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The Taft-Hartley Law

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THE TAFT-HARTLEY LAW

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The Taft-Hartley Bill was enacted over the President's veto on June 23, 1947.[1] Parts of it became effective on the date of enactment. The balance became effective August 22, 1947. There has not been sufficient time elapsed to come to any definite conclusions in regard to what the interpretations of the Act will be in many of its departures from the National Labor Relations Act.[2] Even where the new Act closely or identically follows the language of the old Act, there is no assurance that the interpretation of the same provisions of the old Act will be the same because of the influence of the new provisions introduced.

The new Act is the most complex, extensive and detailed national legislation on the subject of labor relations in the history of the country and will certainly affect employers, employees, unions, the general public and the Federal Government in manifold ways, directly and indirectly, and at many points we may not now apprehend. In addition to the day to day burden of observation and compliance which it directly imposes upon employer and employee, certain new constitutional questions are sure to be raised under the Act which may serve as precedents or at least as bases for argument in other fields of law.

Both the literal terms of the Act and the variously supposed reasons for its passage have been hailed and condemned across the nation according to the political or industrial bias of the observer. In some quarters it is regarded as an evidence of cyclic change in legislation representing a swing to a more conservative treatment of labor relations, in others as a radical and punitive invasion of fundamental rights.

In the case of the Labor Management Relations Act, hereinafter referred to as the L.M.R.A. and popularly known

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* Of Lebanon, Indiana. Address delivered at Evansville at the Annual Meeting of the Indiana State Bar Association, September 5, 1947.

1. Pub. L. No. 101, 80th Cong., 1st Sess. (June 23, 1947).
2. 49 Stat. 449 (1935), 29 U.S.C. § 181 (1940).
3. Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485 (1947); California Packing Corp., 66 N.L.R.B. 1461 (1946); Godchaux Sugars, Inc., 44 N.L.R.B. 874 (1942); Union Collieries Coal Co., 41 N.L.R.B. 961 (1942).

as the Taft-Hartley Law, the legislative history demonstrates that the Act was the result of a massive thrust of public sentiment or that Congress was acting under the compelling and overwhelming sense of a responsibility to do something about the existing labor statutes. A glance at the majorities in both Houses as well as the fact that a presidential veto was overridden is persuasive evidence that the law was not an accident and that it sprang from a Congressional awareness of the need for some change.

It is my purpose in discussing the Act, not to indulge in intracies of possible interpretation but to try to point out some of the major differences between the old law and the new. No specific problems can be solved by such generalities; as their solution, if there be one, can only come from the close study by the individual lawyer of the full text of the Act under the facts of his particular case.

Now let us turn to a more detailed examination of the changes in the N.L.R.A. under Title I.

Definitions:

Section 2(1) expands the former definition of "person," which formerly referred to employers, to include "labor organizations" as persons brought within the control of the law and forbidden to do or refrain from doing certain things under the Act. To many people, this in itself is a great departure and a far cry from the old N.L.R.A. and its interpretation by the National Labor Relations Board.

Overlooking specific exclusions, not of special interest here, Section 2(2) makes another decisive departure from the Wagner Act when, in defining an "employer," it gives as an inclusion in the definition "any person acting as an agent of an employer." The old Act made an employer responsible for the acts of "any person acting in the interest of any employer."

Those of us who have experienced the pangs and frustrations of a hearing before the Board in the days of the development of interpretation under the N.L.R.A. remember with what consternation we learned that disinterested comment either verbal or in the press on the merits of a labor controversy would be seized upon eagerly as coercive and interpreted as being so by the Board. Those of us who may have represented unions also discovered how easy it was to

indirectly instigate or "plant" such comment and then attribute it to our adversary's client with capital results, because it was in his interest. To be in his interest it only needed to be an expression of opinion finding some merit in the employer's side of the story. Many a self-appointed and sincere but misguided local committee of businessmen, representatives of fraternal orders or the clergy offering their services to conciliate labor disputes said or did something with complete innocence which was charged to an employer who had no connection with the matter and in fact did not even know about the events at the time. Many an employer during a labor dispute in which public opinion boiled for expression had to go not only to his friends but to utter strangers who were in a position to speak and beg them not to comment for fear their remarks might be in his interest and laid at his door.

