollars or less." If this is the true meaning, jurisdiction prob-

[156] H. R. Rep. No. 2050, 80th Cong., 2nd Sess. 14 (1949).
[157] Sen. Rep. No. 986, Part 3, 80th Cong., 2nd Sess. 14 (1949).
[158] *Hearings before Subcommittees of the Committee on Education and Labor and the Committee on Expenditures in the Executive Departments on Investigation to Ascertain Scope of Interpretation by General Counsel of National Labor Relations Board of the Term "Affecting Commerce," as Used in the Labor Management Relations Act, 1947*, 80th Cong., 2nd Sess. 26 (1948).
[159] NLRB v. Fainblatt, 306 U. S. 601, 607 (1939).
[160] NLRB v. Suburban Lumber Co., 121 F. 2d 829 (3d Cir. 1941). *Cf.* Groneman & Groneman v. I. B. E. W., 17 CCH Lab. Cas. No. 65,410 (10th Cir. 1949) where the court held the Taft-Hartley Act not applicable to a situation where the building contractor purchased $6,000 worth of materials out of the state.

ably extends as far as urged by Mr. Denham. But in a different context there is no reason why it should be restricted to the common-law meaning. It is believed that matters of small import should not require the Board's attention. With labor disputes involving representation and unfair labor practices over the entire nation centralized in one board of five members, the Board could not cope with all disputes involving only a few dollars or less. The Labor Board has recognized this in dismissing many cases on administrative grounds. If the Board is required to take jurisdiction in all secondary boycott and jurisdictional dispute cases within its constitutional power, it is likely a good many decisions will appear denying the power of the Board. The problem would have been faced already had it not been for the exercise of administrative discretion. There is still ample room under the decisions of the Supreme Court to hold that *de minimis* has some real significance in excluding many small employers from the operation of the Act. The author believes that some rough standard could be used, such as employers who hire no more than fifty workers and whose annual interstate business amounts to less than $100,000. Under this standard thousands of small enterprises, such as small contractors and small retail stores, could claim exemption under the doctrine *de minimis*, which is really a counterpart of the "substantial effect on commerce" criteria.

B. The Boundary between State and Federal Control

The conflict of state and federal authority over labor disputes in intrastate commerce is growing apace. As an original proposition, it would seem that since express power was not given to Congress to regulate intrastate commerce, nor was its regulation by the states prohibited, under well established constitutional doctrine it should fall in the powers reserved to the states. But the history of legislation in the field of regulation of commerce has found the states seeking to extend their power over certain phases of interstate commerce and the federal government equally zealous in extending its power over local trade.[161] The results has been something of a compromise with each invading the field of the other when the issues do not involve fundamental control. Out of the hodge-podge of cases has developed the theory of functional federalism. Since the Constitution cannot be interpreted by mechanical means, it is delineated from case to case as the demand arises and is likely to be steeped in the necessity of the situation. For example, in *Wickard v. Filburn*, the federal power was found to extend over production of grain for consumption on a farm, for to deny this power

[161] For a general discussion of the problem see: Corwin, The Commerce Power Versus States Rights (1936); Rottschaefer, The Constitution and Socio-Economic Change (1948) Ch. II, III, V; Powell, *Current Conflicts Between the Commerce Clause and State Police Power 1922-1927*, 12 Minn. L. Rev 321, 470, 565 (1928).

would be to negate the effectiveness of control over interstate markets.

Expanding control by both the federal and state governments in the field of labor relations since 1935 has made the problem a particularly acute one in this area of governance. Under the Wagner Act the NLRB had a working arrangement with the New York State Labor Relations Board to permit disputes in many local industries to be handled by the state authorities. Provision was made in the Taft-Hartley Act to permit the NLRB to cede jurisdiction to state agencies when the state statute was not inconsistent with the corresponding provisions of the federal statute.[162] Since no state statute meets this requirement, no agreements have been made under this provision.

