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# The Development of Labor Management Legislation in Kentucky

By JOHN L. JOHNSON\*

## PART I

### INTRODUCTION

THE ROLE government should play in the regulation or control of labor-management problems is subject to considerable disagreement. Even among those who agree as to the extent of governmental participation, agreement as to how the federal and state governments should share the responsibility is far from unanimous. It is not the purpose of this study to explore critically the history of governmental participation, nor the area of control that should be assigned to the states; the purpose is to explore some of the areas where state governments can, at the present time, exercise authority. Particular emphasis will be placed on the prevailing situation in Kentucky, and on suggested changes in, or additions to, Kentucky legislation as it applies to labor-management relations.

It is assumed initially that organized labor, and therefore the collective bargaining process in labor-management relations, is a permanent national institution. Trade associations, or societies of workers engaged in the same trade or business, are among the oldest and most enduring institutions known. In 1882 a well-known economist wrote of trade unions in England: "Our grandfathers and great-grandfathers, not to speak of earlier ancestors, did their best to crush all societies of workingmen, and ignomini-

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ous was their failure.”<sup>1</sup> Since that time organized labor has become much more firmly entrenched, in this country as well as in England.

Because every period in history has been a period of change, and because change frequently introduces or is associated with new social and economic problems, the legal atmosphere of collective bargaining should be geared to ever-changing conditions. This may be accomplished in a variety of ways, conditioned primarily by the outlook of each individual concerned.

Society has the right to expect every organization—labor, business, or otherwise—to assume its proper responsibilities. In general it may be said that an organization has accepted “responsibility” if it behaves, not only as it is legally bound to do in respect to the rights and property of others, but in a manner consistent with the moral standards of the community in which it exists.

#### INDUSTRIALIZATION

Many states, particularly during the past decade, have adopted a variety of schemes designed to promote industrial expansion. The objectives are increased job opportunities and increased total and per capita income. These are admirable goals. It would be well to ask then, “What effect, if any, do the statutes of a state as regards labor-management relations have on industrialization?” One authority makes this observation: “The larger companies which have established plants in the South in recent years have not been interested primarily in avoiding labor unions, as such, any more than they have been primarily interested in low wages. Probably most of these companies consider the unionization of their plants inevitable anyway. . . . Thus, they are more likely to be interested in assurances of evenhanded enforcement of law and order than in anti-closed shop legislation by states.”<sup>2</sup> In another instance, executives of 122 companies which located plants in Texas in recent years were asked why they chose Texas rather than some other state. Each gave two most important reasons on “why they located in Texas,” and of the 244 answers “good labor relations

<sup>1</sup> William Stanley Jevons, *The State in Relation to Labor* (London: MacMillan Co., 1887), p. 109.

<sup>2</sup> Calvin B. Hoover and B. U. Ratchford, *Economic Resources and Policies of the South, A Report of the National Planning Association* (New York: MacMillan Co., 1951), p. 382.

and Texas labor laws" was mentioned 13 times and "low salary scale" was mentioned 3 times.<sup>3</sup> This would suggest that a favorable labor-management relations climate is considerably more important than low wages as an inducement to industrialization. In this particular sample of Texas firms, from the figures noted above, it can be concluded that one of the two most important factors in the industrialization picture in at least 10 per cent of the cases is good labor relations and labor laws (or possibly the lack of legislation), as viewed by the executives of firms seeking a plant location.<sup>4</sup>

The people of Kentucky, as of many other states, have cause to be concerned about the future increase in job opportunities. There will be, in the state, more persons seeking work than there are available jobs until such time as industrial growth is great enough to absorb the natural increase in the labor force. The rules and procedures governing collective bargaining relationships should be one part of a general plan designed to promote the growth of a democratic society.

#### THE EQUALITY OF BARGAINING POWER

In 1898 the Supreme Court of the United States<sup>5</sup> handed down a decision that ushered in a new era relative to the relationships between employers and employees. In this case (*Holden v. Hardy*) the court held that ". . . the law be forced to adapt itself to new conditions of society, and particularly to the new relations between employers and employees, as they arise." "In this opinion the court recognized, what had been dimly seen or implied from the beginning of labor legislation, that inequality of bargaining power is a justification under which the state may come to the protection of the weaker party to the bargain."<sup>6</sup>

This reasoning—the responsibility of the state to protect the weaker party—as it relates to employer-employee relationships is now substantially entrenched as national policy. Section 1, of the

<sup>3</sup> Florence Escott, *Why 122 Manufacturers Located Plants in Texas*, Texas Industry Series, No. 3 (Austin: University of Texas Bureau of Business Research, 1954), p. 14.

<sup>4</sup> The relationship between state labor-management legislation and industrialization is discussed further in Chapter V.

<sup>5</sup> *Holden v. Hardy*, 169 U.S. 366 (1898).

<sup>6</sup> John R. Commons and John B. Andrews, *Principles of Labor Legislation* (New York: Harper and Brothers, 1916), p. 29.

Labor Management Relations Act of 1947<sup>7</sup> reads in part as follows:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

This section continues by stating that protecting the rights of workers to organize, "restoring equality of bargaining power between employers and employees," safeguards and promotes the full flow of commerce; but the law recognizes also that there are "certain practices by some labor organizations, their officers, and members" that obstruct the free flow of commerce, and that the "elimination of such practices is a necessary condition to the assurance of the rights" guaranteed employees in the law. The purpose of the act then, is not only to equalize bargaining power but "to equalize legal responsibilities of labor organizations and employers."

The development of public policy was not smooth prior to 1898, or even from 1842 when the Massachusetts Supreme Court declared that either the goal of a labor organization or the methods used to attain that goal must be illegal before the organization can be judged a conspiracy.<sup>8</sup> And, following the *Holden v. Hardy* case, the development of public policy, as stated in the Labor Management Relations Act of 1947, was sporadic rather than gradual.

Public policy, then, is based partially on the bargaining disadvantage of labor. This policy says, in effect, that a greater social good is to be derived by government interference in the relations between employers and employees than could be derived by a policy of noninterference. This interference on the federal level amounts to defining rather comprehensively the rights and duties of both parties and also the functions of government as they apply to administrative and judicial procedures. It is rather obvious that

<sup>7</sup> 61 Stat. 136 (1947).

<sup>8</sup> *Commonwealth v. Hunt*, 4 Metcalf 11 (1842).

complete economic freedom—an economy without controls—is out of the question. Economic controls of one form or another go back in history much farther than strong labor unions; it is an issue of the type and degree of control that is pertinent.

#### THE RIGHTS OF INDIVIDUALS AND THE PROMOTION OF INDUSTRIAL PEACE

One of the prime purposes of any legislation relating to labor-management relations should be the promotion of industrial peace. But industrial peace alone is not enough; the protection and the enhancement of the rights and status of employees and employers are vital. State policy, with considerable variation, as will be shown in subsequent chapters, has usually followed one of three major courses of development. The protective policy provides against the interference by employers with the right of employees to organize and bargain collectively. This policy is based, in part, on the assumption that wages and other conditions of employment, in the absence of collective bargaining, are determined solely by the employer; and that it is in the public interest to recognize labor's inherent right to negotiate wage rates and other conditions of employment on the basis of a bargaining equality.

The restrictive policy gives labor the right to organize as "a matter of abstract justice rather than as a means of furthering the public interest."<sup>9</sup> Usually such laws incorporate most of the provisions of the protective laws, but include also restrictions on the rights of employees and unions in the practice of their "protected" rights. It is difficult to classify in a general way these restrictions because of the variations from state to state.

The third classification of state policy includes all states that have no labor relations act. Many of these states have statutes that amount merely to the codification of the common law relative to the rights of employees and unions. Other states have restrictive laws of various types, such as the prohibition of government employees to strike, special machinery for the settlement of disputes in public utilities, anti-union security laws, controls over the internal affairs of unions, boycott and picketing controls, and many others, usually enacted as separate bits of legislation and

<sup>9</sup> Charles C. Killingsworth, *State Labor Relations Acts* (Chicago: University of Chicago Press, 1947), pp. 7-23.

incorporating no specific policy as to the rights and duties of employers and employees. It should be noted, however, that such laws are generally restrictive by nature because in no instance is it illegal for an employer to refuse to bargain with representatives of his employees.

There is no specific statutory ideal that will insure industrial peace that also insures the rights and status of employees and employers. Many states have gone far in experimenting with laws of various types. These statutes, as will be noted in other chapters, are frequently changed—sometimes by the courts, sometimes because of a change in federal law, and sometimes by state legislative action.

## PART II

### THE JURISDICTION OF STATES

The commerce clause of the United States Constitution during the first century or so of this nation's existence created no really serious obstacle to the fulfillment of national labor-management policy. But the enormous economic changes of the past 75 years have made necessary (or at least have resulted in) a constant redefining of just what constitutes interstate commerce—interstate commerce under control of the federal government relative to employer-employee relationships.

The Labor Management Relations Act of 1947<sup>10</sup> in its declaration of policy refers to "employees and employers in their relations affecting" interstate commerce. The meaning of the word "affecting" is subject to change; and, as a consequence, the coverage of the law frequently is changed, or redefined, by the courts or by the National Labor Relations Board. It would ordinarily be supposed that the proper jurisdictional areas for states to exercise authority are those where the federal government does not claim jurisdiction. But even here, as will be noted later, the line of demarcation is not always agreed upon nor clearly defined.

Within the LMRA are sections where jurisdiction is granted to states or where the federal government and the states are both

<sup>10</sup> Labor Management Relations Act, 1947, 61 Stat. 136; subsequently referred to as LMRA.

presumed to have jurisdiction. The Act specifically allows states to pass laws prohibiting compulsory union membership.<sup>11</sup>

Other sections<sup>12</sup> of the LMRA provide for the participation of states in connection with the conciliation and mediation provisions, and Section 10(a) authorizes the National Labor Relations Board

by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any [unfair labor practice] cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce.

This section continues by saying the state or territorial act applicable must be consistent with the federal act and be so construed. Except in those instances where states and territories are specifically allowed to exercise authority, the courts have made it clear that the federal government has pre-empted the field of labor-management relations in interstate commerce.<sup>13</sup>

There is deliberate exclusion of some employers in the federal act,<sup>14</sup> and in the case of nonprofit hospitals one court has held that "the state of Utah retained the power to protect the right of hospital employees to self-organization, and could compel hospital associations to bargain collectively with representatives selected by them."<sup>15</sup>

But obviously, even in areas that are subject to control by the federal government, a line must somewhere be drawn between what does and does not "substantially" interfere with the flow of commerce. The line is almost constantly being redefined or drawn more clearly—the word "substantial" is constantly being given a

<sup>11</sup> *Ibid.*, sec. 14(b). "Nothing in this act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territory law."

<sup>12</sup> *Ibid.*, secs. 8(d)(3), 202(e), and 203(b).

<sup>13</sup> *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Div. 988, et al. v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951). The police power of states is discussed below.

<sup>14</sup> LMRA, sec. 2(2).

<sup>15</sup> Mozart G. Ratner, "Problems of Federal-State Jurisdiction in Labor Relations," New York University Fifth Annual Conference on Labor (New York: Mathew Bender & Company, Incorporated, 1952), p. 91. The quotation is Mr. Ratner's interpretation of *Utah Board v. Utah Valley Hospital*, 235 P. 2d 520, 28 LRRM 2602 (1951).



new or a more constricted definition. The Supreme Court has frequently made it clear that there is no way to define accurately, and in a manner to fit every circumstance, the phrase "substantially burdens and affects the flow of commerce." Chief Justice Hughes speaking for the majority in one famous opinion said:

Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended to embrace effects upon interstate commerce so indirect and remote that to embrace them, in the view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government.<sup>16</sup>

Another Supreme Court opinion at a later date says substantially the same thing. "Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity."<sup>17</sup>

In October, 1950, the National Labor Relations Board, for the first time in its history,

announced specific standards to govern it in the exercise of its jurisdiction. . . . The Board said: "The time has come when experience warrants the establishment and announcement of certain standards which will better clarify and define where the difficult line can best be drawn."

The Board has long been of the opinion that it would better effectuate the purposes of the Act [LMRA] . . . not to exercise its jurisdiction to the fullest extent possible. . . .<sup>18</sup>

This new policy of the NLRB was initiated by eight unanimous decisions, each of which covered a particular one of the board's new "yardsticks." In general, the policy of the board was to "exercise jurisdiction over employers which annually ship goods valued at \$25,000 or more out of a State,"<sup>19</sup> and to "decline jurisdiction where the direct inflow is less than \$500,000 in value an-

<sup>16</sup> National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937).

<sup>17</sup> Polish National Alliance v. National Labor Relations Board, 322 U.S. 643 (1944).

<sup>18</sup> 26 Labor Relations Reference Manual 50. Hereinafter referred to by the letters LRRM.

<sup>19</sup> Stanislaus Implement & Hardware Co., Ltd., 26 LRRM 1548.

nually."<sup>20</sup> In another case, even though the value of out-of-state shipments was less than \$25,000, the board found that it would "effectuate the policies of the Act [LMRA] to assert jurisdiction over enterprises which substantially affect the national defense."<sup>21</sup>

On July 15, 1954, the NLRB announced a revision of the jurisdictional standards established in 1950 that substantially decreased the board's jurisdiction.<sup>22</sup> A retail store, for example, to meet the board's new standards, must have direct purchases outside the state of \$1,000,000 annually or ship merchandise worth \$100,000 to other states. A radio station, to be subject to NLRB jurisdiction, must have a gross income of \$200,000, and a newspaper, \$500,000, while formerly no minimum standard existed. The floor was similarly raised for utility companies, companies engaged in business relating to national defense, multistate businesses other than trade and service, and companies which supply services to interstate companies; and in no instance will the board exercise jurisdiction over restaurants.<sup>23</sup>

The NLRB has subsequently broadened its jurisdiction over multistate nonretail enterprises. In December, 1955, the NLRB stated that it would take jurisdiction over any unit of a multistate nonretail enterprise where the gross volume of business of the entire enterprise is at least \$3,500,000 annually, or of any unit of a multistate retail enterprise if the annual gross volume of business of the entire enterprise amounts to at least \$10,000,000.<sup>24</sup> The NLRB, in January, 1956, said it would consider any case where a nonretail firm makes sales amounting to a minimum of \$100,000 annually to other firms which meet the Board's jurisdictional standards.<sup>25</sup>

Unlike the NLRB announcement of jurisdictional standards in October, 1950, the 1954 changes were not endorsed unanimously by the board. In the *Breeding Transfer Co.* case,<sup>26</sup> where the reasons for the 1954 standards are set forth, the majority opinion

<sup>20</sup> Federal Dairy, Inc., 26 LRRM 1538.

<sup>21</sup> Westport Moving & Storage Co., 26 LRRM 1581.

<sup>22</sup> 34 LRRM 75.

<sup>23</sup> NLRB public release No. R-449, July 15, 1954.

<sup>24</sup> Coca Cola Bottling Co. of New York, Inc., 114 NLRB No. 225 (Dec. 20, 1955).

<sup>25</sup> Whippany Motor Co., Inc., 115 NLRB No. 11 (Jan. 12, 1956).

<sup>26</sup> *Breeding Transfer Co. v. General Drivers, Warehousemen and Helpers, Local 21*, affiliated with the International Brotherhood of Teamsters, AFL, 110 NLRB No. 64 (Oct. 26, 1954).

stated that "a desire to establish broader State jurisdiction is in no wise a factor in our decision." The purpose in establishing the new standards was "to apply a reasonable rule measured by the probable impact of a labor dispute on interstate commerce." The majority members estimated the board's case load would be reduced by 10 per cent but the number of employees covered by the LMRA would be reduced by no more than 1 per cent. The minority opinion in the same case said the new standards "are premised upon the view that there should be a reallocation of authority between the federal government and the states in the regulation of labor relations. . . . Such action inescapably entails a usurpation of legislative power by an administrative agency."

One exception to the jurisdictional standards of the NLRB has to do with small firms that bargain as an association. If the combined business of the association is great enough to fall within the board's jurisdiction, the board will consider the association as a single employer.<sup>27</sup>

It has been argued by some that the area where the NLRB clearly can but does not choose to exercise jurisdiction is a sort of "no-man's land." The Supreme Court has decided that, when the policies of the LMRA would not be effectuated, it is quite proper for the NLRB to decline to act even though it clearly has jurisdiction to do so.<sup>28</sup> And in a later case<sup>29</sup> the Supreme Court stated specifically that a state could not take jurisdiction where the federal act applied. One NLRB General Counsel answered the question thus: "In practice the Board never has, and I think I may confidently predict it never will, interfere to block state action in a situation where the Board chooses to stay its hand because it believes the impact of the activity on commerce to be insubstantial."<sup>30</sup> The New York courts, however, have said that even though the NLRB has declined to exercise its jurisdiction

<sup>27</sup> *Insulation Contractors of Southern Calif., Inc. and Plant Insulation Co.; International Association of Heat and Frost Insulators and Asbestos Workers, AFL, and its Agent, Albert E. Hutchinson*, 110 NLRB No. 105 (Oct. 29, 1954).

<sup>28</sup> *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951).

<sup>29</sup> *Garner et al., trading as Central Storage and Transfer Company v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL), et al.*, 345 U.S. 991 (1953).