Personally, I do not charge the unions with that situation. The extreme interpretations under the old law furnished the opportunity for such a situation and some unions were not too good to take advantage of it just as some employers were not too good to engage in truly unfair labor practices before the Act. At least, we can hope this new definition will correct that practice and will actually substitute the rule of agency, which has been evolved by hundreds of years of experience, as a test of responsibility.

Section 2(3) defines the term "employee" and two departures from the old Act stand out in this section. The most prominent, of course, is the exclusion of supervisors from the benefits of the Act except for the empty right to organize or belong to an organization.[4] The other striking change is an addition in the exclusions from employee status of the language "any individual having the status of an independent contractor." Under the old Act the Supreme Court has held that the traditional legal definition of independent contractor did not apply and that one who might otherwise be an independ contractor, as most lawyers and judges understood that term, could be an employee under the Wagner Act. While most people regard this section of the Act as of importance because of its exclusion of supervisors from the definition of employees, and it was important that the question be decided

4. N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111 (1943).

that way, I hail the independent contractor provision not only for its innate worth but as an indication of a return to principles of law evolved by experience and understood without specious reasoning.

Board Organization:

Section 3 enlarges the Board to five members, provides that any three or more may have delegated to them any or all of the powers of the Board and that three members shall constitute a quorum of any lesser group. Other customary administrative powers and duties are fixed.

The provisions of Section 3 with respect to the General Counsel, review of trial examiners reports and economic analysis are of especial importance. A General Counsel is appointed, not by the Board, but by the President, by and with the consent of the Senate, who exercises general supervision over all regional officers and employees and all attorneys, except trial examiners and legal assistants to Board members, and who has final authority on behalf of the Board in the investigation of charges and the issuance of complaints under Section 10 (the prevention of unfair labor practices). In the conference committee report it was said that the purpose of this provision was to give the General Counsel final authority to act in these matters and to do so independently of the direction, control or review by the Board and to place final responsibility in that field upon him. Here then is a significant division of power and it goes to substance. The General Counsel and all attorneys under him are free to act within their own good judgment and discretion in enforcement cases and are not bound by any so-called rules of policy or of politics. This may sound naive unless we remember that the charge was too often made under the old Act, whether with justification or not, that the legal staff were the servants, and not the advisors, of the Board.

It is refreshing also to know that the review section under the old Act is abolished. Under the old practice the review section examined, revised or enlarged upon transcripts and made their recommendations to Board members, even though the review section examiners may never have, and in most cases had not, seen the transcripts of evidence, briefs or statement of exceptions. It is not strange that the statement of the facts or conclusions of fact by the Board

frequently came out looking entirely different from the facts as presented at the hearing.

As a necessary concomitant to the last mentioned reform is the prohibition against any trial examiners report being reviewed by any person other than a member of the Board or his legal assistant and that no trial examiner shall advise or consult with the Board regarding exceptions taken to his rulings. This may appear fundamental in appellate procedure but any attorney who has followed cases through the Board in former years can vouch for its necessity.

It is the opinion of most lawyers that the Board can achieve new stature and a much greater actual respect under its new administrative framework. Of course any rules and regulations promulgated by the Board must be published in the Federal Register under the requirements of the Administrative Procedure Act.[5]

Employer Unfair Labor Practices:

We now come to that part of the Act sometimes described as the heart of the Act; employee rights and employer unfair labor practices. Section 7 defines again, as in the N.L.R.A., the rights of employees to organize, form and join or assist labor organizations, to bargain collectively through representatives of their own choosing and similar activities. The notable addition made by the L.M.R.A. guarantees to them also the right to refrain from so doing except as that right may be affected by the later union-shop or maintenance of membership clauses.