The Supreme Court has been faced with the problem of state and federal control in several recent cases and the tenor of the decisions is to recognize the paramount authority of the federal government, though state action has been upheld, even in the area of interstate commerce, where the NLRB has not entered the field and there was no inconsistent federal statute. When the NLRB asserted general jurisdiction over unionization of foremen, the New York State Labor Relations Board was precluded from operating in the field though the NLRB had refused to act in this particular instance on administrative grounds.[163] Yet states have been permitted to make regulations more stringent than those administered by the NLRB when such action is not inconsistent with the policy and purposes of the federal statute; states have been permitted to outlaw union security contracts[164] or to make stricter requirements in elections for a union shop.[165] These cases have arisen in areas where federal jurisdiction is frequently exercised; cases challenging federal control on the ground that the labor dispute has no substantial effect on interstate commerce will present an even more challenging question.

Under the theories previously advanced, jurisdiction of the NLRB could extend over entire industries, leaving no room for state action. However, even in the decisions recognizing the broad powers of the Board, one finds the threads of an idea that somewhere there must be a limit to federal jurisdiction to provide state governments with an unchallenged area of authority.[166] Also there is some foundation for

[162] Section 10(a).

[163] Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U. S. 767 (1947). See also, La Crosse Telephone Corp. v. Wisconsin Employment Relations Board, 69 S. Ct. 379 (1949) where state jurisdiction was denied when it had a standard different from that administered by the NLRB.

[164] Lincoln Federal Union v. Northwestern Iron & Metal Co., 69 S. Ct. 251 (1949).

[165] Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 69 S. Ct. 584 (1949).

[166] As Professor T. R. Powell has remarked, "Congress must not be allowed to roam so widely that there will not be enough reserve space for the exclusive roaming of the states." *Commerce, Pensions and Codes*, 49 HARV. L. REV. 193, 211 (1935).

believing state authorities have some special competence in local regulation. A resurgence of state authority may stay the tendency to centralization; the defenders of state control will quote the words of Chief Justice Hughes that:

The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several states" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.[167]

Mr. Justice Frankfurter gives further support to a limitation based on this theory when he stated in the *Polish National Alliance* case that "interpenetrations of modern society have not wiped out state lines."[168] He further warns that "scholastic reasoning may prove that no activity is isolated within the boundary of a single state, but that cannot justify absorption of legislative power by the United States over every activity."[169]

The implications of Mr. Denham's theory, that the Labor Board has jurisdiction over almost every business enterprise, coupled with the *Bethlehem Steel*[170] decision, which would exclude state action in that area, would leave little need for state action in the field of labor relations, for the Taft-Hartley Act may be deemed a complete code in this field. The reluctance of the NLRB to enter the field of small business enterprises, illustrated by its many decisions declining jurisdiction, based partly on the huge case load which would result from coverage of the entire field, is supporting evidence that an area does exist for the exclusive operation of state law. The issues are primarily local and can best be handled by agencies familiar with the local problems. An opposing argument based on a uniform national policy is chiefly theoretical when there is no evidence the labor dispute has a potential of widespread proportions. It is not a matter of limiting the legislative power, it involves only a decision as to whether it shall lie in the state or federal government.

Proposed Legislation Defining NLRB Jurisdiction

The uncertain limits of the powers of the NLRB have perplexed businessmen and unions alike. When the legality of a discharge of an employee depends upon a question of application of state or federal law, the employer desires advance knowledge of which law is controlling. This unsettled state of the law has caused the General Counsel of the

[167] NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1, 30 (1937).
[168] Polish National Alliance v. NLRB, 322 U. S. 643, 650 (1944).
[169] *Id.* at 650.
[170] Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U. S. 767 (1947).

NLRB, the Joint Committee on Labor-Management Relations and others to call for clarification of the issue by legislation.[171] A great deal of thought has been given to the problem by the NLRB, the General Counsel's office and by various congressional committees, but no one has offered an entirely satisfactory solution.