<sup>30</sup> George J. Bott, speaking before the Arkansas Bar Association, May 31, 1954, quoted in 34 LRRM 80.

for "budgetary or other reasons," the New York Labor Relations Board cannot assume jurisdiction.<sup>31</sup>

In the *Garner* case, the U. S. Supreme Court decided that a state could not enjoin acts which are unfair labor practices under the LMRA. But a few months later, June 7, 1954, the same court upheld a claim for damages granted by the courts of Virginia and arising from an unfair labor practice under the LMRA.<sup>32</sup> The latter was a tort action at common law, and it is the opinion of the Supreme Court that the "LMRA had not pre-empted jurisdiction so as to exclude state courts from entertaining the court action for damages."<sup>33</sup> In the *Garner* case, said the court, the NLRB had an administrative remedy; in the *Laburnum* case, the right of recovery for damages in the state court did not conflict with any remedy available under the federal law.

The Supreme Court held to the *Garner* decision some time later.<sup>34</sup> The Missouri courts had issued an injunction on the grounds that picketing had violated not only the LMRA but also the state "restraint of trade" law. The NLRB had previously determined that no unfair labor practice existed, and it mattered not at all to the Supreme Court that the Missouri courts had found grounds for issuance under another statute. But before the federal courts can act, the NLRB must have passed on the case where an unfair labor practice under the LMRA is the issue.<sup>35</sup>

The power of a state to control or regulate labor relations procedures is based on police power; the power of the federal government is based on the commerce clause of the Constitution. Therefore,

since the National Act pre-empts only the field of labor relations law and policy, the states are not precluded from applying to unions, employees or employers the same general legal policy standards which are applicable to citizens generally. Violence by unions or employers, and unlawful seizures of property, for example, are not placed beyond the

<sup>31</sup> *New York State Labor Relations Board v. Wags Transportation System, Inc.* (1954), 34 LRRM 2855. Affirmed by Appellate Division, 35 LRRM 2058.

<sup>32</sup> *United Construction Workers affiliated with United Mine Workers of America, et al. v. Laburnum Construction Corp.*, 347 U.S. 656 (1954).

<sup>33</sup> 40 *American Bar Association Journal*, 702 (1954).

<sup>34</sup> *Weber, et al. v. Anheuser-Busch, Inc.*, 75 S. Ct. 480 (1955).

<sup>35</sup> *Amalgamated Clothing Workers of America, et al. v. The Richman Brothers*, 75 S. Ct. 452 (1955).

power of states to control merely because they occur in a labor relations context.<sup>36</sup>

Jurisdiction is an important issue. But perhaps more important in any discussion of state control is the business sphere where jurisdictional problems do not apply. "Only rarely, if ever, does the board [NLRB] handle cases involving hotels, restaurants, laundries, dry-cleaning establishments, beauty parlors, garages and other service industries, hospitals, cemeteries, retail stores, local transportation, local utilities and building and construction contractors."<sup>37</sup> In addition, but subject to a change in jurisdictional standards by the NLRB, there are many employers and employees in every industry that are not covered by federal legislation. It is impossible from the available statistics to determine accurately the number of employees in the nation or in any state that are outside federal jurisdiction. Table 1 shows, for Kentucky, the number of employees and employers in the industries that are predominantly subject to state jurisdiction.

TABLE 1  
NUMBER OF FIRMS AND EMPLOYEES  
IN SELECTED INDUSTRIES IN KENTUCKY, 1953

Industry	Employees <sup>a</sup>	Employers <sup>b</sup>
All industries .....	475,206	39,024
Industries predominantly subject to state jurisdiction:		
Construction .....	44,910	3,205
Public Utilities <sup>c</sup> .....	11,770	587
Retail Trade .....	97,604	15,066
Services .....	40,605	8,133
Totals .....	194,889	26,991

Source: U.S. Department of Commerce, County Business Patterns, 1953, Part 7 (Washington: Government Printing Office, 1953), pp. 34-36.

<sup>a</sup> Employees covered by the Old Age and Survivors Insurance program.

<sup>b</sup> Actually this is "reporting units," and probably is a slight understatement of the number of employers.

<sup>c</sup> Selected privately operated public utilities predominantly local in character.

<sup>36</sup> Ratner, *op. cit.*, p. 117. See also *Allen-Bradley Local 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942).

<sup>37</sup> Charles C. Killingsworth, *State Labor Relations Acts* (Chicago: The University of Chicago Press, 1948), p. 3. The contraction of the area of jurisdiction assumed by the NLRB since 1948 is discussed above.

Within the four industries listed in Table 1, there are probably many employers and employees subject to federal jurisdiction; but, likewise, in the industries not listed (manufacturing, mining, several public utilities, wholesale trade, and finance), there are probably many employers and employees who do not come under the jurisdiction of the NLRB. An approximation of the coverage of the federal law as it applies to commerce and business in Kentucky shows that about 69 per cent of all employers and 41 per cent of all employees in the state fall outside the federal jurisdictional orbit.

### PART III

#### THE DEVELOPMENT OF PUBLIC POLICY IN KENTUCKY

Kentucky is not among those states that have comprehensive labor relations acts to deal with labor-management problems in intrastate commerce. The Kentucky Department of Industrial Relations is relatively new, even though the state has had some "labor legislation" since 1902. In that year the General Assembly created the office of labor inspector in the Bureau of Agriculture, Labor and Statistics.<sup>38</sup> The inspector and his assistant were to be men having a practical knowledge of factories and shops. But it was stated in the act that neither the inspector nor his assistant were to take part, interfere, or in any way become involved in any strike or similar labor difficulty.<sup>39</sup>

The 1902 act was amended ten years later<sup>40</sup> and provided for the appointment of two labor inspectors and two assistants, a man and a woman in each capacity. The duties of these persons were not changed substantially and, as in the 1902 act, consisted primarily of inspecting factories and other places of employment for any violation of the laws relating to the employment of women and children.<sup>41</sup> It was also the duty of the labor inspectors to collect statistics concerning labor when directed to do so by the Commissioner of Agriculture. Under the 1912 statute, however,

<sup>38</sup> Kentucky Acts 1902, chap. 24.

<sup>39</sup> *Ibid.*, sec. 7.

<sup>40</sup> Kentucky Acts 1912, chap. 108.

<sup>41</sup> *Ibid.*, sec. 2.

the inspectors were still prohibited from interfering in any labor difficulty.<sup>42</sup>

The 1902 act and the 1912 amendments were repealed in 1924;<sup>43</sup> but the 1924 act made no material changes in the functions of the labor inspectors as prescribed in the earlier legislation. The Department of Labor, still in the Bureau of Agriculture, Labor and Statistics, was, as before, without a voice in labor disputes or lockouts.<sup>44</sup>

### THE DEPARTMENT OF INDUSTRIAL RELATIONS

In 1936, just as the nation was emerging from the Great Depression and a new national policy relating to the place of organized labor in the economy was fast developing, the General Assembly passed a rather inclusive reorganization act.<sup>45</sup> Article XV of this act established, as a major department of the state administrative system, the Department of Industrial Relations. This department, except as otherwise provided, exercised all the administrative functions of the state having to do with employer-employee relationships. Its functions in 1936, among others, were those relating to employer-employee relationships and the safety of workers. The Chief Labor Inspector and the deputy inspectors became a part of the new department in January, 1940. The department was charged with the promotion of friendly relationships between employers and employees, and directed to concern itself with the improvement of living conditions of employees.<sup>46</sup> This act, however vague and nonspecific, was the first major legislative departure from the pattern that was first set in 1902. Also, it was the forerunner of a more comprehensive law<sup>47</sup> that was enacted four years later.

The functions and duties of the department and of the Commissioner of Industrial Relations, related to the subject matter of this study as prescribed by the 1940 legislation and still a part of the law of the Commonwealth, were expanded to include the

<sup>42</sup> *Ibid.*, sec. 5.

<sup>43</sup> Kentucky Acts 1924, chap. 68.

<sup>44</sup> *Ibid.*, sec. 13.

<sup>45</sup> Kentucky Acts 1936 (Extra Session), chap. 1.

<sup>46</sup> *Ibid.*, sec. 1.

<sup>47</sup> Kentucky Acts 1940, chap. 105; Kentucky Revised Statutes (hereafter cited as KRS), 336.

promotion and development of fair practices by employers and employees; and the department was further charged to discourage and eliminate as far as practicable all unfair practices of either party.<sup>48</sup> Included in the duties and obligations, as set forth in the statute, are the specific functions of the department. But the legislature chose not to be specific as to how friendly relationships between employers and employees should be promoted. Unfair labor practices are not specifically defined but, perhaps more important, there is no machinery for administration and enforcement. It has been stated by the Kentucky Court of Appeals that implications are never to be extended beyond a fair and reasonable inference.<sup>49</sup> A maxim this court has consistently followed is that the enumeration of particular things excludes the idea of something else not mentioned.<sup>50</sup> And in the act there is an "enumeration of particular things." For example, employers may not interfere when employees choose to associate collectively, or collectively designate representatives to negotiate terms and conditions of employment.<sup>51</sup> The act continues by saying that neither party "shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion." The Kentucky act, in this respect, is quite similar to the federal act<sup>52</sup> and to many state laws.<sup>53</sup> But unlike the federal statute and the state acts that are patterned after, or similar to, the federal act, the unfair practices of the parties are not spelled out. The Kentucky act does not say, for example, that it is an unfair practice for either party to refuse to bargain collectively. Although it is the policy of the state to eliminate unfair labor

<sup>48</sup> KRS 336.040.

<sup>49</sup> *Bloemer v. Turner*, 281 Ky. 832, 137 S.W. 2d 387 (1939).

<sup>50</sup> *Ibid.*

<sup>51</sup> KRS 336.130.

<sup>52</sup> Labor Management Relations Act, 1947, 61 Stat. 136, sec. 7.

<sup>53</sup> Colorado Statutes Annotated, chap. 97, sec. 94.

General Statutes of Connecticut, chap. 370, secs. 7388-7399.

Kansas General Statutes, chap. 44, secs. 801-815.

Acts of Massachusetts, 1937, chap. 436.

Compiled Laws of Michigan, chap. 423.

Minnesota Statutes, chap. 179.

New York Consolidated Laws, chap. 31, art. 20.

Oregon Revised Statutes, chap. 661.

Purdon's Pennsylvania Statutes Annotated, Title 43, chap. 7, sec. 211.

Public Laws of Rhode Island, 1941-42, chap. 1066.

Utah Code Annotated, Title 34, chap. 1.

Wisconsin Statutes, chap. 111, subchap. 1.



practices whenever possible, the Department of Industrial Relations is without power to carry out this policy because such practices are not specifically defined.

### ELECTIONS

Kentucky law does not provide for the holding of representation elections except by consent of both the employer and his employees. Even if it were possible for either party to force a representation election,<sup>54</sup> it would not be an unfair practice, following the election, for either party to refuse to bargain collectively. The Kentucky Court of Appeals has held that such elections may be held only if both parties give consent.<sup>55</sup> The *Blue Boar Cafeteria Co.* case reached the courts as a result of an attempt by the Commissioner of Industrial Relations, at the request of a union,<sup>56</sup> to conduct a representation election. In a letter to the employer, the commissioner stated that the election would be held on the premises of the employer during working hours if he did not "agree to a consent election." The court again held that the "powers of officers are limited to those conferred expressly by a statute or which exist by a necessary and clear implication." Even though the employees have a statutory right to bargain collectively through representatives of their own choosing, there is nothing in Kentucky law that says or expressly implies that the employer must recognize a labor organization or even consent to an election to determine if the organization represents the majority of the employees. Only two states<sup>57</sup> that have comprehensive labor relations laws make no provision for such elections.

### STRIKES, PICKETING, AND BOYCOTTS

Under Kentucky law, employees are allowed to strike, engage in peaceful picketing, and assemble collectively for peaceful purposes.<sup>58</sup> As in the case of most rights, the right to strike, to picket peacefully, or to assemble collectively for peaceful purposes, is not unlimited. Just as the right to drive an automobile rests upon the

<sup>54</sup> Sometimes referred to as a "collective bargaining election."

<sup>55</sup> *Blue Boar Cafeteria Co., Inc. v. Hackett et al.*, 312 Ky. 288, 227 S.W. (2d) 199 (1950).

<sup>56</sup> Hotel and Restaurant Employees and Bartenders International Union, Local No. 181.

<sup>57</sup> Kansas and Michigan.

<sup>58</sup> KRS 336.130.

observance of traffic rules, there are rules that regulate strikes and picketing. These and other activities concerning employer-employee relations must be conducted without recourse by either party to illegal acts, violence, intimidation, threats, or coercion.<sup>59</sup>

The right to strike, although written into Kentucky statutory law for the first time in 1940, was, in effect, considered as such by the courts many years previous. On February 7, 1912, the Kentucky Court of Appeals, in a rather lengthy decision,<sup>60</sup> confirmed this right. Just as the employer was free to discharge any or all of his employees without cause, said the court, the employees, in the absence of a contract, could likewise withdraw their labor. A man's labor is his own; an organization of workers may legally act as one.

Twenty years after the *Saulsberry* case, the Court of Appeals handed down two more decisions<sup>61</sup> in which a strike is again termed a lawful act. In these two cases the court was not interested in determining the legality of the strikes; this was an accepted fact. Both cases were on appeal from a conviction under Kentucky's "banding and confederating" law,<sup>62</sup> frequently referred to as the "conspiracy" law. The strike is without doubt the most potent of all the pressures employees can use in a dispute with an employer. Any legislation by the state, or any decision by the courts, that has the effect of increasing or decreasing the pressure that can be brought to bear on either the employer or the nonstriking employees, therefore, is important, in determining the effectiveness of strikes. Kentucky's conspiracy law was passed in 1873 and intended as a control of the activities of the Ku Klux Klan. It has seldom been used effectively as a control of strike activity.<sup>63</sup> The courts have repeatedly stated in conspiracy cases

<sup>59</sup> *Ibid.*

<sup>60</sup> *Saulsberry v. Coopers International Union, Thomas McManus and Ed. Lineback*, 147 Ky. 170, 143 S.W. 1018 (1912).

<sup>61</sup> *Alsbrook v. Commonwealth*, 243 Ky. 814, 50 S.W. (2d) 22 (1932); *Newton v. Commonwealth*, 244 Ky. 41, 50 S.W. 2d 18 (1932).

<sup>62</sup> KRS 437.110. This is the so-called Ku Klux law and was enacted in 1873; and, as amended, reads in part as follows: "No two persons shall confederate or band themselves together and go forth for the purpose of intimidating, alarming, disturbing or injuring any person . . . [or] for the purpose of molesting, damaging or destroying any property of another person, whether the property is molested, damaged or destroyed or not." (Violation of this law was reduced from a felony to a misdemeanor in 1948.)

<sup>63</sup> George N. Stevens, "The Development of Labor Law in Kentucky," 28 *Kentucky Law Journal*, 173 (1940); *Underhill v. Murphy*, 117 Ky. 640, 78

that the line between criminal coercion and legal persuasion is faint indeed.<sup>64</sup> This is particularly true in labor dispute cases where the employer's rights and the right to strike must both be protected. In *Alsbrook v. Commonwealth*, the Kentucky Court of Appeals said:

The right to live in peace and quiet, and pursue according to his own inclinations such lawful employment as he pleases, is one of the highest privileges of the citizen. . . . Every citizen of the commonwealth is entitled to be protected in the peaceable enjoyment of any legitimate business or occupation he is following. . . . On the other hand, men engaged in a lawful strike as was the appellant and his associates have a lawful right to assemble and to address their fellow men and endeavor in a peaceful, reasonable, and proper manner to persuade them regarding the merits of their cause, and to enlist sympathy, support, and succor in the struggle for the betterment of working conditions, or for higher wages, or for the advancement of their interests.

As noted above, peaceful picketing is permissible under Kentucky law, but only so long as it is free from violence, intimidation, threats, or coercion. Picketing is the usual and most important method of soliciting support for a strike. Strikes, picketing, and other concerted activities of organized labor, under common law, were prima facie a tort, and permissible only if legally justified. In 1937, following considerable preliminary development, the United States Supreme Court gave the first indication that peaceful picketing may be identified with freedom of speech.<sup>65</sup> As such, it is protected by the United States Constitution. Two later cases<sup>66</sup> further clarified the Supreme Court's position. This doctrine—that picketing is a form of free speech and therefore protected by the Constitution (limited considerably by later cases)—substantially limited the area of state jurisdiction

S.W. 482 (1904); and *Cobb v. Commonwealth*, 242 Ky. 424, 46 S.W. 2d 776 (1932).

<sup>64</sup> *Commonwealth v. Morton et al.*, 140 Ky. 628, 131 S.W. 506 (1910); *Alsbrook v. Commonwealth*, 243 Ky. 814, 50 S.W. 2d 22 (1932); and *Chapman v. Commonwealth*, 294 Ky. 631, 172 S.W. 2d 228 (1943).

<sup>65</sup> *Senn v. Tile Layer's Union*, 301 U.S. 468 (1937). For further discussion of this point see Charles C. Killingsworth, *State Labor Relations Acts* (Chicago: University of Chicago Press, 1948), p. 53.

<sup>66</sup> *Thornhill v. Alabama*, 310 U.S. 88 (1940), in which a state law prohibiting picketing was declared unconstitutional; and *Carlson v. California*, 310 U.S. 106 (1940), in which the same action was taken relative to a county ordinance.

over the control of picketing, and the development of public policy in Kentucky must be considered in this light.