As in the N.L.R.A., Section 8(a) defines employer unfair practices. Section 8(a)(3) makes it an unfair practice to discriminate in regard to hire or terms of employment so as to encourage membership in any labor organization. The provision attached to this part of the law, however, entirely changes the complexion of the old Act. Formerly it was provided and held that discrimination *in favor* of union membership was permitted by the old Act which contained a proviso that an employer might make an agreement with a properly certified union requiring membership as a condition of employment, closed shop, union shop, etc. The new Act provides that the employer can only discriminate in favor of

5. Pub. L. No. 404, 79th Cong., 2nd Sess. (June 11, 1946).

union membership under certain conditions, *viz.*, the contracting union must be the lawful bargaining agent, not established by any unfair labor practice and a majority of the employees *in the collective-bargaining unit* (not a majority of those voting) must have voted for such agreement. There are additional restrictions later in the Act on the union's right to call for such an election. Furthermore, an employer cannot discriminate (discharge) against an employee for non-membership in a labor organization, even where a union shop or maintenance of membership contract is properly in existence and defend his action if he has reasonable grounds for believing the employee involved was not accorded membership or offered it on the same terms and conditions generally applicable to other members or if he has reasonable grounds for believing membership was denied or terminated for reasons other than the failure of the employee to tender the dues and fees regularly required.

It can be easily seen why organized labor generally rose against the provisions of the Act outlawing closed shops. Whether for better or worse the closed-shop as we knew it is gone. Very little union security, as we have known it, is left under the existing Act. An employee may be a member of a union under a union shop agreement and can make anti-union speeches and engage in other activities against his union. So long as he pays reasonable dues (and the Board will see that they are reasonable) the union cannot compel the employer to discharge him. What is more, he can discuss his grievances with his employer personally even though in the presence but without the intervention of a labor representative. Whether this result is desirable or not may be debatable but it is the result produced by the law.

Unions in many localities may control the labor supply and are protected in their right to make rules and by-laws governing their membership and internal affairs; but so long as the member pays his reasonable initiation fee and dues I doubt very much whether his union can affect his employment other than by bargaining. In other words, the arguments made by the unions that an employee can become a member to realize the benefits of union bargaining and then forget his union loyalty is a valid argument.

Employers now have exclusive control over hiring and can forget about work permits and other similar practices.

Employee Unfair Labor Practices:

Section 8(b) of the Act undertakes the decidedly new task of defining and prohibiting union unfair labor practices, a bit of phraseology which would have been the cause of much wonder and astonishment in the early days of the Wagner Act.

Subsection (1) makes it an unfair labor practice for a union to restrain or coerce employees in the rights guaranteed them under Section 7 which, as you will remember, includes the choice to organize or not to organize. In addition, a union cannot coerce or restrain an employer in the selection of his bargaining or grievance representative which it is hard to imagine could have been done but which was done. This subsection preserves to unions the right to make their own rules with respect to membership which may raise some question as to the rights of a union to enforce its membership rules by ouster and then a demand that an employer discharge under a union shop contract. Personally, I believe the provision in Section 8(a) (3) is controlling and that a discharge cannot be justified on grounds other than failure to pay reasonable union fees and dues and that this section 8(b) (1) has reference to the union's own rules voluntarily enacted and observed by the members.

As to what will be held to constitute restraint or coercion in union unfair labor practices, no one can say at this time except that of course the forms of violence such as "goon squads," deliberately false recruiting statements and promises of impossible benefits will no doubt come under the ban. Mass picketing, organization strikes and threats will possibly be interdicted in interpretation of the Act. It is also noteworthy that not only unions but their agents are prohibited from engaging in union unfair labor practices and agents are to be determined as such under the ordinary rules of agency. To make certain that the term "agent" when used in the Act is understood to have its ordinary legal meaning, the Act at §2(13) impliedly includes "general scope of employment" as the test by providing that the question of whether the specific act was actually authorized or ratified shall not be controlling. It should be noted that this test is radically different from the provisions of the Norris-LaGuardia Act[6]

6. 47 Stat. 70 (1932), 29 U.S.C. § 101 (1934).

which requires that no labor organization shall be responsible for the unlawful acts of officers, members or agents "except upon clear proof of actual participation, or actual authorization of such acts or of ratification of such acts after actual knowledge thereof." Labor frequently used this section of the Norris-LaGuardia Act as a shield for its agents. This means therefore, that hereafter, in determining responsibility for the acts of agents under L.M.R.A., both labor and management will be governed by the same rules.