It would not be unusual in legislative practice to set up exemptions of certain small enterprises. The Fair Labor Standards Act exempts from its provisions "any employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce."[172] The difficulties arising out of this exemption caused the drafters of the proposed amendments to the FLSA to exempt from the operation of the Act:

> . . . any retail or service establishment whose employer had a total volume of sales or servicing or not more than $500,000 during the preceding calendar year. An establishment shall not be deemed a retail or service establishment within the meaning of this subsection if more than twenty-five percentum of its annual dollar volume during the preceding calendar year was derived from activities other than retail selling or servicing.[173]

A similar exemption in the NLRB could be easily applied in cases where jurisdiction is based on movement of goods in interstate commerce, but it would have little meaning in cases where the business enterprise itself has no interstate commerce, yet its effect on commerce is sufficient to warrant an exercise of the Board's powers.

Limitations of jurisdiction based on mathematical formula could include total volume of interstate commerce, percentage of business in interstate commerce, or the number of employees in the business enterprise. The Joint Committee on Labor-Management Relations suggested some formula be presented based on the number of employees in combination with interstate sales. It is believed a formula based on twenty-five employees and $100,000 interstate business would be a fair limit of coverage. The NLRB could operate in a wide field and leave a good many local situations to the local boards. This would achieve only a very rough justice and would by no means be a certain test of what "substantially affects interstate commerce." But the very nature of the question makes impossible a perfect test.

A mathematical formula could be set up to take into consideration other factors which have influenced assertions of jurisdiction in the past. Following is a suggested amendment to Section 7 of the present NLRA:

[171] Sen. Rep. No. 986 Pt. 3, 80th Cong., 2nd Sess. 14 (1949); *Hearings before the Joint Committee on Labor Management Relations*, 80th Cong., 2nd Sess. 1161 (1949). Chairman Herzog believes the legislative remedy may be worse than the disease. *Id.* at 1137.

[172] 29 U. S. C. A. §213A (1940).

[173] H. R. Rep. No. 267, 81st Cong., 1st Sess. 9, §13(a) (1949).

(b) The business of an employer shall not be found to affect commerce within the meaning of the Act where the principal basis for such finding would be in the inflow and outflow of goods or services across state lines to or from the employer, unless such employer:

(1) Receives directly across state lines goods or services at the annual rate of $100,000 or more in value, or

(2) Sends or causes to be sent directly across state lines goods or services at the annual rate of $50,000 or more in value, or

(3) Receives goods at the annual rate of $200,000 or more in value from one or more persons or firms who received directly from out of state such goods in essentially the same condition as when forwarded to the employer, or

(4) Sends or causes to be sent goods at the annual rate of $100,000 or more in value to one or more persons or firms who forward directly out of state such goods in essentially the same condition as when received from the employer, or

(5) Receives, sends or causes to be sent, in the manner described in paragraphs (1), (2), (3) or (4) of this subsection, goods or services at a combined annual rate of $200,000 or more in value, *provided*, that in arriving at the combined annual rate, the actual value of any goods or services received or sent as in paragraphs (1) and (4) of this subsection shall be multiplied by two, and the actual value of any goods or services sent as in paragraph (2) shall be multiplied by four.

(c) These limitations in subsection (b) shall not apply (1) where the business of the employer is an integral part of a firm which is engaged in commerce, or (2) where the products or activities of the employer are an essential element in the business of a firm which is engaged in commerce.[174]

The word "rate" implies a continuing inflow of materials and eliminates consideration of capital goods, which is current practice in Board decisions.[175] The amendment also gives effect to a belief that goods coming to rest within the state and goods moving direct to the employer from out of state should not be given as much weight in determining coverage as goods moving from the employer to other states. This idea is based on the extent and rapidity with which commerce would be affected by labor disputes in the employer's business. The amounts are suggestive, but the ratio has some basis in fact.

The same result might be achieved without legislation if the Labor Board would promulgate rules setting forth the policy of its assertions of jurisdiction. Precedent is found in the interpretative bulletins of the Wage and Hour Administrator stating the policy under which the FLSA will be administered. Such a statement by the NLRB would give employers, employees and unions something solid on which to judge coverage instead of leaving them to rely on decisions of doubtful meaning which may be departed from at any time.