Workers had the right to picket peacefully<sup>67</sup> and the right to assemble peaceably for the purpose of persuading other men not to take their jobs<sup>68</sup> by the early 1930's. It was stated also, as early as 1920, that organized workers were free to use peaceful means, not otherwise illegal, to induce other workers to join the organization.<sup>69</sup> The latter case, *Diamond Block Coal Co. v. U.M.W.A.*, was important, not only as a statement of the rights of organized labor, but because it dissolved an all-embracing injunction obtained by the coal company against the union. Injunctions restraining the activities of organized labor had been issued in this country prior to the *Debs* case,<sup>70</sup> but 1894 is generally considered the date of birth of this type control in labor disputes. The first case to be heard by the Kentucky Court of Appeals involving an injunction growing out of a labor dispute was one in which a union was the party seeking relief.<sup>71</sup> In this case the union sought to prevent an employer from using a certain cigar label, claimed to be the property of the union. The case was decided in favor of the union.

The first case decided by the Kentucky Court of Appeals involving an injunction obtained by an employer restricting the activities of a labor organization was in 1904.<sup>72</sup> The court in this instance upheld the position of the employer. The injunction was brought against former employees, all members of a union, to enjoin acts of violence and intimidation. In this first case involving such an injunction obtained by an employer, the court was careful to spell out the legitimate rights of organized labor. But the court further stated that "where the breach of a criminal law is also a violation of a property right the chancellor may interpose by injunction to protect property." Organized labor was the victor in the next case<sup>73</sup> to reach the state's highest court. The expression

<sup>67</sup> *Music Hall Theatre v. Moving Picture Machine Operator's Local No. 165*, 249 Ky. 639, 61 S.W. 2d 283 (1933).

<sup>68</sup> *Newton v. Commonwealth*, 244 Ky. 41, 10 S.W. 2d 18 (1932).

<sup>69</sup> *Diamond Block Coal Co. v. United Mine Workers of America et al.*, 188 Ky. 477, 222 S.W. 1079 (1920).

<sup>70</sup> *Pullman Co. v. Debs*, 158 U.S. 564 (1895).

<sup>71</sup> *Hetterman v. Powers*, 102 Ky. 133, 43 S.W. 180 (1897).

<sup>72</sup> *Underhill v. Murphy*, 117 Ky. 640, 78 S.W. 482 (1904).

<sup>73</sup> *Saulsberry v. Coopers' International Union*, 147 Ky. 170, 143 S.W. 1018 (1912).

of the court in this instance was that a labor organization could not be required to enter into a contract with an employer on terms not acceptable to the union; nor could a union be deprived of the right of control over its property. The *Diamond Block Coal Co.* case mentioned above was the next of this nature to reach the Court of Appeals, and again the decision was in favor of the union. This phrase—"in favor of the union"—however, may be misleading. It brings to light what was then, and in some cases still is, the misuse of the injunctive process.<sup>74</sup> The temporary restraining order was granted in the lower court, in the *Diamond Block Coal Co.* case, on March 10, 1920, and dissolved by the Court of Appeals on June 18, 1920, an elapsed time of more than three months. During this period the injunction remained in effect; and, without interference from the union, the employer was free to bolster his position. The company may have known the order would be dissolved by the high court, but during the interim it may win its battle with the union so dissolution of the order could mean little to the union as a victory. In a rather lengthy decision the court took the opportunity to point up, in terms that could not possibly be misunderstood, that "labor unions have a status in this country the same as other associations. . . . The general rule seems to be that organizers of labor unions may use any peaceable means, not partaking of fraud to induce persons to become members, and equity will not enjoin such organizers. . . ."

In 1933 the Court of Appeals again held that peaceful picketing could not be enjoined even though inspired by neither a strike nor a drive to organize the unorganized, but "the making of false statements, the indulgence of violence, and interference with the business"<sup>75</sup> constituted grounds for injunctive relief. Following the *Senn* case (1937),<sup>76</sup> and prior to the next two cases<sup>77</sup> wherein the doctrine of "picketing as a form of free speech" was expounded by the United States Supreme Court, the Kentucky Court of Ap-

<sup>74</sup> The authorities that may be quoted here are numerous, but see particularly, in reference to Kentucky, Stevens, *op. cit.*, 182; and James D. Cornette, "Temporary Restraining Orders," 40 Kentucky Law Journal, 98-104 (1951).

<sup>75</sup> *Music Hall Theatre v. Moving Picture Machine Operator's Local No. 165*, 246 Ky. 639, 61 S.W. 2d 283 (1933). The quotation, although applicable in the *Music Hall* case, is from *Hotel, Restaurant and Soda Fountain Employees Local Union No. 181 v. Miller*, 272 Ky. 466, 114 S.W. 2d 501 (1938).

<sup>76</sup> *Senn v. Tile Layer's Union*, 301 U.S. 468 (1937).

<sup>77</sup> *Thornhill v. Alabama*, 310 U.S. 88 (1940); and *Carlson v. California*, 310 U.S. 106 (1940).

peals made it clear that picketing could be enjoined in the absence of a bona fide labor dispute.<sup>78</sup> Such was the situation in Kentucky when the free speech doctrine was at its pinnacle nationally.

Based on the *Thornhill* and *Carlson* decisions, and in particular on the decision of the United States Supreme Court in *American Federation of Labor v. Swing*<sup>79</sup> that legalized picketing in a secondary boycott case, the Kentucky Court of Appeals in 1941 changed its position on what constituted legal picketing.<sup>80</sup> The court stated in the *Blanford* case that "members of any union, so long as they refrain from acts of violence, cannot be enjoined from picketing premises of any persons against whom the union has a grievance, or from conducting a boycott against his business." Contrary to the previously prevailing doctrine, the *Blanford* case made it clear that pickets need not be employees of the establishment being picketed.

But what appeared to be complete association of picketing with the constitutional provision guaranteeing to persons the right of free speech was soon to be qualified. In a series of cases<sup>81</sup> that came before the United States Supreme Court in the years immediately following the *Swing* case, it became clear "that some rules regarding time, place, manner, and circumstance may be applied to picketing which are not applied to other methods of communicating ideas."<sup>82</sup> Picketing by an organized group was determined to be something more than free speech. That "something more" gave back to the states some of the control over picketing. And again in 1949 the Supreme Court held that "picketing is not beyond the control of a State if the manner in which the picketing is conducted or the purpose which it seeks to effectuate

<sup>78</sup> *Hotel, Restaurant and Soda Fountain Employees Local Union No. 181 v. Miller*, 272 Ky. 466, 141 S.W. 2d 501 (1938). Twelve states besides Kentucky had taken this position by 1941; six states had taken the position that picketing could be legal in nonstrike situations. Ira Schlusberg, "The Free Speech Safeguard for Labor Picketing," 34 *Kentucky Law Journal*, 10 (1945).

<sup>79</sup> 312 U.S. 321 (1941).

<sup>80</sup> *Blanford et al. v. Press Publishing Co.*, 286 Ky. 662, 151 S.W. 2d 440 (1941).

<sup>81</sup> *Bakery and Pastry Drivers and Helpers v. Wohl*, 315 U.S. 769 (1942); *Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe*, 315 U.S. 722 (1942); and *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941).

<sup>82</sup> *Killingsworth*, *op. cit.*, p. 56.

gives grounds for its disallowance.”<sup>83</sup> The Kentucky Court of Appeals has interpreted this to mean that the state may enjoin picketing that contravenes the law or public policy of the state.<sup>84</sup> In the *Blue Boar* case of 1952, the Court of Appeals held that picketing by nonemployees involved coercion in violation of Kentucky law.<sup>85</sup> Pressure, through picketing, said the court, was put on the employer to coerce his employees into joining the union.

One year previous to the 1952 *Blue Boar* decision, the Court of appeals upheld the right of a union to continue picketing an establishment where a strike was in process even though, according to the argument of the employer, all strikers had been replaced, and the strike and the picketing had wholly failed in their purpose.<sup>86</sup> The court, in this case, refused to “go on record as upholding this method of ‘breaking’ a strike.” Less than five months later, however, the court upheld a lower court decision enjoining all picketing because “evidence was sufficient to show that unions were in contempt of court for violating injunction [enjoining all except peaceful picketing by a limited number of pickets] . . . in connection with picketing of hotels and building.”<sup>87</sup> The employees of two hotels and another building had gone on strike at the same time and the court held that, because all three buildings had common ownership, it amounted to a single strike.

In the 1952 *Blue Boar* case, picketing by nonemployees was held to be enjoined. It was not determined how many of a company’s employees would have to be in the picket line to change the situation from one of “forcing the employer to exercise coercion on the employees to join the union” to “a legal strike to persuade the employer to recognize the union as bargaining agent for the employees.” In a later case,<sup>88</sup> where one employee was “persuaded to go on strike,” the Court of Appeals upheld an injunction granted to restrain all picketing on the basis of the *Blue*

<sup>83</sup> *Hughes v. Superior Court of California*, 339 U.S. 460 (1949).

<sup>84</sup> *Blue Boar Cafeteria Co., Inc. v. Hotel and Restaurant Employees and Bartenders International Union Local No. 181*, 254 S.W. 2d 335 (Ky., 1952).

<sup>85</sup> KRS 336.130.

<sup>86</sup> *Broadway and Fourth Ave. Realty Co. v. Local No. 181, Hotel and Restaurant Employees Union et al.*, 244 S.W. 2d 746 (Ky., 1951).

<sup>87</sup> *Local No. 181, Hotel and Restaurant Employees Union et al. v. Broadway and Fourth Avenue Realty Co. and Local No. 181, Hotel and Restaurant Employees Union et al. v. Brown Hotel Co.*, 248 S.W. 2d 713 (Ky., 1952).

<sup>88</sup> *Local No. 227, Amalgamated Meat Cutters and Butcher Workers of North America, et al. v. F. B. Purnell Sausage Co.*, 264 S.W. 2d 870 (Ky., 1953).

*Boar* decision. The court did hold, however, that the injunction could not be extended to restrain the union from requesting the customers of the employer to cease doing business with him so long as the shop remained nonunion. The issue of whether or not the union's requests of the employer's customers constituted a secondary boycott was not raised. But in another case<sup>89</sup> decided by the Court of Appeals a few months earlier, and involving a quite different set of circumstances, the court said:

An important factor in determining whether activities of union against an employer other than the one with which union has labor dispute come within purview of secondary boycott is the relationship between the two employers, and if the relationship is so close that one may be regarded as the ally of the other, picketing of one may be permissible during labor dispute with other.

#### CONCILIATION, MEDIATION, AND ARBITRATION

Kentucky law specifies that the Commissioner of Industrial Relations may act as mediator and conciliator in labor disputes, and may "appoint conciliators and mediators in labor disputes whenever his intervention is requested by either party."<sup>90</sup> The commissioner may also offer his services in any emergency resulting from a labor dispute. If the parties accept his offer, he is authorized to hold hearings and receive the testimony of witnesses under oath. If the parties accept the commissioner's offer, they also accept the responsibility of refraining from engaging in either a strike or a lockout for a period not to exceed 15 days.

In practice, the commissioner intervenes in labor disputes only at the request of both parties. Obviously, very little can be accomplished by conciliation and mediation if one or both parties to a dispute choose not to cooperate. It does appear, however, that such services have declined in importance as a function of the Department of Industrial Relations. The services of the department were requested in only six instances during the fiscal year ended June 30, 1954; while, in the years immediately following the enactment of the law, as many as 144 major cases and "scores"

<sup>89</sup> *General Drivers, Warehousemen and Helpers, Local Union No. 89 v. American Tobacco Co.*, 264 S.W. 2d 250 (Ky., 1953).

<sup>90</sup> KRS 417.



of lesser cases were handled in a single year.<sup>91</sup> It is common, in the department's annual reports, to encourage both labor and industry to utilize the conciliation and mediation services offered.

The arbitration of labor disputes in Kentucky is subject to the rules and procedures set forth in the law covering all arbitration proceedings.<sup>92</sup> Prior to 1949, only one case<sup>93</sup> could be found "in which an interpretation of Kentucky decisions is applied to an arbitration clause in a collective bargaining agreement."<sup>94</sup> In this case a coal company employee sought back wages claimed to be due under the wage clause of a collective bargaining agreement. It was the employer's contention that compliance with the arbitration procedure of the agreement must precede the bringing of action. The court, however, ruled that in Kentucky any agreement to arbitrate all disputes arising under a contract is invalid and unenforceable because it is an attempt to take over the jurisdiction of the courts. It was further held that the National Arbitration Act<sup>95</sup> did not apply "to agreements concerning employees in interstate commerce."

In a *Kentucky Law Journal* article<sup>96</sup> dealing with the subject of arbitration clauses in collective bargaining agreements, the author suggested that full account of Kentucky policy was not taken in the *Cox* case. Such does not appear to be the situation in a 1952 Kentucky Court of Appeals decision.<sup>97</sup> "The law," said the court, "favors and encourages the settlement of controversies by arbitration." Arbitrators are to have due regard for "natural justice," and are neither required nor expected to "follow the strict rules of law." The substitution of arbitration for a court of law should not be agreed to by the parties if they want "exact justice."

<sup>91</sup> Kentucky Department of Industrial Relations, Annual Reports.

<sup>92</sup> KRS 417.

<sup>93</sup> *Catcliff Coal Co. v. Cox*, 142 F. 2d 876 (C.A. 6th, 1944).

<sup>94</sup> Catherine E. Gillis, "Enforceability of Arbitration Clauses in Collective Bargaining Agreements," 37 *Kentucky Law Journal* 198 (1949).

<sup>95</sup> 43 Stat. 883 (1925), 9 U.S.C. sec. 3 (1940).

<sup>96</sup> Gillis, *op. cit.*, 198-203.

<sup>97</sup> *Smith v. Hillerich and Bradshy Co., Inc.*, 253 S.W. 2d 629 (Ky., 1952). The court quoted KRS 417.040, as applicable in this decision: "There must be a gross mistake of law or fact constituting evidence of misconduct amounting to fraud or undue partiality in order to impeach an [arbitration] award. . . ."

<sup>98</sup> KRS 336.170.

## "ONE HUNDRED OR MORE MEMBERS"

In 1952 the Kentucky legislature passed a law<sup>98</sup> providing that "every national or international labor organization having one hundred or more members in good standing who reside or work in Kentucky" shall, at all times, have one or more chartered locals or subsidiary organizations in the state. The Kentucky Court of Appeals, in upholding this law,<sup>99</sup> noted that it is quite proper to consider the historical setting and economic conditions that inspired the General Assembly to enact such a law. In this instance, the need for such a law, as the court interpreted the action of the legislature, was based on conditions growing out of the construction of the atomic energy plant in western Kentucky.

## JUDICIAL ENFORCEMENT OF COLLECTIVE BARGAINING AGREEMENTS

Various judicial techniques may be employed in the enforcement of collective bargaining agreements. In Kentucky the courts have held to the theory of agency.<sup>100</sup> In other words, in negotiating the terms and conditions of employment with the employers, a union acts as the agent of its members. As such, the union is not a party to the agreement; and to enforce the provisions of the agreement, claims must be pressed by individual employees who must also be members of the agent union.<sup>101</sup>

Under the strict interpretation of common law, a labor union, because it is a voluntary association, could neither sue nor be sued. The Kentucky Court of Appeals held to this interpretation until 1948, although it had had, many times previously, the opportunity to take a stand on the legal status of labor organizations that would clarify the situation. Even now there appears to be no

<sup>98</sup> *Hamilton v. International Union of Operating Engineers*, 262 S.W. 2d 695 (Ky., 1953).

<sup>100</sup> *Louisville Railway Co. v. Louisville Area Transport Workers Union et al. and Transport Workers Union of America, C.I.O., et al. v. Louisville Area Transport Workers Union*, 312 Ky. 626, 228 S.W. 2d 652 (1950); and *Hill v. United Public Workers of America*, 314 Ky. 791, 236 S.W. 2d 887 (1950). In both of these cases, the membership decided to join and support, as the bargaining representative, a union different from the one currently in control. The court held such action proper because the members are principals to a bargaining agreement (contract); the union plays only the role of agent. The members, said the court, were free to select a new agent if they so chose.

<sup>101</sup> For a brief discussion of the agency theory and others that are employed as judicial tools see Charles O. Gregory, *Labor and the Law* (New York: W. W. Norton & Company, Inc., 1946), pp. 379-390.

cut-and-dried rule relative to suits involving labor organizations. In the 1948 case,<sup>102</sup> in which a discharged employee sought money damages for "actual loss of time, and for future loss of time, humiliation, embarrassment and willful actions of defendants . . .," the court held in favor of the discharged employee and against the unions. The case was decided under the "Civil Code of Practice,<sup>103</sup> the Constitution<sup>104</sup> and statutes<sup>105</sup> quoted, fortified by the reasoning in the *Asher-Express* case<sup>106</sup> and *Coronado* case."<sup>107</sup>

### SUMMARY

Kentucky labor legislation is little more than the codification of previously existing common law or judicial interpretations of prevailing national and state policy. Employees had already been granted the right to strike, to picket peacefully, and to assemble collectively for peaceful purposes, prior to the legislative sanctioning of these rights. The rules of conduct that must be followed in the exercise of these rights were also pretty well spelled out.

Although the Department of Industrial Relations is charged with eliminating, as far as possible, all unfair labor practices, the activities that constitute such practices are not stipulated in the law. Therefore, neither party to a dispute can be forced to bargain collectively; nor can the Department of Industrial Relations determine via the election process, the labor organization, if any, that represents the majority of the employees unless both parties

<sup>102</sup> *Jackson v. International Union of Operating Engineers et al.*, 307 Ky. 485, 211 S.W. 2d 138 (1948).

<sup>103</sup> Watson Clay, *Kentucky Civil Rules: Practice and Procedure* (St. Paul: West Publishing Co., 1954), Rule 23.01. This rule, under certain conditions, allows persons constituting a "class" to sue or be sued. "A 'true' class action is one in which there is a community of right or interest in the claim or defense. . . . Examples would be members of unincorporated associations such as labor unions. . . ."