Subsection (2) of Section 8(b) makes it unlawful for a labor organization to cause or attempt to cause an employer to engage in activities forbidden by the anti-discrimination provisions as to employers. Again it should be emphasized here that a union cannot compel an employer to discriminate against an employee for any other reason than failure to tender the fees and dues reasonably and uniformly required of members under a union-shop contract.

It is in violation of the Act for a union to refuse to bargain collectively with an employer where it is properly certified. What constitutes bargaining is set out later in the Act in Section 8(d).

Section 8(b) (4) is specifically designed to prevent strikes or boycotts for the purpose of:

One-man shops	1.	Compelling an employer or self-employed person to join a labor or employer organization.
Secondary boycott or hot goods	2.	Compelling an employer or other person to boycott any other person.
Secondary organization strike	3.	Compelling any other employer to deal with a labor organization not properly certified as the bargaining agent of the unit or units involved.
Board strike	4.	Compelling an employer to deal with a labor organization if another labor organization has been properly certified as bargaining representative.
Jurisdictional	5.	Compelling an employer to assign work to one particular craft or union rather than to another in the absence of a Board decision as to the bargaining rep-

> resentative for employees performing the work involved.

This section does preserve the right of union men to refuse to cross picket lines or enter on struck premises but only if the strike is one properly called by a properly certified bargaining representative. The Act in a later provision, Section 10(1), makes it the duty of the Board to bring injunction proceedings against certain of the above described strikes and boycotts and elsewhere provides a right of action for damages caused by any of the prohibited practices set out in Section 8(b)(4).

Some very serious problems of administration and enforcement are suggested in Section 8(b)(5). By that section labor organizations holding union shop contracts are forbidden to charge initiation fees which are excessive and discriminatory. Whether they are so or not is to be determined by reference, among other factors, to the practices of other unions in the industry and the wages to be earned. Section 8(a)(3) allows discharges under a union shop contract for failure to pay reasonable fees and Section 8(b)(2) prevents a union from requiring a discharge on any ground other than that of failure to pay reasonable fees and dues. Also, as a prerequisite to the exercise of any statutory rights by unions, they must furnish reports of their initiation fees and dues.

The Board in Section 4(a) is prevented from employing persons for economic analysis. How then shall the Board determine the reasonableness of fees and dues? How, also, will the Board enforce Section 8(b)(5) by cease and desist order, by refund, by fixing a sum to be charged by clarification or by one or more of these?

Section 8(b)(6) is the prohibition against "feather bedding." It simply prohibits causing or attempting to cause an employer to pay for services not actually rendered. Press reports indicate that in some sections of the country this was having its effect immediately after the enactment of the law.

Free Speech:

The "free-speech" provision of the Act at Section 8(c) is brief and simple and in line with the trend of Board and

Court decisions prior to the enactment of the new law. It briefly provides that no expression shall be unlawful if it contains no threat of reprisal, force or promise of benefit.

Collective Bargaining:

Collective bargaining, the objective which is the purpose of the Act and the purpose of the old law is defined in Section 8(d). It had been pretty well defined under interpretations of the old law but here we have it specifically delineated with certain definite machinery provided in the hope that it will effectively operate. It is the mutual obligation of employer and employee through their representatives to meet at reasonable times and places to confer in good faith with respect to wages and other terms and conditions of employment, including negotiation of agreements, or questions thereunder and to reduce the agreement reached to writing on the request of either party. Neither party is required to agree to a proposal or to make a concession.

In addition to this, parties to a contract desiring to terminate or modify the same must do the following:

1. Serve a written notice on the other party 60 days (at least) prior to the termination date or proposed modification date advising of the proposed termination or change.
2. Offer to meet and confer on a new contract or modifications.
3. Notify the Federal Mediation and Conciliation Service within 30 days after the notice as well as the state mediation agency of the existence of a dispute if no agreement has been reached.
4. Continue the existing contract in force without strikes or lockouts for 60 days after such notice or until expiration of the existing contract whichever is later. This may be interpreted to effect an automatic renewal of existing or expired contracts without strikes or lockouts and without limit as to time.