[174] The author is indebted to Mr. George Squillacote, Legal Assistant to the NLRB, for suggestions regarding this proposed amendment.

[175] Richter Transfer Co., 80 N. L. R. B. No. 186 (1948).

CONCLUSION

If the NLRB wishes to assert it, coverage of a large area of the building and construction industry is indicated by the foregoing discussion. The extent of asserted coverage will depend somewhat on the theory adopted in the particular case. Industry-wide coverage might be achieved to effectuate the policies of the Act and to make the law apply uniformly throughout the industry. The author believes jurisdiction will not extend over so broad an area. Jurisdiction in most cases will depend upon the volume of goods moving in interstate commerce affected by the labor dispute and it is this theory which affords an opportunity for holding that many small contractors and their employees are not covered by the Act.

It may be helpful to categorize the industry for a closer examination. The industry could be classified as follows: (1) heavy construction: dams, highways, roads and bridges; (2) construction for interstate instrumentalities: telephone, telegraph, railroads, post offices and warehouses; (3) industrial construction: new manufacturing plants and new units in existing plants; (4) commercial construction: office buildings and stores; (5) public and semi-public buildings: schools, hospitals, churches and government buildings; (6) housing.

Since the work is an intimate part of interstate commerce, the first and second groups would certainly be covered. Construction of new plants intended for manufacturing goods for interstate commerce and construction of new units in existing plants manufacturing goods for interstate commerce should be within the Board's power; plant construction must precede production.[176] Cases applying the FLSA and the NLRA to building maintenance employees[177] would lend support to extension of the Board's power over construction of office buildings whose prospective tenants will be engaged in interstate commerce. If the future tenants will not be engaged in interstate commerce, jurisdiction could be based on the interstate movement of construction materials substantially affecting commerce.

Jurisdiction over construction of department stores can be based on the interstate movement of construction materials or on the fact that the store will be the throat for distribution of goods moving in interstate commerce. The work is similar to the construction of a warehouse for goods moving in interstate commerce. The reasoning which supports the Board's authority over store employees is available to assert juris-

[176] *Cf.* Warren Bradshaw Co. v. Hall, 317 U. S. 88 (1949) (employee drilling oil well who stopped short of completion of the well was subject to the FLSA since this drilling was a necessary part of the productive process and there was reasonable grounds to anticipate that oil would move to other states).

[177] Borden Co. v. Borella, 325 U. S. 679 (1945); Butler Bros. v. NLRB, 134 F. 2d 981 (7th Cir. 1943), *cert. denied*, 320 U. S. 789 (1943).

diction over the workmen who construct the building. The argument for coverage of construction of schools, churches and government buildings would be based on interstate movement of construction materials. Inclusion or exclusion would depend upon the volume of commerce affected by the labor dispute. Housing construction can be divided into apartment houses, housing developments and single dwelling units. The volume of material required for construction would ordinarily be sufficient in the first two categories to substantially affect interstate commerce. Construction of single units may come near the border-line of the Board's authority. Though the volume of materials required for a single dwelling may be only a few thousand dollars, this would be sufficient to come within the *de minimis* rule. If a contractor built several houses a year, the effect of his total construction could be considered.

Another ground on which jurisdiction over many small construction jobs can be based will be the far-reaching effect of the labor dispute due to the likelihood the dispute will spread to other projects. It is believed that ordinarily small construction jobs, such as single dwellings, should not be within the Board's power, but the likelihood that the labor dispute will spread is presented as the touchstone to determine coverage of small projects and if this element is lacking, local law should govern.

Whatever the limit of jurisdiction in the building and construction industry may be, it will be pricked out in a series of hard fought decisions; and, with the NLRB declining jurisdiction in some cases on policy grounds, uncertainty will reign supreme for a long time to come. Probably we should join the chorus requesting Congress to be more specific in defining the coverage under the Labor Relations Act.