<sup>104</sup> Sec. 208. "The word corporation as used in this Constitution shall embrace joint-stock companies and associations."

<sup>105</sup> KRS 446.010. "'Corporation' may extend and be applied to any corporation . . . or association."

<sup>106</sup> *American Railway Express Co. v. Asher*, 218 Ky. 172, 291 S.W. 21 (1927). The court, in this case, upheld "the principle that our statutes justify or authorize a suit against an unincorporated association."

<sup>107</sup> *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344 (1922). This case provided a base for class action. The United States Supreme Court, in interpreting the Sherman Act, held that "person" or "persons" should be interpreted to include associations existing under the law; and they further concluded that "associations" included "unincorporated associations."

give consent. The situation relative to the legality of secondary boycotts in intrastate commerce has fluctuated some in the past, partly because the state courts have made an effort to follow national policy. At present, a secondary boycott by a labor organization would probably be justifiable only if the party against whom such action were taken was, in the eyes of the courts, virtually inseparable from another employer against whom the union had taken some type of permissible primary action. In brief, it may be noted that only the courts, and neither the statute nor the Department of Industrial Relations, can define an unfair labor practice.

There is one legislative control over the internal functions of unions, passed as a result of labor-management differences during the construction of the AEC projects in western Kentucky. Any labor organization with 100 or more members in good standing in the state, must have a local organization in the state. The Kentucky Court of Appeals has given a rather broad meaning to this law and has said that, even though a national or international union does have a local union in the state, another local must be chartered if more than 100 members in another locality are not members of the existing local.

The conciliation and mediation service in the Kentucky Department of Industrial Relations, although seemingly rather active at one time, appears at present to be not much more than a thing ignored. It functions only at the request of both parties to a dispute, as does the election machinery (a mediation and conciliation device in Kentucky) noted above. The Court of Appeals, which made the policy as to elections, has made some effort to encourage the arbitration of industrial disputes; but it is not possible to enforce a collective bargaining agreement that would substitute completely the arbitration process for judicial procedure.

The state's banding and confederating act has never been used extensively in labor-management disputes. But one body of principles, outside labor legislation as such and the criminal code as it applies to violence and other type criminal activity, important in a labor relations context is the law of agency. The legal status of unions in the state is not clearly defined. There is, for example, considerable disagreement as to the conditions under which a union, in its own name, can sue or be sued. If the courts

hold strictly to the common law doctrine of agency, unions are outside the position of becoming a party to a lawsuit. The Court of Appeals in one instance, however, found a basis for bypassing the strict interpretation—a basis for lending to the union a legal personality.

## PART IV

### AREAS OF PROPOSED CHANGE IN PUBLIC POLICY

One method of evaluating suggested changes in public policy is to examine them in the light of experience. Virtually every proposed change in Kentucky policy that would necessitate new legislation has been tried in other states. And almost every piece of labor legislation at the federal level has been patterned after, or preceded by, similar state legislation. It has been suggested also that states may quite properly experiment with such laws and that Congress may quite properly take advantage of the results of such experimentation in drafting federal legislation.

Suggestions for change in Kentucky law relating to the problems and theory of labor-management relations have been made by numerous persons and associations. During the 1954 session of the Kentucky General Assembly, two bills relating to labor-management relations were introduced.<sup>108</sup> The passage of either bill would have caused considerable change in existing public policy. There have been other suggestions for change in Kentucky policy, but most have never been formally considered by the legislature. It is quite unlikely, however, that any major provisions of the federal law or of the several state laws have escaped the attention of interested persons. In many instances it is possible to give credit to the many persons or groups that have incorporated some of the provisions discussed in a plan for the statutory atmosphere of labor-management relations in Kentucky.<sup>109</sup> In other instances it is not possible because policy

<sup>108</sup> Kentucky Right to Work Act (H.B. 225 and S.B. 103); and a labor relations act, popularly referred to as "The Little Wagner Act" (H.B. 389).

<sup>109</sup> Statements of suggested change in public policy, other than the two bills noted above, include (a) the annual reports and other publications of the Kentucky State Federation of Labor, the CIO, the A. F. of L., and of several international unions; (b) a report of the Kentucky Chamber of Commerce Labor Committee; and (c) a resolution adopted by the Kentucky Farm Bureau at its 1955 annual convention. Also employed as source materials in this and in other chapters,

changes are frequently advocated without a spelling-out of the detail necessary to implement such a policy.<sup>110</sup>

### MEDIATION AND CONCILIATION

Mediation and conciliation provide for a third party to a dispute whose sole function is to bring the parties to an agreement through the bargaining process. Most states provide for some sort of mediation service to facilitate the settlement of disputes between management and labor. Although in some states the laws have proved rather ineffective because of the small use made of the service, there are instances also where the mediation and conciliation service has functioned rather successfully.

There are major variations from state to state in the operation of the mediation machinery. It may, for example, be administered by the same staff that administers other labor laws, or it may be designed to operate as an independent unit of state government. In some instances a strike notice of perhaps 10 or 30 days must be filed with the mediation service, and the mediators must be called in in an effort to settle the dispute—in other words, compulsory mediation. In some states use is made of fact-finding boards; in some, the mediation service can take part in a dispute only after its services are requested by both parties.

In determining the type of mediation and conciliation service most desirable, a few basic facts must be kept in the forefront. A strike over wages or conditions of employment—an economic strike—is usually a manifestation of the forces of a market in operation. The main purpose to be served by mediation is the settlement of disputes without resorting to a show of strength. Extensive use of mediators in labor disputes may tend to prevent strikes, and such use may also encourage a reliance on government for the settlement of private issues.

For the most satisfactory results, a state mediation and conciliation service should probably be administered by an agency

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are the suggestions of many representatives of management, of organized labor, and of "the general public" secured through personal interviews and by correspondence.

<sup>110</sup> See, for example, L. Reed Tripp, J. Keith Mann, and Frederick T. Downs, *Labor-Management Relations in the Paducah Area of Western Kentucky*, Bureau of Business Research Bulletin No. 28 (Lexington: University of Kentucky, 1954), p. 76.

other than that administering other labor legislation.<sup>111</sup> There is little to indicate, by comparing the results under various state acts, that strike notices and cooling-off periods have lessened labor-management strife.<sup>112</sup> It is also doubtful whether compulsory mediation does any more than add a third party to many labor-management negotiations.<sup>113</sup>

#### EMPLOYEE REPRESENTATION AND ELECTIONS

Machinery for conducting representation elections to determine whether the employees wish to be represented by a union for collective bargaining purposes is provided in nearly every state. Usually the choice in such an election is between one or two particular unions and no union. In most states, however, a representation election may be held only at the request of both the employer and the employees; and, as a general rule, few such elections are held where these conditions prevail.

In the states<sup>114</sup> that allow representation elections at the request of either the employer or the employees, the procedure, basically, is similar to that followed under the National Labor Relations Act of 1935.<sup>115</sup>

The great differences in election provisions are confined to just a few issues, "including employer election petitions, the circumstances under which an election may be ordered, the determination of the appropriate bargaining unit, the manner of conducting elections, and court review of certifications."<sup>116</sup> In large firms (those in interstate commerce), all of these issues may be extremely important; but in small firms (those over which states may have jurisdiction in such matters) there is a tendency

<sup>111</sup> Leland J. Gordon, "Recent Developments in Conciliation and Arbitration," *Labor in Postwar America* (Brooklyn: Remsen Press, 1949), p. 216. This, in part, is a discussion of the Labor-Management Conference of 1945 during which the representatives of both sides unanimously agreed that the Federal Conciliation Service should be in the Department of Labor, not administered by the NLRB. See also 62 *Monthly Labor Review*, 42 (1946).

<sup>112</sup> Charles C. Killingsworth, *State Labor Relations Acts* (Chicago: University of Chicago Press, 1948), p. 230.

<sup>113</sup> George W. Taylor, *Government Regulation of Industrial Relations* (New York: Prentice-Hall, Inc., 1948), p. 92. See also Allan Weigenfeld, "Mediation or Meddling," 7 *Industrial and Labor Relations Review* 288-293 (1954).

<sup>114</sup> Colorado, Connecticut, Massachusetts, Minnesota, New York, Pennsylvania, Rhode Island, Utah, and Wisconsin.

<sup>115</sup> 49 Stat. 449 (1935), usually referred to as the Wagner Act.

<sup>116</sup> Killingsworth, *op. cit.*, p. 145.

for some to become less of a problem, or problems that may very well be solved by administrative fiat or through the collective bargaining process. The way employer election petitions are handled is an important issue at any level. Originally, under the federal law and some of the early state laws, no provision was made for honoring employer petitions.<sup>117</sup> Unrestricted employer petitions can have the effect of undermining the organizational activities of a union by requesting an election before a majority of the employees have been sold on the idea of collective bargaining. But there are instances also where the denial of an employer petition can result in a hardship on the employer, as for example, where there are two unions that claim to represent the employees and neither will petition for an election. The employer is in the middle even though he may be making every effort to comply with the law.

Because disputes over representation arise over differences as to "basic principles," they have been recognized as one of the types most difficult to settle.<sup>118</sup> An important question that gives rise to this difficulty is that of voter eligibility. In most state laws where election procedures are spelled out, the agency administering the law (usually a state labor relations board) has the authority to determine voter qualifications. The problems occasioned by seasonal employment, temporary employment, or part-time employment can usually be settled administratively with little difficulty. But determining the eligibility of persons on strike may present a quite different set of problems. This question seems also to be determined by those administering the law. Laws, substantially similar as to the definition of employee, have been interpreted quite differently.<sup>119</sup> In New York, for example, a person legally on strike is usually eligible to vote in representation elections and any replacement of the striking employee is not eligible;<sup>120</sup> but in Pennsylvania, an employee on strike may not vote and his replacement may.<sup>121</sup> Quite frequently both the employee

<sup>117</sup> NLRB, Rules and Regulations, Effective July 14, 1939, Sec. 2 (b) (5); and Killingsworth, *op. cit.*, p. 151.

<sup>118</sup> Taylor, *op. cit.*, p. 91.

<sup>119</sup> New York Laws, chap. 443, sec. 701 (3); and Pennsylvania Laws, P.L. 1168, sec. 3 (c).

<sup>120</sup> Matter of Ross, et al., 15 New York State Labor Relations Board No. 42 (1952); and New York State Department of Labor, "Majority Representation," 27 Industrial Bulletin 29 (1949).

<sup>121</sup> Pennsylvania Labor Relations Board, Seventh Annual Report (1943), p. 20.



on strike and the person who replaced him are declared eligible to vote in representation elections.<sup>122</sup>

The appropriate unit for collective bargaining is determined in Pennsylvania by the State Labor Relations Board,<sup>123</sup> but the basis for determining the bargaining unit "should depend on such factors as unity of interest, common control, independent operation, . . . character of work, unity of labor relations, and past collective bargaining history in the plant and in the same industry."<sup>124</sup> The Pennsylvania act and most of the other state labor relations acts that define "appropriate unit" have a "craft-unit proviso" that requires the board to designate a single craft as the appropriate bargaining unit if a majority of the employees of a particular craft so choose.<sup>125</sup> The Wisconsin act gives the state board no power to determine the appropriate unit; but the board must determine whether a group of employees, as defined in the election petition, constitutes an appropriate unit for collective bargaining purposes.<sup>126</sup> The standards employed are similar to those relied on by the Pennsylvania board. Most state labor relations acts grant the administrative agency considerable power to define the appropriate bargaining unit subject to certain standards such as in Pennsylvania and Wisconsin.

### UNION SECURITY

On November 7, 1944, Florida became the first state to make the denial of work because of membership or nonmembership in a labor organization an illegal act.<sup>127</sup> Since then, 16 other states<sup>128</sup> have adopted similar provisions—some, as in Florida, by amending the state constitution, and others by legislation. Such provisions, popularly referred to as "right-to-work" laws, outlaw

<sup>122</sup> Killingsworth, *op. cit.*, p. 208.

<sup>123</sup> Pennsylvania Labor Relations Board, Sixteenth Annual Report (1952), p. 32.

<sup>124</sup> Pennsylvania Labor Relations Board, Britton's Cleaner's Employees, Case No. 60 (1952).

<sup>125</sup> Pennsylvania Laws, P.L. 1168, sec. 7 (b).

<sup>126</sup> Digest of Decisions of the Wisconsin Employment Relations Board and the Courts Involving the Wisconsin Employment Peace Act, May 12, 1939-Dec. 31, 1953 (2nd ed.; Madison: June 1, 1954), p. 110.

<sup>127</sup> Florida Constitution, sec. 12 (1947).

<sup>128</sup> Alabama, Arizona, Arkansas, Georgia, Iowa, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, and Virginia.

the closed shop, the union shop, and usually every other type of agreement technically referred to as "union security" agreements. In the history of labor legislation, few issues have commanded the attention of the labor and management organizations, as well as the general public, as have these state anti-union security provisions.

The Labor Management Relations Act of 1947<sup>129</sup> outlaws the closed shop in firms in interstate commerce. This act, while making it impossible for states to legalize the closed shop, has a provision<sup>130</sup> that allows states to enact laws that prohibit other types of union security provisions. And such laws cover firms in both interstate and intrastate commerce.

Some of the arguments—both for and against such laws—are sound. But because of the extreme emotional appeals of both sides, objective evaluation of the pros and cons is difficult. The arguments usually presented by those favoring the adoption of state laws prohibiting union security provisions in labor-management collective bargaining agreements are:

1. An individual must not be deprived of his right to work even though he may not choose to join a union.
2. Such laws encourage industrial growth. This argument is used primarily by supporters in southern states.
3. The number of strikes will be reduced.
4. There will be an improvement in labor-management relations.
5. Union security agreements are not in the public interest.
6. The enactment of provisions restricting the right of employers and employees to enter into union security agreements represents a healthy return to the states of governmental control over collective bargaining relationships.

In opposition to these laws—and it should be pointed out here that opposition is not confined to labor organizations, just as those favoring such laws are not confined to employer organizations—the arguments are:

1. The advocates are not interested in anyone's right to a job—that "right-to-work" is actually a phrase designed to misrepresent the issue involved in order to gain public support.

<sup>129</sup> 61 Stat. 136, sec. 8 (a) (3).

<sup>130</sup> *Ibid.*, sec. 14 (b).

2. Union security provisions in collective bargaining agreements should be allowed if agreed upon by the parties in negotiations.
3. There has been no decline in strike incidence that can be directly attributed to the existence of these laws.
4. States should not have control over collective bargaining in industries in interstate commerce.
5. If a union is the bargaining agent of a particular group of employees, it must represent the nonmembers as well as the members; and nonmembers share equally in the higher wages and improved working conditions which result from labor-management negotiations.
6. Such laws do not promote industrialization.

These arguments, for and against the abolition of union security agreements, are by no means exhaustive. But they are, perhaps, rather typical of those most frequently presented. The role of union security agreements must, in the final analysis, rest upon the prevailing concept of proper public policy. Laws restricting union security agreements have, for the most part, been enacted in the least industrialized states which are generally the states where labor is least organized. If unions and collective bargaining are regarded as socially desirable, and current national public policy would suggest they are, then "right-to-work" laws at the state level violate this policy. But if it is to be assumed that the activities of labor unions should be curbed somewhat—that if the bargaining power of unions is now greater than is socially desirable—the case for such laws is on much firmer ground. From an analysis of numerous books and articles written expressly and admittedly for the purpose of promoting a particular point of view, it would appear that many persons and organizations begin with particular philosophical and economic beliefs and search out a basis to support these premises. Some proponents, for example, "predict that under laws prohibiting compulsory unionism, unions will not become weaker, but rather will seek and gain a more genuine base of worker support—a voluntary one."<sup>131</sup> It is no secret that the goal of "right-to-work" advocates is not to strengthen labor unions. And a common argument of the unions relates to the compulsion under law to bargain

<sup>131</sup> Earl F. Cheit, "Union Security and the Right to Work," 6 Labor Law Journal, 400 (1955).

for all employees in the bargaining unit. "Yet, who can recall a single union argument to the effect that it should bargain for its members only? . . . How vigorously and effectively . . . do unions represent non-members in the bargaining unit?"<sup>132</sup>

In January, 1955, the National Right-to-Work Committee was organized "to establish in the United States that Americans must have the right, but not be compelled, to join unions."<sup>133</sup> About three months later it was claimed by this committee that the 12 states with anti-union security laws since 1947 "have in many cases registered substantial gains in employment, income, earnings, population, and business growth and the greatest average reduction of workless days due to labor disputes."<sup>134</sup> Other reports by advocates of such laws make similar claims.<sup>135</sup> But individuals and organizations in opposition to anti-union security laws make similarly strong claims supporting their position. The Governor of Massachusetts, speaking in opposition to a right-to-work bill that failed to get out of committee, stated that the bill was ill-advised—that if enacted it would create industrial strife.<sup>136</sup> And the Governor of Alabama, in a public statement on May 4, 1955, asked for repeal of the "right-to-work" law in his state because it had increased industrial unrest and strikes.<sup>137</sup> Many attacks by labor organizations on proposed and existing anti-union security measures are as vigorous and uncompromising as are many of the supporting statements.<sup>138</sup> Another attack on these laws has been made on the grounds that they are unenforceable.<sup>139</sup>

<sup>132</sup> Selwyn H. Torff, "The Case for Voluntary Union Membership," 40 Iowa Law Review, 621 (1955). This article is one part of a dual review of The Case Against "Right to Work" Laws (Congress of Industrial Organizations, no date), pp. 169. For another rather complete analysis of this type legislation, in which the author concludes it is "undesirable legislation," see Maurice C. Benewity, "Nature and Effect of State Right-to-Work Laws," 1 Wayne Law Review, 165-186 (1955).