These requirements for modification or termination do not apply if the Board has in the meantime certified another labor organization as the bargaining representative. Neither party can be required to discuss or agree to termination or modification of an existing contract for a fixed period if the

modification is to become effective before the terms and conditions can be reopened or discussed under the terms of the existing contract. Any employee whether on his own initiative or by authority of the union who strikes during the 60 day period loses his status, including all rights, as an employee until and unless he is reemployed.

Representatives and Elections:

Section 9(a) defines bargaining representative. Heretofore the handling of grievances has been considered by N.L.R.B. as a part of bargaining and the employee had only the right to present a grievance. Now the law specifically provides that one or more employees may present and adjust their grievances without the intervention of their bargaining representative, although it must have been given an opportunity to be present at adjustment, and the adjustment must not be inconsistent with the existing contract. This provision, together with the questions raised on the enforcement of union discipline under union shop contracts, makes it very likely that a union representative may have to stand by and watch grievance after grievance be adjusted contrary to union policy and even contrary to what the individuals involved may have voted for in union meetings without being able to raise his voice in protest.

So long as reasonable dues are paid the union, employers are to have freedom of hiring, discharging for cause and grievance adjustment when requested by the employee. This is just about as effective a method as could be devised for sapping the strength and weakening the compulsory influences of unions over their members. Unions are now reduced to an advisory capacity for their members in return for which they are assured of reasonable fees and dues under a union-shop contract, if a majority of the employees involved properly vote for such a contract. Whether this is a desirable situation remains to be decided in the future and by experience.

Section 9(b) relates to the appropriate bargaining unit, provides that professional employees shall not be included unless a majority of them vote for inclusion, forbids the discarding of any craft unit because the Board may have refused to recognize that unit before and isolates and insulates plant

guards for bargaining purposes. The Board cannot include professional employees in any unit without the consent of a majority of those involved. Two significant departures occur here. Now the Board cannot reject a craft petition for representation because there has been no history of bargaining with such craft. The other departure of consequence is the provision that plant guards shall not be included in *any* bargaining unit with other employees (even if both groups desire it) and what is more important, no guard union or organization will ever be certified if it is affiliated *directly* or *indirectly* with an organization that admits other than guards to membership. On its face this means that no guard union can have any connection with the A.F.of L., the C.I.O. or any independent union which has heretofore set up guard locals. The question occurs as to whether this requires the existing unions to cut away from all guard connections before either one or both can come before the Board.

Representation status of a labor organization is properly secured only by certification by the Board now. Section 9(c) provides the exclusive method. A petition for determination of such status may be filed either by employee groups or by the employer, with appropriate allegations, irrespective of whether there is more than one organization involved or any dispute as to representation. It may not have been safe for employers under the old Act to assume in some cases that the organization presenting itself represented a majority of the employees in the appropriate unit. It is not safe now for either the employer or the employees to so assume. Unions or employees may also ask for decertification of other unions.

The Board, upon determining that a reasonable cause exists, provides for a hearing conducted by a representative of the Board, and if it finds upon the record, without any recommendation of the examiner that the question exists, it shall conduct an election. No distinction is permitted between employer and employee petitions, between nationally affiliated and nonaffiliated unions and between unions found to have been company dominated or successors to the same unless there exists a former order depriving them of further bargaining rights. Elections are not to be held in any bargaining unit more often than 12 months. Employees on strike in violation of the sixty-day cooling period requirement and those on strike who are not entitled to reinstatement are not

entitled to vote and run-off elections are provided for. The inclusion of "no union" in the run-off ballot, if it is one of the two highest, is required. Consent elections are permitted and probably will be encouraged.

The former practice of the Board of breaking up a single multi-plant business into multi-plant units for purposes of permitting elections in each plant is abolished by Section 9(c)(5) providing other considerations do not require separation. For example, if the Board decides that a certain class of machine-operator in a multi-plant industry is the basis for an appropriate bargaining unit, it cannot go further and hold separate elections in each plant as a separate bargaining unit without other good cause.

Section 9(d) provides for judicial review of representation proceedings only where there is also a proceeding under Section 10 for an unfair labor practice. Neither the employer nor the union has any recourse after an election or certification except to refuse to bargain, thus raising the unfair labor practice question and on that to take up the question of proper certification. No doubt this will be of some help in relieving the burden of work on the Board as was intended under the old practice. Some practitioners have felt that recourse may be had to equity to secure such a review, but conflicting decisions make his an extremely questionable remedy. Both unions and employers might well have united on some proposal to provide an independent review under the jurisdiction of a federal court and thereby have eliminated many unfair labor practice reviews and appeals and, in fact, many unfair labor practices, for many policies and courses of conduct on the part of both parties originate in the issues and heat of representation matters.

Union shop contracts can only be established under the provisions of Section 9(e) which requires that a petition be filed by 30 per cent or more of the employees within the unit claimed to be appropriate stating a desire for such contract. Upon such filing the Board shall take a secret ballot *if no* question of representation exists. This of necessity would appear to mean *after* a representation election is held. Upon such secret ballot a majority of the employees in the unit, not a majority of those voting, is required by the provisions of Section 8(a)(3).

Thirty per cent of the employees in a unit may also peti-

tion to rescind a union shop contract provision by election. No rule is given for the majority necessary to rescind but we believe it must be assumed the same rule would apply as to authorize a union-shop agreement. In either event, authorization or rescission, may such elections be held more often than 12 months apart.

Section 9(f) has to do with additional conditions imposed upon labor organizations as prerequisites to the exercise of statutory rights under the Act. This was one of the most bitterly opposed parts of the law and simply closes the door to any organization desiring to raise a question of representation, union shop, or unfair labor practice unless such organization and any national or international organization of which it is a part or with which it is affiliated has filed detailed information in answer to inquiries which will not be set out here as to the internal affairs of the organization, its finances and the degree of actual participation and control or opportunity therefor enjoyed by its members. All of this information must be filed with the Secretary of Labor and kept up to date by annual reports. Interesting developments may result from these requirements. No provision is made for access to these reports and no provision we have found specifically makes them confidential.

Management has greeted this part of the Act with glee and the general public seems to think it is a good law, if the results of some public opinion polls are to be credited. No doubt demands will be made of the proof of such filings and efforts directed thereby to learn the contents. In this connection it might be worthwhile to reflect whether management will better its position by such efforts. In the past management has in the main resisted any requirements that they open their books for bargaining. Now if unions may be required either directly or indirectly to open their books, is it not possible that the definition of good faith in bargaining may be interpreted to require such disclosure on the part of companies?

In addition to the tremendous task of accounting for and filing all of such detailed reports the Act also requires non-Communist affidavits to be filed prior to a union's assertion of any rights given and annually, by each officer of a labor organization involved and each officer of any national or international organization with which it is affiliated. In view

of the reported duty of every Communist to deny his interest there was some doubt as to the efficacy of this provision in preventing the spread of the ideology of communism which must have been the purpose. Otherwise it only adds another hurdle to the union's pursuit of its rights. Of late, however, it appears that this provision may have furnished the means whereby many unions may force a division on the "fellow-travelers" in their membership. If it thereby helps unions in their own internal efforts to "smoke-out" and eliminate communism in their ranks it has conferred a great benefit on all of us. It might be well also to question what officers, appointed or elected, shall file such statements and what "affiliation" means and how far it extends. May not a union in Indiana be "affiliated" with a union in the Northwest of which it has not even heard?[7]

Prevention of Unfair Labor Practices:

After defining unfair labor practices the Act undertakes to provide for enforcement of its prohibitions and injunctions by Section 10 on prevention of unfair labor practices. While the general pattern of procedure as to filing of changes, issuance of complaints, hearings and review are similar to the old Act several important changes occur. The Board may cede jurisdiction in less important local cases to a state agency having similar functions. The Board's General Counsel has sole responsibility for issuance and prosecution of complaints. Charges will be filed now both by employers and employees.