<sup>133</sup> New York Times, CIV (January 29, 1955).

<sup>134</sup> *Ibid.* (April 13, 1955).

<sup>135</sup> See, for example, Missouri State Chamber of Commerce, Research Report, No. 25 (Jefferson City: March 18, 1954); and U.S. Chamber of Commerce, States' Rights in Labor Relations, Information Bulletin No. 26 (Washington: March 23, 1954).

<sup>136</sup> New York Times, CIV (March 1, 1955).

<sup>137</sup> *Ibid.* (May 4, 1955).

<sup>138</sup> The views and arguments of the Congress of Industrial Organizations are presented in rather complete detail in the organization's publication, The Case Against "Right to Work" Laws. As an answer to the anti-union security bill introduced in the 1954 Kentucky Legislature, the Kentucky State Federation of Labor published Labor's Arguments Against "Bosses' Folly."

<sup>139</sup> See John M. Kuhlman, "Right-to-Work" Laws: The Virginia Experience," 6 Labor Law Journal, 453-461 and 494 (1955).

Many observers, and indeed some labor leaders, believe the union security issue will receive more attention in the coming year than will any other legislative or political goal sought by organized labor generally.

#### UNFAIR LABOR PRACTICES

The National Labor Relations Act of 1935 contained only employer unfair labor practices—there were no comparable provisions to restrict the activities of employees and unions. It was presumed, evidently, by the sponsors of the act that there were ample restrictions on the activities of labor embodied in other federal and state laws and in the general nature of the labor market. But the state labor relations acts passed between 1935 and 1947 reflect, in general, a quite different attitude. And on the national level this attitude is expressed by the enumeration in the 1947 act of unfair labor practices of a labor organization or its agents.<sup>140</sup>

When the Labor Management Relations Act of 1947 was passed (actually this is an amendment to the 1935 act) little consideration was given to outright repeal of the existing statute. "Restrictions against unfair labor practices by the employer had to be continued as a practical matter."<sup>141</sup> There was considerable evidence that the balance of power had shifted too far to the side of organized labor; but correction was in the form of restricting the activities of labor rather than a lifting of the restrictions (generally speaking) on the employer. The economic strength and the vast memberships of labor unions by 1947 were due in part, undoubtedly, to the "one-sidedness" of the 1935 act. But other factors probably played important roles, particularly the growth of industrial unions and later the high level of the national economy. To curb the activities of unions because the changed philosophy of union organization had resulted in a situation that in 1935 was unpredictable is understandable. To curb the activities of labor organizations because they were momentarily benefited by a high-level war economy (an economy quite unlike that of even the most prosperous years of peace) is something else.

<sup>140</sup> LMRA, sec. 8 (b).

<sup>141</sup> Taylor, *op. cit.*, p. 254.

The complexities of labor legislation and the economic and social consequences of the various proposed and current provisions cannot be overemphasized. This is particularly true in the realm of unfair practices. The LMRA, for example, makes it an unfair practice, subject to certain provisions, for an employer to refuse to bargain collectively with the representatives of his employees.<sup>142</sup> But even this provision, which at a glance would appear rather clear in its meaning to require an employer to bargain collectively with employee representatives over terms and conditions of employment, may involve considerable difference of opinion as to whether certain specific issues are or are not bargainable.

The unfair labor practices for both the employers and the employees or unions forbidden by the several state labor relations acts<sup>143</sup> are shown in Table 2. It should be noted that many of these practices, and particularly those applying to employees and unions, are forbidden in other states—states that have no labor relations act as such. Three other states<sup>144</sup> have provisions against jurisdictional disputes, for example, and five other states<sup>145</sup> have outlawed secondary boycotts. Many states, other than those shown in Table 2, also have laws to control picketing, prevent blacklisting, provide for the free organization of employees without employer interference, and other such regulations.

### *Jurisdictional disputes*

Jurisdictional disputes, disputes between unions involving the assignment of work, give rise to some of the most heated debates—inside and outside labor union circles—as to the proper method of settlement. As noted above, they have been outlawed in several states. But there is great difference of opinion as to whether this is a proper area for government regulation and control. Those who favor governmental action usually base their case on the fact

<sup>142</sup> Sec. 8 (a) (5).

<sup>143</sup> A state labor relations act, to be here classified as such, must be similar in several respects to either the NLRA (1935) or the LMRA (1947). Most other states have some type labor legislation but these "laws differ from the labor relations acts in that they are aimed exclusively at one or a few union practices, place few or no restrictions on employers, and do not attempt to establish a comprehensive labor relations policy." (Killingsworth, *op. cit.*, p. 3).

<sup>144</sup> California, Florida, and Iowa. Some state control of jurisdictional strikes in Massachusetts, Michigan, and Minnesota. 33 LRRM 3023.

<sup>145</sup> Arizona, Idaho, Iowa, North Dakota, and Texas. 33 LRRM 3023.

TABLE 2  
UNFAIR LABOR PRACTICES FORBIDDEN BY STATE LABOR RELATIONS ACTS

Prohibited Practice	Colo.	Conn.	Kan.	Mass.	Mich.	Minn.	N.Y.	Ore.	Penn.	R.I.	Utah	Wis.
<b>For Employers</b>												
Interference .....	x		x	x	x		x	x	x	x	x	x
Domination of union .....	x		x	x	x		x		x	x	x	x
Discrimination for union activity .....	x		x	x	x		x	x	x	x	x	x
Discrimination for testifying .....	x		x	x	x		x		x	x	x	x
Refusal to bargain .....	x		x	x			x		x	x	x	x
Espionage .....	x		x				x			x		x
Blacklisting employees .....	x		x				x			x		x
Checkoff not authorized individually .....	x		x						x			x
Breach of contract .....	x		x				x					x
Bargaining with minority .....											x	
Lockout contrary to agreement .....							x					
Ignoring final determination of tribunal .....	x											x
<b>For Employees</b>												
Secondary boycott .....			x				x		x		x	x
Picketing in minority strike .....			x				x				x	x
Coercing employees .....			x	x	x	x		x	x		x	x

TABLE 2, Continued

Prohibited Practice	Colo.	Conn.	Kan.	Mass.	Mich.	Minn.	N.Y.	Ore.	Penn.	R.I.	Utah	Wis.
Coercing employers to engage in interference .....	x		x								x	x
Breach of contract .....	x		x			x						x
Sit-down strike .....	x		x	x	x	x			x		x	x
Ignoring final determination of tribunal .....	x											x
Mass or violent picketing .....	x		x	x	x	x					x	x
Picketing beyond industry .....	x		x									
Intimidating employee's or employer's family .....	x		x			x					x	x
Acting as union agent without license	x		x							x		
Forcing union membership .....	x			x	x	x			x			x
Insistency on hiring stand-by employees .....	x		x									
Jurisdictional strike .....									x			x

Sources: 35 LRRM 3032; and Kansas Laws of 1955, H.B. 402 (effective July 1, 1955) and codified as sec. 44-801 to 44-815 in the General Statutes.



that the employer, even though he may favor and have good relations with the unions, is usually caught in the middle and without recourse. If the disputed work is assigned to union "A," union "B" will go on strike; if assigned to union "B," union "A" will strike. In either case it is likely that all, or most all, work on the particular project or shop will be halted.

Persons opposing any regulation by government base their case on the fact that the jurisdiction of craft unions is an internal matter—an issue to be settled within and by the unions and federations involved. It is argued also that the time-loss from jurisdictional strikes is overstated, that the absolute number of strikes is no indication of the severity of the problem because most are of extremely short duration;<sup>146</sup> and that the public may be quite unaware of the importance of the outcome of the dispute to the unions and workers involved. The last major argument of organized labor is that the action of government in such situation is typically slow—that the particular job may be completed before a decision can be given.<sup>147</sup>

Considerable action has been taken to correct jurisdictional troubles, particularly by the craft unions in the A.F. of L. Similar action has been taken by the CIO and between the two federations.<sup>148</sup> Like so many other economic and social situations that are, in part, a result of changing technology, there appears to be no easy solution to the problem. Thousands of workers each year are involved in situations that could easily result in jurisdictional disputes simply because a new method was devised for doing an old job, or different materials and equipment have replaced those previously employed.

Minnesota, as a part of its labor relations act, tried to solve the jurisdictional strike problem through arbitration.<sup>149</sup> The labor

<sup>146</sup> Tripp, Mann, and Downs, *op. cit.*, p. 63.

<sup>147</sup> In a case involving a jurisdictional dispute between two unions over a work assignment that resulted in a strike on January 3, 1953, a NLRB decision was handed down on August 11, 1954. The board said the dispute was properly before it for determination, "even though the particular job that gave rise to the dispute has been completed." (109 NLRB 118).

<sup>148</sup> For a summary of several of these agreements as well as the text, see 33 LRRM 80-83, and 34 LRRM 26-41. Since this chapter was first written, the CIO and the A.F. of L. have merged into a single federation. Article III of the AFL-CIO Constitution covers the settlement of jurisdictional disputes.

<sup>149</sup> Jack W. Stieber, *Ten Years of the Minnesota Labor Relations Act*, Bulletin 9, Industrial Relations Center, University of Minnesota (Minneapolis: University of Minnesota Press, 1949), p. 8.

organizations could submit the issue to any federation or international union with which they are both affiliated or to an arbitration tribunal. If this was not done, the Governor could appoint an arbitrator to settle the controversy. But "it is apparent that the Minnesota statute has not resolved the problem of jurisdictional disputes."<sup>150</sup>

In 1947<sup>151</sup> Pennsylvania made jurisdictional strikes an unfair labor practice. There were 59 unfair labor practice charges brought before the Pennsylvania Labor Relations Board in 1952. Of these, 55 were filed against employers and four against unions. One of the charges against unions came about as a result of a jurisdictional dispute. The charge was not processed as an unfair practice but settled by a representation election at the request of the employer.<sup>152</sup> It is difficult, from the Pennsylvania and other state reports,<sup>153</sup> to determine just how effective the provisions outlawing jurisdictional strikes are. It would appear, however, that very few such cases are processed by the courts or by state boards of labor relations; but in the states that have no statute banning jurisdictional strikes, there is some resort to the use of injunctions as a means of control, as for example, in Texas.<sup>154</sup>

### *Secondary boycotts*

Just as jurisdictional strikes have been outlawed by statute in some states and can be held to a minimum by the use of injunctions and restraining orders in some of the others, a second type of economic pressure—the secondary boycott—has been held by some legislatures and courts to be against the public interest on much the same grounds. A secondary boycott "implies the refusal of one party to deal with another unless such other will, in turn, refuse to deal with a third."<sup>155</sup> It is a means of applying eco-

<sup>150</sup> *Ibid.*, p. 28.

<sup>151</sup> Act 558, L. 1947. Labor Relations Act as Amended, sec. 6 (e).

<sup>152</sup> Pennsylvania Labor Relations Board, Sixteenth Annual Report (1952), p. 111.

<sup>153</sup> There were, for example, no unfair labor practices under the Wisconsin Employment Peace Act, sec. 111.06 (2) (1), "to engage in, promote, or induce a jurisdictional strike," reported in the board's Annual Report for the year ending June 30, 1954.

<sup>154</sup> Lionel E. Gilley, "Jurisdictional Disputes," 2 *Southwestern Law Journal*, 128 (1948).

<sup>155</sup> See Charles O. Gregory, *Labor and the Law* (New York: W. W. Norton and Company, Inc., 1946), p. 34, and Chaps. V and VI, pp. 105-157, for an excellent analysis of the problem.

conomic pressure on a third party, through a second, if he does not meet the demands of the first. Actually there are two rather distinct types of secondary boycotts practiced by organized labor. The first may be referred to as the secondary labor boycott, and may be illustrated by a situation where union plumbers would refuse to work with materials manufactured by a nonunion shop. The other type—the secondary consumption boycott—may be illustrated by a plea from one or more unions or federations that the members refrain from buying a particular product because the employer is “unfair” to organized labor. Secondary boycotts may be defined broadly so as to cover most any boycott situation; or they may be defined by statute so as to make some secondary practices legal and some illegal. In some states primary boycotts are likewise outlawed.<sup>156</sup>

The ability of a union to apply economic pressure through combination and concerted action is basic to the labor union movement. The strike and the boycott are the most important and effective means of applying such pressure, and it is often difficult to draw a line between these types of activity. Frequently both primary and secondary action may be taken in a single dispute. President Truman, in his message to the Eightieth Congress, asked for the outlawing of “unjustifiable” secondary boycotts, particularly those called in connection with a jurisdictional dispute.<sup>157</sup> Section 8 (b) (4) (A) of the LMRA as it was enacted, the so-called secondary boycott provision, does not contain the words “secondary boycott.” This leaves the door open for different interpretations by the courts, and such interpretations have been expressed.<sup>158</sup>

President Eisenhower, in his message to Congress on January 11, 1954, suggested that certain changes be made in the “secondary boycott” section of the LMRA.<sup>159</sup> The bill<sup>160</sup> incorporating

<sup>156</sup> See Killingsworth, *op. cit.*, pp. 68-75, for the application of the various types of boycott laws in the states with labor relations acts.

<sup>157</sup> President's Message to Congress, Congressional Record, Vol. 93, Part I (January 6, 1947), p. 136.

<sup>158</sup> In *International Rice Milling Company v. NLRB*, 188 F (2d) 21 (1950), the Court of Appeals reversed a board decision involving secondary action, but the Supreme Court upheld the board, 341 U.S. 665 (1951). In *Joliet Contractors Association v. NLRB*, 202 F (2d) 606 (1953), the Court of Appeals, while upholding the board's decision, implied that the legality of the union's conduct did not hinge on whether the action was primary or secondary in nature.

<sup>159</sup> Specifically, the President asked that two types of secondary boycott be legalized—those against employers accepting “farmed out” work from struck em-

these changes (and others), which never became law, defined "primary" and "secondary" employer and provided for a relaxation of the secondary boycott ban in three respects. The analysis by the Senate Committee on Labor and Public Welfare of the proposed amendments is indicative of the complexity of the secondary boycott problem, and also of the various types of secondary pressure that may be engaged in by unions.

An important type of secondary action sometimes results from a joint action or agreement of employers and organized labor. A group of New York City business firms combined with a union to keep out-of-state firms from competing for business in the New York City area. Under the federal anti-trust laws this action was declared illegal because it tended to create a monopoly in a particular market.<sup>161</sup>

As noted above, several states have made secondary boycotts an unfair labor practice, an illegal act, or both. It has been suggested by one writer that the Minnesota law,<sup>162</sup> which outlaws virtually every type of secondary activity that organized labor may engage in, is unfair in that it "apparently prohibits labor organizations from engaging in types of activity which are not denied employers."<sup>163</sup> Some states, in their efforts to control the secondary activities of organized labor, have enacted a "hot cargo" law. Such a law makes illegal an agreement between employers and employees that in effect states that the employees shall not be obliged to handle the merchandise of a struck employer. The courts, however, have held that such agreements do not violate the federal anti-trust acts.<sup>164</sup> The California "Hot Cargo and Secondary Boycotts" act<sup>165</sup> was declared invalid because it was too broad in scope,<sup>166</sup> and in 1953 a California court held that the refusal of truck drivers to cross a picket line to deliver beer to a

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ployers, and those against employers engaged on construction projects with struck employers. For an analysis critical of these suggestions see John A. Lloyd, Jr., "Public Policy and Secondary Boycotts," 23 University of Cincinnati Law Review, 31-54 (1954).

<sup>160</sup> Senate Bill 2650, reported out favorably by Senate Labor Committee on March 31, 1954, defeated, May 7, 1954, by a vote of 50 to 42.

<sup>161</sup> *Allen-Bradley Company v. Local Union No. 3*, 347 U.S. 797 (1954).

<sup>162</sup> Minnesota Laws (1947), chap. 486.

<sup>163</sup> Stieber, *op. cit.*, p. 28.

<sup>164</sup> *Meier and Poblmann Furniture Co. v. Gibbons*, 113 F. Supp. 409 (1953).

<sup>165</sup> Deering's California Code: Labor, Vol. 1, secs. 1131-1136.

<sup>166</sup> *In re Blaney*, 30 Calif. (2d) 643 (1947).

struck cocktail lounge was not a violation of the California anti-trust laws.<sup>167</sup> The court, in this case, said the boycott was lawful on the grounds that the "action was reasonably relevant to working conditions and purposes of collective bargaining."

States that do not have a statute defining the legal and illegal secondary activities of labor unions must also, of course, deal with such problems. An example is a recent Ohio case where an employer asked that a labor union be enjoined from picketing his place of business. Such picketing was being done for the purpose of persuading the employer to hire union help. The lower courts of the state refused the injunction but the decision was reversed by the Ohio Supreme Court.<sup>168</sup> But the wording of the decision leaves the impression that the court may, even under similar circumstances, take quite another position.<sup>169</sup>

### *Picketing*

A discussion of the various types of picketing that are, or may be, classified as unlawful or as unfair labor practices under state law should, perhaps, be prefaced by a few remarks on the status of picketing generally. It will be recalled that the "free speech" doctrine reached its highest point about 1940, and that a Supreme Court decision<sup>170</sup> in 1942 marked the first major departure away from this doctrine. In this decision the court pointed up that a legislature may constitutionally prohibit picketing if, in its judgment, such action is necessary for the protection of the community as a whole.

This doctrine was enlarged upon in 1950 when, in three cases,<sup>171</sup> the Supreme Court decided it was quite proper to prohibit picketing for any objective, "apparently, deemed unsound by

<sup>167</sup> Schweiger v. Joint Executive Board, Calif. Dist. Court of Appeals (1953), 33 LRRM 2200.

<sup>168</sup> Anderson Sons Co. v. Local Union No. 311, International Brotherhood of Teamsters, 104 N.E. (2d) (Ohio) 22 (1952).

<sup>169</sup> *Ibid.*, p. 33. "The rule in this state as to secondary boycotts, which, from a review of decided cases seems to have become a state policy, is summarized in 24 Ohio Jurisprudence, 676, Section 61, as follows: ". . . The view now prevailing in most of courts in this country is that secondary boycotts may not lawfully be employed in a labor dispute. And this is the view adopted by the majority of cases in Ohio." (Italics added.)

<sup>170</sup> Carpenters Union, A.F. of L. v. Ritter's Cafe, 315 U.S. 722 (1942).

<sup>171</sup> International Brotherhood of Teamsters Union, Local 309 v. Hanke, 339 U.S. 470 (1950); Building Service Employees International Union, Local 262 v. Gazzam, 339 U.S. 532 (1950); and Hughes v. Superior Court, 339 U.S. 460 (1950).

the legislature, or by the court."<sup>172</sup> In the *Hanke* case, originating in the state of Washington, picketing against an operator with no employees was declared enjoined even though there was no state law to prohibit such action. In the *Gazzam* case, originating in Oregon, a state law prohibited employer coercion of nonunion workers but was silent on coercion if applied by employees or a union; but picketing to persuade an employer to require his employees to join a union was not allowed. In the *Hughes* case, from California, picketing an employer to persuade him to hire Negro help in proportion to his Negro customers was enjoined; the United States Supreme Court upheld the injunction.

These cases are cited as examples of some of the restrictions on peaceful picketing and to show that the once-prevailing free speech doctrine no longer occupies, as it once did, the exalted position in the eyes of the Supreme Court. The phrase "restrictions on peaceful picketing" is apt because mass picketing and violence, even though restrictions on such practices are outlawed in some state labor statutes, have never been seriously considered by the courts to be legal procedures. Some restrictions of peaceful picketing are implicit in the previous discussions of jurisdictional disputes and boycotts. But primary interest here is centered about the restrictions on peaceful picketing under other circumstances. Three types of picketing that have the status of being an unfair labor practice—mass picketing, picketing in a minority strike, and picketing beyond the industry—in one or more states are listed in Table 2. Other types of peaceful picketing that from time to time have been held to be against public policy are stranger picketing (picketing by nonemployees) and organizational picketing.

Just as secondary boycotts are in many instances outlawed even though the boycotting union may have a real economic interest, picketing for other purposes may be held enjoined even though the union may again have an economic interest. Picketing is something more than free speech, and also something more than coercion; but the Supreme Court has made an effort to balance equitably the constitutional protection of free speech and the power of states to limit picketing in labor-management dis-

<sup>172</sup> Nathan P. Feinsinger and Edwin E. Wittee, "Labor Legislation and the Role of Government," 71 *Monthly Labor Review*, 56 (1950).

putes.<sup>173</sup> It is difficult to define, at this time, the power of states to restrict peaceful picketing. In Missouri, for example, peaceful picketing was enjoined, and the injunction upheld by the United States Supreme Court,<sup>174</sup> because it violated the state anti-trust law; but at the same time the picketing was part of a union organization campaign.

In general, it may be said that peaceful picketing is not prohibited when it is in connection with a legal economic strike; but there are restrictions in many states on even this type activity. Mass picketing, even though peaceful, is usually illegal; picketing must, in many states, be confined to the premises of the employer against whom the employees are striking; picketing by nonemployees is frequently forbidden or partially restricted; and, even though the prohibition of all picketing would be unconstitutional, there are other standards in many states that picketing procedure must meet if it is to be wholly legal.

### *Strike votes*

The idea that an employee, before going on strike, should "have an opportunity to express his free choice by secret ballot held under government auspices"<sup>175</sup> was incorporated in several state laws before it was suggested as an amendment to the LMRA. It matters little here that the President's suggestion was not made a part of the 1954 bill<sup>176</sup> to amend the LMRA.<sup>177</sup>

Seven states require that a majority of the employees voting must be in favor of a strike before a strike can legally be called.<sup>178</sup> In some instances, as in the Colorado law,<sup>179</sup> it is stated that a majority of all employees must endorse a strike in order to make it legal. This section of the act, however, was declared unconstitutional.<sup>180</sup> A Michigan statute<sup>181</sup> requires that "a majority of all employees casting valid ballots must vote in favor" of a strike.

<sup>173</sup> International Brotherhood of Teamsters Union, Local 309 v. Hanke, 339 U.S. 470 (1950).

<sup>174</sup> Giboney et al. v. Empire Storage and Ice Co., 336 U.S. 490 (1949).

<sup>175</sup> President's Message to Congress, Congressional Record, H. Doc. No. 291, Vol. 100, Part 1 (January 11, 1954), p. 128.

<sup>176</sup> Senate Bill 2650 (1954).

<sup>177</sup> See Samuel Harris Cohen, "Labor, Taft-Hartley and the Proposed Amendments," 5 Labor Law Journal, 407 (1954).

<sup>178</sup> Colorado, Florida, Kansas, Michigan, Minnesota, Utah, and Wisconsin. 35 LRRM 3028, and Kansas Laws (1955), H.B. 402.

<sup>179</sup> Colorado Statutes, chap. 97, sec. 94 (7) (2).

<sup>180</sup> American Federation of Labor v. Reilly, 113 Colo. 90 (1944). Declaring this section invalid was actually secondary to a declaration by the court that unions

Prior to 1949 the Michigan law said that a majority of all employees in the bargaining unit must vote in favor of a strike in order to legally authorize it. Even though the law was changed to a voting majority, the United States Supreme Court declared it invalid<sup>182</sup> on the grounds that Congress has protected union conduct which the state has forbidden. The federal act (LMRA) does not require majority authorization for a strike; "legislative history demonstrates that this proposal was rejected on its merits, and not because of any desire to leave the states free to adopt it."<sup>183</sup> The strike-vote provision of the Wisconsin law<sup>184</sup> has been, in part, nullified.<sup>185</sup> As early as 1941, "the Wisconsin Supreme Court sustained an unfair labor practice complaint against an employer and held that the Board is authorized by statute to order the remedy most consistent with the public interest."<sup>186</sup> And in 1948 the Wisconsin Employment Relations Board noted that the strike-vote section of the law was designed largely "to protect employees from arbitrary action by labor leaders."<sup>187</sup> But as late as 1953, violation of the strike-vote provision was held by the Wisconsin board to be an unfair labor practice.<sup>188</sup>

State legislation that makes a strike illegal unless authorized by the employees may carry with it implications not readily noticed. It may, for example, prohibit organizational picketing, secondary and primary boycotts, prevent a minority group of employees from striking even though they may have a legitimate grievance, and in general go far beyond "enforcing democratic procedures in industrial disputes."<sup>189</sup>

### *Refusal to bargain collectively*

It has often been said that it is unsound and ill-advised for a legislature to grant a right without imposing a corresponding

could not be forced to incorporate. The strike vote section, chap. 97, sec. 94 (7) (2), was closely tied to the incorporation provisions, chap. 20.

<sup>181</sup> Michigan Compiled Statutes, chap. 423, sec. 9.

<sup>182</sup> United Automobile Workers of America, CIO v. O'Brien, 339 U.S. 454 (1950).

<sup>183</sup> *Ibid.*, note 5.

<sup>184</sup> Wisconsin Statutes, chap. 111, sec. 06 (2) (e). It is an unfair labor practice to call a strike, or engage in "any other overt concomitant of a strike" unless such action is approved by a majority of the employees in the bargaining unit.

<sup>185</sup> See Killingsworth, *op. cit.*, and cases cited therein.

<sup>186</sup> Appleton Chair Corp., 239 Wis. 337 (1941).

<sup>187</sup> The Crandon Co., W.E.R.B. Decision No. 1508 (1948).

<sup>188</sup> Struty Heating and Air Conditioning Co., W.E.R.B. Decision No. 3606 (1955).

<sup>189</sup> Killingsworth, *op. cit.*, p. 65.



duty. Under the NLRA of 1935, employees were given the right to organize without interference from the employer and the employer was obligated to bargain collectively with representatives of the employees. When this act was amended in 1947 (the LMRA) and the unfair practices of employees, conspicuously absent from the original law, were added, it became an unfair practice for employees to refuse to bargain collectively with their employer (subject, of course, to certain conditions). None of the several state labor relations laws specifically make it an unfair practice for the employees to refuse to bargain collectively. There is such a provision in a bill introduced in the Kentucky Legislature in 1954.<sup>190</sup>

*Refusal to bargain collectively—employees.* A few cases have come before the National Labor Relations Board charging the employees or a union with the refusal to bargain collectively. In a 1950 case<sup>191</sup> a union was charged with refusing to bargain when, as a result of the failure of an employers' association and the union to reach an agreement, the union struck against one employer in the association. In spite of a seven-year history of association-wide bargaining, an attempt by the union to secure a collective bargaining agreement with one member of the association did not constitute an unfair practice. It was merely the substitution of one type bargaining for another. Each employer in the association continued to be an employer under the LMRA even though the collective bargaining function had been transferred to the association. It is not, however, an unfair practice for a union to refuse to bargain with a single employer if the employer is a member of an association with which the union has an agreement.<sup>192</sup>

In a 1953 decision, the NLRB found a union in violation of the law when insisting on the establishment of "unlawful closed-shop conditions."<sup>193</sup> In this case the International Typographical Union was enjoined also from using "*any* means tending to interfere with the establishment of genuine collective bargaining on a

<sup>190</sup> H.B. No. 389.

<sup>191</sup> Morand Brothers Beverage Co., et al., 91 NLRB 409 (1950).

<sup>192</sup> NLRB Administrative Ruling, Case No. 993, July 29, 1954 (34 LRRM 1439).

<sup>193</sup> International Typographical Union (American Newspaper Publishers Ass'n), 104 NLRB 806 (1953).

basis of mutuality." This case was the result of a long history of union control over some aspects of employment conditions which conflicted with parts of the LMRA.<sup>194</sup>

*Refusal to bargain collectively—employer.* Eight states<sup>195</sup> make the refusal of an employer to bargain collectively an unfair labor practice. In order to determine whether or not a complaint is based on an actual violation of this provision, it is essential, first of all, to determine whether the employer is obligated to bargain with the employees or union filing the complaint. The union must be the legally designated bargaining agent of the employees, as determined through some recognition process—usually an election. Some attention has already been directed toward elections, appropriate units, etc., and in this discussion it is assumed there is no question of representation.

Under the state laws and the LMRA, the employer, as well as the employee representatives, to fulfill his legal obligation, must bargain in "good faith." "The Act [LMRA] does not compel either party to agree to the other's proposal. It only requires the parties to confer in good faith."<sup>196</sup> Under the LMRA, however, the employer is required to present a counterproposal to the demands of the employees and show evidence of more than just "going through the motions of collective bargaining."<sup>197</sup> And obligations under the LMRA can only be fulfilled if "the parties come to the bargaining table with a fair open mind and a sincere desire and purpose to conclude an agreement on mutually satisfactory terms."<sup>198</sup> Similar language was used by the New York Labor Relations Board in stating that the employer has the duty to meet and negotiate with employee representatives.<sup>199</sup> The New York board also holds, ordinarily, to the doctrine that it is the obligation of the union to make the first move in negotiating a collective bargaining agreement.<sup>200</sup> Changes in wage rates or working

<sup>194</sup> For a rather complete background and analysis of this situation, see Arthur R. Porter, Jr., *Job Property Rights, A Study of the Job Controls of the International Typographical Union* (New York: King's Crown Press, Columbia University, 1954), pp. 8-15.

<sup>195</sup> See Table 2.

<sup>196</sup> *Old Line Life Insurance Co. of America*, 96 NLRB No. 66 (1951).

<sup>197</sup> *Armstrong and Hand, Inc. and District Lodge 37, International Association of Machinists*, 104 NLRB 420 (1953).

<sup>198</sup> *Shannon and Simpson Casket Co.*, 99 NLRB No. 62 (1952).

<sup>199</sup> *In Matter of Stanyione*, 15 SLRB (N.Y.) No. 13 (1952).

<sup>200</sup> *New York State Labor Relations Board, Sixteenth Annual Report for the year ended December 31, 1952* (Albany: 1953), p. 59.

conditions initiated by the employer without consulting representatives of the employees may be an unfair practice, provided the employer has recognized and dealt with the union previous to such action.<sup>201</sup> Other decisions that shed light on the operation of state laws as regards the refusal of an employer to bargain show that where there is reasonable doubt that the union still represents a majority of the employees, the employer could refuse to bargain until the state board had ruled on the question of representation;<sup>202</sup> that the insistence by the employer that certain terms be included or excluded from the agreement does not in itself constitute an unfair practice;<sup>203</sup> that the granting of a wage increase after refusing to meet with the majority union and promoting the withdrawal of employees from the union is unfair;<sup>204</sup> and that a refusal to bargain may be based on an employer refusal to enter into wage negotiations on the reopening of a collective bargaining contract, when the employer made no counter-proposal to the union and refused to participate in arbitration proceedings under the existing agreement.<sup>205</sup> All of these cases, in a rather general way, help point up the basis of "good faith" bargaining. There is no way of defining "good faith" bargaining or "refusal to bargain" that will fit every circumstance; but the cases, as they arise at either the state or federal level, must be decided on their merits.

One of the questions involving the employer's obligation to bargain collectively has to do with bargainable issues. The LMRA requires that the employer bargain with the representatives of his employees "in respect to rates of pay, wages, hours of employment, or other conditions of employment."<sup>206</sup> It is in connection with the latter clause that most disagreements as to bargainable issues arise. Many of these disagreements have centered around issues relating to those that have become popularly known as "fringe benefits." Company houses, for example, have been held to come

<sup>201</sup> In Matter of Stanyione, 15 SLRB (N.Y.) No. 13 (1952).

<sup>202</sup> Pennsylvania Labor Relations Board v. Anchorage, Inc., Pennsylvania Court of Common Pleas, Philadelphia County (1952), cited in 31 LRRM 2145.

<sup>203</sup> *Ibid.*

<sup>204</sup> Pennsylvania Labor Relations Board v. Hall's Furniture Store, Inc., 78 Pennsylvania District and County Reports 241 (1951).

<sup>205</sup> Purity Food Co. v. Connecticut State Board of Labor Relations, Connecticut Superior Court, Fairfield County (1951), cited in 28 LRRM 2094.

<sup>206</sup> Sec. 9 (a).

within the scope of collective bargaining only when "their ownership and management materially affect conditions of employment."<sup>207</sup> Pensions and insurance plans,<sup>208</sup> union security,<sup>209</sup> profit sharing,<sup>210</sup> vacations,<sup>211</sup> and many other issues have been found by the NLRB and the courts to be "conditions of employment" and, therefore, bargainable.

As noted above, only eight of the states with labor relations acts make it an unfair practice for an employer to refuse to bargain collectively. It is possible that the acts of the other four states are designed to equate bargaining power in this one respect because in no state is it illegal for representatives of the employees to refuse to bargain collectively. There is, however, an important difference. Most, or in the first instance virtually all, of the issues discussed in a collective bargaining session are raised by the employee representatives. Traditionally, this is the way collective bargaining works. Allowing an employer legally to refuse to bargain is quite different from allowing the employee representatives to refuse. In some instances, as for example in Kansas,<sup>212</sup> it is an unfair practice for anyone "to violate the terms of a collective bargaining agreement." If a collective bargaining agreement in Kansas or other states with the same legal provision carries the provision that both parties bargain "collectively as to the rates of pay, wages, hours of employment, and working conditions",<sup>213</sup> the fact that such a provision (employer refusal to bargain collectively as an unfair practice) is not included in the law renders it less offensive to the contracting union.

<sup>207</sup> In *NLRB v. Bemis Bros. Bag Co.*, 206 F. (2d) 33 (1953), the housing issue was declared not bargainable; in *NLRB v. Lehigh Portland Cement Co.*, 205 F. (2d) 821 (1953), the company was guilty of an unfair labor practice when it refused to bargain on housing.

<sup>208</sup> "It is well settled by now that pensions and insurance benefits are bargainable issues. . . ." in *Matter of Babylon Cleaners, Inc., et al.*, 15 SLRB (N.Y.) No. 98 (1952).

<sup>209</sup> ". . . one of the factors establishing the employer's lack of good faith was its attitude with regard to the union's request for a union security clause." In *Matter of Sena Beauty Salon, Inc.*, 15 SLRB (N.Y.) No. 125 (1952).

<sup>210</sup> *NLRB v. Black-Clawson Co.*, 210 F. 2d 523 (1954).

<sup>211</sup> The employer changed the method of computing vacation pay without consulting the union and thereby committed unfair practice. *Phelps Dodge Products Corp.*, 101 NLRB No. 103 (1952).

<sup>212</sup> From Kansas Laws (1955), H.B. 102 (effective July 1, 1955). Codified as sec. 44-809 (15) in General Statutes.

<sup>213</sup> This phrase is from a collective bargaining agreement between a manufacturer and an American Federation of Labor international union.

*Interference with employees in their right to organize*

Eleven state laws<sup>214</sup> and the federal law have a provision that makes interference an unfair labor practice. As in many other instances, it is not the wording of the law but the various interpretations and the general trend, if any, in the degree of interference permitted that requires explanation.

During the early years of the NLRA, the NLRB interpreted this provision as outlawing almost every conceivable type of employer interference. But in 1941, the United States Supreme Court reversed an NLRB decision,<sup>215</sup> breaking the ground for greater freedom of speech by employers relative to organized labor. The employer's remarks could not be coercive, nor could they contain implied threats or promise of economic gain. An NLRB decision<sup>216</sup> in 1946 held that an employer was in violation of the law when he delivered an anti-union speech to his employees, compulsorily assembled during working hours, one hour before a representation election. This decision was modified by the United States Court of Appeals to the extent that the employer was free to speak to the employees on company time if union representatives were given the same opportunity.<sup>217</sup> The 1947 legislation (LMRA) has a provision, not contained in the NLRA, which provides that any expression of views or opinions shall not constitute an unfair practice "if such expression contains no threat of reprisal or force or promise of benefit."<sup>218</sup> In 1948 the NLRB repudiated the *Clark Bros.* decision and said that the employer could make noncoercive anti-union speeches during working hours without granting the union the same opportunity.<sup>219</sup> In 1951, the board again changed directions<sup>220</sup> and reverted to the *Clark Bros.* doctrine. This new doctrine, the so-called "Bonwit Teller" rule, was applied by the NLRB until late in 1953. At that time, the board again held that, with certain exceptions, the employer could take advantage of his position to speak to the employees as a "captive audience" without being obligated to allow the union to do the

<sup>214</sup> All of the 12 state laws except that of Minnesota. There are many other states that have such legislation but that have no labor relations law as such.

<sup>215</sup> *NLRB v. Virginia Electric and Power Co.*, 314 U.S. 469 (1941).

<sup>216</sup> *Clark Bros. Co. Inc.*, 70 NLRB No. 60 (1946).

<sup>217</sup> *NLRB v. Clark Bros. Co. Inc.*, 163 F. 2d 373 (1947).

<sup>218</sup> Sec. 8 (c).

<sup>219</sup> *S & S Corrugated Paper Machinery Co.*, 89 NLRB No. 178 (1948).

<sup>220</sup> *Bonwit Teller, Inc.*, 96 NLRB No. 73 (1951).

same.<sup>221</sup> Any such pre-election speech the employer makes, however, must be made more than 24 hours prior to voting time or the election can be voided.<sup>222</sup>

There are, of course, other ways by which an employer can interfere with the rights of employees—by questioning them about union activities, by enforcing rules that unduly restrict union activities, by employing any of several methods to discourage union activities, and by the activities of subordinates and others acting for the employer in the capacity of agent.<sup>223</sup>

Decisions relating to employer interference under the Wisconsin law indicates that the Wisconsin Employment Relations Board and the Wisconsin courts hold very close to the NLRB policies. In most categories there are too few decisions to indicate any major trend; but every case<sup>224</sup> having to do with the questioning of employees concerning union activity held this to be a violation of the law. Also, the employer, under Wisconsin law, is held to have committed acts of interference if he threatens an employee with discharge for union activity; if he threatens, on the day of the election, to reduce working hours or remove employee buying privileges if the union wins; threatens to close his business if the employees join a union; promises a wage increase during a union organizational drive; or if he executes individual contracts with his employees after learning that some of them belong to a union.<sup>225</sup>

The most frequent type of interference under New York law is the discharge of persons for union activity.<sup>226</sup> Questioning employees about union membership "in an atmosphere of hostility" also is prohibited under New York law,<sup>227</sup> and an employer may not encourage his employees to become members of one union in preference to another when both unions are trying to organize

<sup>221</sup> *Livingston Shirt Corp.*, 107 NLRB No. 109 (1953).

<sup>222</sup> *Peerless Plywood Co.*, 107 NLRB No. 106 (1953).

<sup>223</sup> The NLRB standards for these different types of illegal practice are discussed briefly in NLRB Nineteenth Annual Report for the year ended June 30, 1954 (Washington: Government Printing Office, 1955), pp. 72-79.

<sup>224</sup> Seven such cases, the latest dated June 1952, are listed in *Digest of Decisions of the Wisconsin Employment Relations Board and the Courts Involving the Wisconsin Employment Peace Act*, (2d ed., Madison: June, 1954), p. 80.

<sup>225</sup> *Ibid.*, pp. 81-82. Several other practices which constitute interference are listed, as well as acts that the WERB and the courts have held to be legal after the union has charged the employer with interference.

<sup>226</sup> "Unfair Labor Practices," 28 *Industrial Bulletin*, 19 (1949).

<sup>227</sup> *Matter of City Laundry*, 15 SLRB (N.Y.) No. 135 (1952).

his plant.<sup>228</sup> The Pennsylvania Supreme Court has held that obscene language used in expressing opposition to a union does not, by itself, constitute an unfair practice;<sup>229</sup> and a threat by the employer to close his shop if the employees organize has likewise been held a legal practice.<sup>230</sup> Colorado, which goes as far as, or further than, any other state in its statute relative to interference, gives the right to both the employer and employees "freely to express, declare and publish their respective views and proposals concerning any labor relationship."<sup>231</sup>

*Discrimination against employee for union activity or for filing charges or giving testimony under a labor relations act.*

Prior to the change in national labor relations policy in 1935 and the subsequent enactment of several state labor relations laws, the easiest way for an employer to conduct a countercampaign against a union that was trying to organize his employees was for the employer to discharge, demote, or otherwise penalize anyone who joined the union. Usually these measures proved effective. But under virtually all the state labor relations laws and the LMRA, employees are protected in their right to join labor organizations; and if any employer discriminates against an employee solely on the basis of the employee's exercising of this right, the employer is guilty of an unfair labor practice. No employer is denied the right to discharge an employee for just cause; and in Pennsylvania, for example, when the state board orders the reinstatement of an employee it holds as having been illegally discharged, the burden of proof before the courts is on the board.<sup>232</sup> The employer does not have to prove the employee was discharged for a specific cause.

There are literally hundreds of situations out of which a charge of discrimination can arise. Such things as the employee's length of service, past disciplinary record, position in the union, job satisfaction, and attendance record are usually considered by the boards and the courts before making a decision; but they may,

<sup>228</sup> Matter of White Silver Wet Wash Laundry Co., Inc., 15 SLRB (N.Y.) No. 168 (1952).

<sup>229</sup> Pennsylvania Labor Relations Board v. Sansom House Enterprises, Inc., 378 Pa. 385 (1954).

<sup>230</sup> *Ibid.*

<sup>231</sup> Colorado Statutes, chap. 97, sec. 94 (7) (2).

<sup>232</sup> Pennsylvania Labor Relations Board v. Sansom House Enterprises, Inc., 378 Pa. 385 (1954).

and do, consider whether or not a discharged employee was replaced, or whether the employer showed preference to union members or nonmembers in giving wage increases, or the evidence as to whether a particular shop rule is enforced against all employees.

The preceding discussion of various unfair practices of employers and employees is not exhaustive, either as to the topics covered or in the coverage of the topics discussed. No two state labor relations laws are identical; and, if they were, there would be a strong likelihood that in some respects the state boards or the courts would offer different interpretations. The illustration of how the NLRB changed positions several times on the "captive audience" principle is an example of how an unchanged law can mean different things at different times and under different circumstances—partly because it was being interpreted by different people.

#### PROCEDURE FOR HANDLING UNFAIR LABOR PRACTICE COMPLAINTS

"The procedural provisions of the labor relations statutes are only slightly less controversial than are their substantive provisions."<sup>233</sup> In general, it may be said that these laws are administered in one of two ways—by a quasi-judicial board with the combined functions of investigation, prosecution, and adjudication; or, in some instances, enforcement through the existing system of courts. A typical example of the board method is that employed by the federal government. But even under the board method, decisions are subject to review by the courts.

Most states with labor relations acts have adopted the board method of administration. It has been said, as a complaint against this type of procedure, that the prosecution function and the judicial function should be separated. In actual practice, this is usually the case. Another basis of complaint against the board type of administration is that some unfair practices are more "unfair" than others and should be given priority. The LMRA actually follows this practice; but, at the same time, it has been the basis for other complaints—that only an unfair practice charge against employees or a union can be given priority, and that these

<sup>233</sup> Killingsworth, *op. cit.*, p. 111. For a complete analysis of this subject, the reader may refer to Chapter VII in Killingsworth.



charges take precedence over all other unfair practice charges including those against employers.

About 90 per cent of all cases that come before the New York State Labor Relations Board, and this is probably typical of other states that have a similar administrative set-up, are settled without a formal hearing.<sup>234</sup> Under the LMRA, during the fiscal year ending June 30, 1954, 83.4 per cent of all unfair labor practice cases were closed without a formal hearing before the NLRB.<sup>235</sup> The objections to informal practices are that one party or the other may be "forced" into accepting the other party's demands in order to avoid litigation, and that informal investigation may result in a prejudgment of the cases by the board.<sup>236</sup> Elimination of the informal hearings, as has been done in some states, would seem to do little to alleviate the first situation; and the second has been largely taken care of by allocating the various functions of the board to different persons. This has been done at the federal level by giving the General Counsel "the sole and independent responsibility for investigating charges of unfair labor practices."<sup>237</sup> Probably the greatest advantage of the board technique is that both penalties and remedies are provided in a single action. The court technique provides only penalties.<sup>238</sup>

In the processing of some unfair practice charges, the court procedure would be less delaying; but, at the same time, it would probably be difficult to standardize a great number of local courts to the same extent as a state board operating under a single set of administrative rules. Of the Minnesota act, which uses the court technique of enforcement, it has been said:

The act does not provide adequate safeguards for employees in the exercise of their rights to organize and bargain collectively through their representatives. The practice of handling unfair practice charges in the courts is not conducive to remedying or preventing such practices by employers.<sup>239</sup>

<sup>234</sup> "Solutions by Agreement," 28 Industrial Bulletin, 27 (1949).

<sup>235</sup> NLRB, Nineteenth Annual Report, *op. cit.*, p. 6.

<sup>236</sup> Killingsworth, *op. cit.*, p. 135.

<sup>237</sup> NLRB, Nineteenth Annual Report, *op. cit.*, p. 5.

<sup>238</sup> Killingsworth, *op. cit.*, p. 134.

<sup>239</sup> Stieber, *op. cit.*, p. 31.

## CONTROL OF THE INTERNAL AFFAIRS OF UNIONS

Much of the day-to-day discussion relative to collective bargaining in all its phases has to do with the legislative enactment of provisions for making unions more "responsible"—more responsible to the members, to the employers, and to the public. One method of encouraging—or forcing—unions to accept additional responsibility is through the partial control by government of their internal affairs. The phrase "partial control" is used because even those who advocate most vigorously that unions should be brought under the watchful eye of the state would not argue that they should become wards of the state. If controls are necessary, they are necessary for one reason only—that certain practices in which they are now free to engage are socially or economically undesirable in this country. It is for this reason that most controls are instituted, whether they are controls of the internal affairs of general business, the private affairs of individuals, or the almost complete control of some aspects of public utilities.

Regulations of the internal affairs of unions fall into four main groups: the requirement of registration, licensing, incorporation, and reports to the state; the regulation of union finances; the regulation of the election of union officials; and the regulation of membership policies.<sup>240</sup> Under the federal act, the NLRB cannot take action to certify any union as a collective bargaining agent or investigate and process an unfair labor practice complaint against an employer unless the union involved has fulfilled certain requirements relating to internal practices and policies.<sup>241</sup>

It was noted above, in connection with strike-vote provisions of state laws, that a Colorado act requiring labor unions to incorporate was declared unconstitutional.<sup>242</sup> Other provisions relating to the internal affairs of unions fell at the same time, not because of what they were, but because they were so entwined in the incorporation provision that they could not stand alone. A Texas statute<sup>243</sup> that made it illegal for a union organizer to

<sup>240</sup> Killingsworth, *op. cit.*, p. 98. For a summary of state laws regulating the internal affairs of unions, see Chester A. Morgan. "State Regulations of Internal Union Affairs," 6 Labor Law Journal, 226-233 (1955).

<sup>241</sup> LMRA, secs. 9 (f) and (g).

<sup>242</sup> American Federation of Labor v. Reilly, 113 Colo. 90 (1944).

<sup>243</sup> Vernon's Texas Statutes, art. 5154a, sec. 5.

solicit members within the state without first registering with a state official was declared unconstitutional by the United States Supreme Court in 1945;<sup>244</sup> and in the same year, a Florida law<sup>245</sup> providing for the licensing of union business agents was held invalid by the Supreme Court because it was in conflict with the NLRA.<sup>246</sup> The Texas Court of Civil Appeals later held several other sections of the union regulation law unconstitutional,<sup>247</sup> including (a) the filing of annual financial statements with a state official, (b) the provisions prescribing the method of electing union officials, and (c) a section prohibiting the collection from members in the form of dues, fees, assessments, and fines that would create a fund "in excess of the reasonable requirements of such union in carrying out its lawful purpose. . . ." But the court, at the same time passing on the validity of several other sections of the same law, found no reason for throwing out a provision prohibiting political contributions by unions, or one that required unions to file annually a report giving the names and addresses of union officials, and other such information. The Texas Court also held valid a provision requiring unions to keep accurate and detailed financial records that may be inspected at any time by the state attorney general or any member of the union. The Florida union regulation law, in the *Hill* case,<sup>248</sup> was invalidated as to the reporting and registration fee requirements,<sup>249</sup> not because of the illegality of the requirements as such, but because they placed an obstacle in the path of collective bargaining not consistent with federal policy.

The regulation of the membership policies of unions are, likewise, not confined to states with labor relations laws. One such type of regulation, the "fair employment practice" type law, has been enacted in several states and localities during the past few years. These laws, designed to prevent discriminatory practices in hiring, may apply also to unions in their discriminatory practices relating to new members. The Wisconsin Industrial Commission, for example, recently requested that two Negro ap-

<sup>244</sup> *Thomas v. Collins*, 323 U.S. 516 (1945).

<sup>245</sup> Laws of Florida, chap. 21968, sec. 4.

<sup>246</sup> *Hill v. Florida*, 325 U.S. 538 (1945).

<sup>247</sup> *American Federation of Labor v. Mann*, 188 S.W. 2d 276 (Texas 1945).

<sup>248</sup> *Hill v. Florida*, 325 U.S. 538 (1945).

<sup>249</sup> Laws of Florida, chap. 21968, sec. 6.

plicants be admitted to membership in a union. The commission can make only recommendations, but the courts have strengthened somewhat this phase of the law.<sup>250</sup> A Connecticut law<sup>251</sup> that prohibits the exclusion of persons from union membership because of race was upheld by the Supreme Court of Errors of that state.<sup>252</sup> In Pennsylvania the term "labor organization," as it is used throughout the state's labor relations act, "shall not include any labor organization which . . . denies a person or persons membership in its organization on a count of race, creed, color, or political affiliation."<sup>253</sup> Because of this provision, any employer commits an unfair labor practice by negotiating a union security agreement with a labor organization practicing discrimination.

Most of the controls over the internal affairs of unions are designed to promote industrial peace, to encourage democratic practices in union administration, and to prevent any organization from gaining a position where it can control a particular labor market or segment of such a market. There is a question in the minds of many persons as to whether such controls have been effective in advancing the desired ends, or whether such legislation has accomplished little more than the creation of additional administrative work at the state and national levels. The Minnesota Labor Union Democracy Act<sup>254</sup> was passed in 1943 to regulate union election procedures and insure adequate financial reporting to union members. No enforcement proceedings were instituted under the act during the first five years it was in effect, indicating either that the act was ineffective, provisionally or administratively, or that all labor organizations in the state were in compliance.<sup>255</sup>

Traditionally, in this country, regulation of the internal affairs of unions has been left to the unions. But with the enormous increase in union membership during the past 20 years and the accompanying increase in social responsibility, many persons considered some control by government essential—in some instances

<sup>250</sup> A finding by the Wisconsin Industrial Commission against Local 8, Bricklayers, Masons and Plasterers International Union (A.F. of L.), cited at 35 LRRM 139.

<sup>251</sup> General Statutes of Connecticut, chap. 371, sec. 7405.

<sup>252</sup> *International Brotherhood of Electrical Workers v. Commission on Civil Rights*, 140 Conn. 537 (1953).

<sup>253</sup> Purdon's Pennsylvania Statutes, Title 43, sec. 211.3 (f).

<sup>254</sup> Minnesota Statutes, chap. 179, secs. 18-24.

<sup>255</sup> Stieber, *op. cit.*, p. 29.

with just cause. But most of the strict union regulation laws at the state level were enacted prior to 1947, when internal controls were made a part of federal policy. And many of these state laws have been repealed, declared unconstitutional, or otherwise rendered ineffective.

### PUBLIC INTEREST DISPUTES

A public interest dispute is here classified as one that, at the outset, immediately and directly affects persons not directly involved in the controversy. Such labor-management disputes, for convenience, can be classified in three groups—those involving public employees, those involving public utilities, and those in private industry that do not fall in either of the above groups. There is a provision in the federal act<sup>256</sup> designed to control the right of employees to strike and the right of employers to lockout so as to prevent national emergencies. The LMRA also makes it unlawful for any employee of the federal government to strike.<sup>257</sup> A strong case can be made for legal provisions that allow a state to act immediately and with authority if a dispute involving the public interest arises; but there is likewise a good case for preserving the right to strike and lockout on the basis that they are essential to collective bargaining. If the policy of a state, therefore, is to promote collective bargaining as a means of preserving the rights of both employers and employees, and to decrease industrial strife, it is desirable to define “dispute affecting public interest” narrowly enough (if, indeed, there is a special set of rules that may be applied in such cases) to allow for the greatest possible proportion of disputes to be settled through collective bargaining. At the same time, it should also be recognized that the safety and health of the people should not unduly be jeopardized.

#### *Public interest disputes in private industry*

The Minnesota labor relations law<sup>258</sup> provides that the Governor may appoint a fact-finding board to investigate public-interest disputes when notified by the labor conciliator that “the

<sup>256</sup> LMRA, sec. 202.

<sup>257</sup> LMRA, sec. 305.

<sup>258</sup> Minnesota Statutes, chap. 179, sec. 07.

life, safety, health or well-being of a substantial number of people in any community" is in jeopardy. Neither party to the dispute may change the existing situation for a period of 30 days (longer if the fact-finding boards deems it necessary). This act has been criticized because public interest dispute is not clearly defined,<sup>259</sup> and because the law has been abused by too broad an interpretation of public interest.<sup>260</sup> In addition to the general provisions of the Minnesota law, the state, in 1947, enacted a law<sup>261</sup> prohibiting strikes and lockouts in charitable hospitals. If a dispute does arise that cannot be settled through collective bargaining or by resort to the state conciliation service, the dispute must go to arbitration.

A Michigan statute<sup>262</sup> providing for compulsory arbitration of labor-management disputes in any hospital was declared unconstitutional by the Michigan Supreme Court<sup>263</sup> on the ground that it conferred nonjudicial powers on a circuit judge. A Virginia law<sup>264</sup> provides for the seizure of coal mines by the Governor whenever there is "an imminent threat of substantial interruption" that may endanger the health, welfare, or safety of the people of Virginia; and a Massachusetts law,<sup>265</sup> enacted in 1947, states that "the distribution of food, fuel, . . . hospital and medical services is essential to the public health and safety" and gives the Governor a variety of means for dealing with disputes affecting these industries. He may use seizure, fact-finding, or arbitration, and by seizure can effectively prevent strikes or lockouts.

#### *Public interest disputes in public utilities*

In 1947 eight states<sup>266</sup> passed laws to prevent the interruption of public utility services by labor-management disputes. With the declaration of the United States Supreme Court<sup>267</sup> that the Wisconsin law<sup>268</sup> was invalid as applicable to industries in interstate

<sup>259</sup> Stieber, *op. cit.*, pp. 17-18.

<sup>260</sup> Dale Yoder, "State Experiments in Labor Relations Legislation," 248 *Annals of the American Academy of Political Science*, 133 (1946).

<sup>261</sup> Minnesota Statutes, chap. 179, sec. 38.

<sup>262</sup> Compiled Laws of Michigan, chap. 423, sec. 13.

<sup>263</sup> Local 170, Transport Workers Union of America, C.I.O. v. Gadola, 322 Mich. 332 (1948).

<sup>264</sup> Virginia Laws (1950), chap. 22.

<sup>265</sup> Massachusetts Acts (1947), chap. 596.

<sup>266</sup> Florida, Indiana, Massachusetts, Michigan, Missouri, Pennsylvania, Virginia, and Wisconsin.

<sup>267</sup> *Amalgamated Association v. Wisconsin Employment Relations Board*, 340 U.S. 394 (1951).

<sup>268</sup> Wisconsin Statutes, chap. 111, subchap. 3.

commerce, the laws in the other states that provided for compulsory arbitration in such cases were rendered ineffective.<sup>269</sup> A proposed amendment in the LMRA that would have made such state laws valid was defeated in the United States Senate by a vote of 50 to 42 in 1954.<sup>270</sup>

State regulation of emergency disputes is frequently based on the confused idea that inconvenience and emergency are the same.<sup>271</sup> This may lead to treating public utility disputes, even labor-management troubles in other industries, as emergency disputes when there is no immediate danger to the health or safety of persons affected. Arbitration is usually considered a poor substitute for collective bargaining unless agreed to by the parties to a dispute as a measure of last resort; and compulsory arbitration as a means of settlement, coupled with the prohibition of strikes and lockouts, lacks the endorsement of a majority of both the employers and the employees.

#### *Disputes involving government employees*

Just as the LMRA makes it unlawful for federal employees to strike, several states<sup>272</sup> have passed laws that outlaw strikes by employees of state and local governments. Under the present state laws, as under the federal law, there are no exceptions. In most instances the state acts are similar to the New York law<sup>273</sup> as to definitions and penalties, provisions for the automatic and immediate discharge of any public employee going on strike, and restrictions on the pay and tenure of any employee reinstated following his discharge under the law. The Texas law,<sup>274</sup> which is as comprehensive as, or more so than, any other state law restricting the activities of government employees, provides that it is against public policy for any government official to recognize a labor organization as the bargaining agent for any group of employees.

<sup>269</sup> "The Public Utilities Act of 1947 has not been used since 1950 because a similar Wisconsin law was declared unconstitutional. . . . Also in 1950 . . . in a local court the . . . law was declared invalid." Letter from a state chief conciliator.

<sup>270</sup> Congressional Record, 83rd Congress, 2nd Session, Vol. 100, Part 5 (May 7, 1954), 6202.

<sup>271</sup> The Case Against "Right to Work" Laws (Congress of Industrial Organizations, no date), pp. 103-134.

<sup>272</sup> Minnesota, Missouri, Nebraska, New York, Ohio, Pennsylvania, Texas, and Virginia. (35 LRRM 3030.)

<sup>273</sup> New York, Civil Service Law, sec. 22-a.

<sup>274</sup> Vernon's Texas Statute, art. 5154c.

Any public employee in Texas who engages in a strike forfeits all civil-service rights and any right to re-employment.

## PART V

### OPINIONS AND OBSERVATIONS RELATING TO LABOR RELATIONS LEGISLATION IN KENTUCKY

It is common, and frequently perhaps proper, to refer to proposed changes in state labor relations policy as being endorsed and supported by management or by labor. But it is unusual to find representatives of either group in complete agreement on a particular policy issue or on how such a policy should be effectuated. In the preceding chapter several proposed changes in Kentucky law were analyzed in the light of experience under the laws of other states and under the federal labor-management relations act. The purpose of this chapter is to analyze the proposed changes as to which group within Kentucky—labor, management, both, or neither—supports such legislative changes, and to what degree such changes are supported within these two groups. The areas of general agreement between management and labor are substantial; but the areas of disagreement are important and in the following analysis may be allocated a disproportionate amount of space.

#### EMPLOYEE REPRESENTATION AND ELECTIONS

Both labor and management support vigorously the idea that workers should be free to join unions of their own choosing. A major employer organization in Kentucky has stated that an employer is morally bound to recognize and bargain collectively with a union that represents a majority of his employees. But while the unions would make such recognition compulsory, not all employers would go along with a suggestion that some agency of state government be given the right to hold representation elections if requested to do so by either an employee or an organization of employees. Several persons familiar with labor relations law through mediation or arbitration activity have suggested that the Commissioner of Industrial Relations be given the authority



to hold representation elections with or without the consent of either labor or management.

There are two questions, however, that must be answered before any effective election machinery could be put into operation. The first, having to do with appropriate bargaining unit, is answered almost unanimously by both labor and management as any unit agreed to by the parties. The second, having to do with voter eligibility, is subject to considerable dispute. If there is a strike going on when an election is scheduled to be held, this question becomes increasingly important. Assuming a state authority has the right to order an election at the request of either the employer or the employees, two possible courses are open. Eligibility may be determined by administrative fiat as, for example, in New York; or legal provisions may determine voter eligibility as in the Labor Management Relations Act of 1947.

#### UNION SECURITY

Several major employer organizations have gone on record as favoring legislation that would outlaw union security agreements. "Right-to-work" laws have just as vigorously been opposed by organized labor. The major arguments, both pro and con, are listed in the preceding chapter; but it should be pointed up that neither the employers nor the representatives of organized labor are in complete agreement with policy statements of their respective organizations. As a general rule, however, there is less disagreement among union people as to the policy of the parent organization than there is among employers. The union representatives, almost without exception, favor retaining the present standards relative to union shop agreements. (A union shop agreement requires that all employees become members of the union within a specified time after being employed.) A substantial majority would also allow other forms of union security agreements. Employers, although generally favoring "right-to-work" legislation, look with more favor on the union shop than on other types of union security. There appears to be some indication that employers are more inclined to favor union security agreements in the industries where unions have been long established. The

remarks of two employers, paraphrased, are rather representative of the different points of view.

Against union security agreements: No employee should be forced to become a union member in order to hold his job; he should be free to join or not join a union, just as he is free to join or not join a church or other organizations. The union shop is conducive to poor union leadership, and membership on a voluntary basis is the best guarantee of responsible union leadership. Forced union membership has no place in a free society.

In favor of allowing union security agreements if agreed to in collective bargaining: There is nothing wrong with a union shop, as such, so long as it is the choice of a majority of the employees and agreed to through collective bargaining; and, as to industrial peace, which is one of the most important goals of labor relations policy—either state policy or that involving a single employer—there are many things besides the enactment of a “right-to-work” law that should be the basis of sound and peaceful collective bargaining procedure.

#### UNFAIR LABOR PRACTICES

There is general agreement among both the employers and labor that both parties should be required to bargain in good faith—that it should be illegal for either party to refuse to bargain collectively with the other where bargaining relationships have been established previously or where the union represents a majority of the employees in a particular bargaining unit. Both groups likewise proclaim a distaste for coercion and interference relative to the rights of any person, employer or employee; but a few employers, as indicated by the publications of the National Labor Relations Board and by other sources, would prefer to have some of the “captive audience” techniques declared noncoercive. Labor and management are in general agreement also that an employee should not be discriminated against because of the employee’s relationship with a labor organization.

Differences of opinion arise in connection with company unions. Most union leaders, as would be expected, are opposed to company unions; and under federal law it is an unfair labor practice for an employer to dominate or interfere with the formu-

lation or administration of a labor union. But even under federal law, the employees of a particular plant or firm (subject to bargaining unit qualifications) can organize themselves into a bona fide labor union and bargain collectively with their employer.

The restrictions of government and the actions of organized labor designed to curb entirely or reduce the number of jurisdictional disputes were mentioned earlier. Such a dispute occurs when the members of two different unions both lay claim to a particular job or operation. Both unions, or the members of both unions, are competing for jurisdiction over a particular segment of the total market for labor. Employers generally are in favor of declaring jurisdictional disputes illegal. But even though such disputes are recognized by labor organizations as one of the weak spots in the argument for strong labor unions, there are few persons in the labor movement who would suggest outlawing jurisdictional strikes. Organized labor views jurisdictional problems as an internal matter—as something that should be settled by the unions and not by law. An example of such action on a local scale is exemplified by the Louisville Jurisdictional Peace Plan.

Although strikes and boycotts have traditionally been recognized as the most potent weapons of organized labor, secondary boycotts have seldom, if ever, been accepted by the courts or by the public as being justifiable to the same degree as have strikes. As in the case of jurisdictional disputes, there is the argument of injury to a third person—a person with whom no dispute exists but against whom pressure is directed as a means of persuading such third person to perform some act or suffer economic harm. And, as in the case of jurisdictional disputes, employers are almost unanimously in favor of declaring secondary boycotts illegal; union representatives are generally of the opposite view.

#### CONTROL OF THE INTERNAL AFFAIRS OF UNIONS

Even though most employers and a majority of union officials would, in any proposed labor relations law, give the state considerable control over the internal affairs of unions, considerable opposition to such control has been expressed by many persons actively engaged in mediation and arbitration work. Whether such control over the financial affairs, membership policies, and

internal policy in general should come under the watchful eye of the state may be open to dispute. The questions that follow are intended merely as a guide to individuals in their quest for a satisfactory answer relative to proper state policy. Do the regulations in the federal law provide for more or less than adequate control? Would state controls improve collective bargaining? Would the benefits derived from state controls be commensurate with the cost of administration?

#### PUBLIC INTEREST DISPUTES

Management and labor both support the idea that the state should enact special legislation applicable in the case of any dispute involving a privately owned public utility or hospital. Legislation of this type usually consists of waiting periods before strikes, the compulsory participation of government mediators, the use of injunctions, and other techniques designed to delay strike action until every possible means of averting a strike has been tried. The United States Supreme Court, it will be recalled, has declared unconstitutional a state law that provided for compulsory arbitration in public utility disputes. There is also a general consensus that government employees not directly associated with protection of the health or welfare of the people should not be deprived of the right to strike.

#### ADMINISTRATION

The effectiveness of any policy a state may adopt regarding the rights and duties of labor and management and the role of government in labor relations, and the effectiveness of the legislation, if any, enacted to implement such a policy, must hinge in part upon administrative procedures. There is general agreement between labor and management that a state labor relations law, if enacted, should parallel somewhat the federal law and many state laws as to the administrative set-up. A comment that is made frequently by persons from the ranks of both management and labor is that the governing board should consist of representatives of both groups and of the general public. The public interest, as persons in both groups specifically stated or implied, should be the paramount consideration.

## MEDIATION AND CONCILIATION

If a strike or lockout can be averted or shortened by bringing in a neutral third party to assist in resolving the basic issues of a dispute, the net result is usually beneficial to both parties. There is no basic disagreement between management and labor as to whether the state should provide for mediation and conciliation in labor disputes at the request of the parties. Kentucky, at the present time, has a law that allows the Commissioner of Industrial Relations or others he may appoint to mediate labor disputes at the request of the parties. Various suggestions have been made on how this service may be made more effective. The federal government has established an independent agency wholly apart from the National Labor Relations Board to mediate labor-management disputes. The Federal Mediation and Conciliation Service has been effective because (a) there has been a general acceptance of the principle of collective bargaining, without which third-party intervention can accomplish little; (b) the public was ready to accept national labor relations policy when it was written into the law; and (c) recognition of the fact that mediators must be persons of integrity—experienced, respected, and well-trained.<sup>275</sup>

## OTHER OPINIONS AND OBSERVATIONS

Many interested individuals have expressed opinions as to the proper role of the state government in relation to collective bargaining generally, and to particular provisions specifically. As a means of summarizing these remarks, they are paraphrased below.

*Management comments*

1. All administrative agencies should be representative of the public interests, not loaded in favor of either management or labor.
2. Legal provisions relative to liability and damages are particularly important. Damage suits against individuals, unions, and corporations should be allowed.

<sup>275</sup> Carl R. Schedler, "Third Party Assistance in Labor-Management Relations," Proceedings of the Eleventh Annual Louisiana Personnel Management Conference (Baton Rouge: Louisiana State University College of Commerce, 1955), pp. 46-51.

3. The purpose of any such law should be to provide equal protection and rights to both management and labor consistent with the fairest possible settlement of labor-management disputes. Neither party should be favored by the law—*the public should be favored.*

4. Any strike not authorized by a majority of the members voting should be illegal; and, in the event of a strike, the employees should have the right to vote on whether to accept the employers last offer.

5. There should be a "right-to-work" law, providing a person with the right to work without union affiliation.

6. Any law relating to labor-management relations should be designed to encourage new industry to come to the state.

7. Jurisdictional disputes should be outlawed.

#### *Labor comments*

1. Administration of a state labor relations law should be in the public interest, and there should be appropriations enough to administer the law effectively.

2. There should be no restrictions on the right to negotiate a union security agreement through the collective bargaining process.

3. The finding of either labor or management guilty of an unfair practice should result in a heavy fine on the guilty party.

4. Most important, a state labor relations law should provide for representation elections in firms in intrastate commerce and for collective bargaining in good faith.

5. A state labor relations law should be patterned after the National Labor Relations Act of 1935.

6. A state labor relations law would not be in the best interest of labor; any legislation, based on the history of state labor legislation since 1947, would be undesirable.

#### *Comments in general*

Kentucky labor relations law has evolved from the application of common law principles by the courts and a minimum of statutory law. From time to time persons from the ranks of both management and labor have complained of the lack of legislation; but the thought that Kentucky statutory law is inadequate is not

universal among either group. Complaints as to the deficiencies are usually directed toward something specific—jurisdictional disputes, representation elections, union security, etc.—and only infrequently represent a broad view of the role of a state in relation to labor relations.

Two important facts have frequently been pointed up as constituting a basis for re-evaluating the legal foundations and scope of labor law in Kentucky. The state is becoming industrialized; and, as industrial employment increases, it is argued, the need for a legislated set of working rules in labor-management relations increases. Also, the scope of federal jurisdiction over labor-management relations has been narrowed leaving a greater area to state regulation. These two factors, in some quarters, are reasons enough for advocating a state labor relations law. But the contemporary situation, according to other sources, does not merit a change from the course presently being followed. Advocates of both policies include persons from both management and labor groups.

Little has been said of the attitudes and ideas, relating to the proper scope of a labor relations law for Kentucky, of persons other than those that may be classified as either promanagement or prolabor. Persons who participate regularly in labor relations activity but who represent neither party—mediators, conciliators, and arbitrators—have made suggestions from time to time relating to state labor relations law. In general, such persons have preference for a law that is administratively simple—a law that, in addition to the present provisions, would provide for the holding of representation elections at the request of either an employer or his employees, a minimum number of provisions to insure the full operation of the collective bargaining process in the event the employees selected a union as their bargaining agent, and little else. Such a law would leave the control of the internal affairs of unions, for example, to be administered as part of the national policy; and as to the other areas subject to state control, such as secondary boycott and damage suits, the present policy would supposedly continue as at present, subject to judicial interpretation.

It is the responsibility of government to assure that neither

management nor a union, with respect to labor relations, have unrestricted power in the conduct of its affairs. It is, therefore, the responsibility of government to define the rights and duties of both labor and management, and to specify how these rights should be protected and how these duties should be imposed. This is the substance of labor relations law.