A statute of limitations prevents the filing of complaints on charges concerning a practice which occurred more than six months prior to filing of the charge, with an exception on account of military service. There is no such limitation in the Act on complaints which apparently may be filed a year or more after the charge.

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7. Since this paper was written, the opinion of the General Counsel that all top level union officials of parent labor organizations, such as A.F. of L. and C.I.O., were required to file the affidavit was overruled by the Board in Northern Virginia Broadcasters, Inc. and Local 1215 I.B.E.W. (A.F.L.) 75 N.L.R.B. No. 2 case No. 5—R—3049, Oct. 7, 1947. This case is interesting as a demonstration of how far the Board will go to effectuate the policies of the Act in construing what appears to be in plain language. The Board's ruling has not been supported by decisions of the courts of appeal.

Of interest to lawyers especially is the new provision as to rules of evidence. The old Act provided that "the rules of evidence prevailing in courts of law or equity shall not be controlling" and Board and union attorneys in early hearings had a field day each day in court in presenting hearsay and otherwise improper types of evidence in courts of law, and, to the shocked and anguished amazement of company attorneys, such evidence was received, exceptions overruled and that action upheld in our Supreme Court. This interpretation has been somewhat restricted of late under both Board and court decisions but the statutory fallacy still existed until enactment of the new law. Now "any such proceedings shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States." In this connection the Board makes its decision as to unfair labor practices upon a "preponderance of the testimony taken." This together with the statutory inclusion of the Supreme Court's requirement of "substantial evidence" supporting a Board finding presents quite a different theory and approach to the question of due process frequently raised and gives some measure of comfort to those attorneys who have compared some hearings to "Kangaroo Courts."

The Act makes it clear also that in determining the existence of certain unfair labor practices the Board shall give no preference to nationally or internationally affiliated unions which serves as a sort of minor declaration of rights for independent unions and associations. No back pay or reinstatement can be ordered by the Board for an employee discharged for cause. This may be regarded as an affirmation to the Board by Congress that there are occasions when a discharge for cause is valid. The new Act writes into the law the procedure on Trial Examiners Reports which become final unless exceptions are filed within twenty days after service.

The Board has the power to petition the federal courts for enforcement of an order and the parties may obtain a review by appeal to the federal courts. The provisions of the old law are here followed closely except that the findings of fact are conclusive "if supported by substantial evidence on the record as a whole." This may mark a considerable departure from the handling of appeals under the old law where

the courts felt bound to accept findings of fact if there was *any* evidence under the Wagner Act which provided that such findings were conclusive "if supported by evidence." This change together with the other changes in the rules of evidence for hearings certainly indicate a congressional intent to change the existing law and interpretations.

In Section 10(j) appears an entirely new procedure for relief, available to the Board upon its issuing a complaint on an unfair labor practice on the part of either labor or management. The Board may petition the United States District Court for injunctive relief and the court in granting such relief would appear not to be restricted by the provisions of the Norris-LaGuardia Act. Under the old Act such relief could not be sought until after the Board had issued a final order and filed it for enforcement with the appropriate court.

Section 10(e) makes Board action imperative in cases of certain strikes and secondary boycotts, defining the duty of the Board to seek injunctive relief immediately after a preliminary investigation and expediting the matter in courts.

Relief is provided against the industrial problem of jurisdictional strikes in Section 10(k) by providing for a charge whereupon the Board determines the dispute if the parties do not do so within ten days after notice. Section 10(e) also adds jurisdictional disputes to the practices which may be stopped by injunctive action of the Board prior to the filing of any complaint. It will be interesting to note how closely a Board decision on the merits in a case follows a court decision on a petition for injunctive relief under the procedure whereby the case may go back to the court on review.

The investigatory powers of the Board are set out in Section 11 and are substantially similar to the old act except that the power to issue subpoenas has become a *duty* to issue subpœnas personals and/or *duces tecum* subject to revocation within five days upon a showing by any person served *duces tecum* that the subpoena is not proper within limits recognized as reasonable by all lawyers. This removes the ground for criticism sometimes heard that one party was limited to a few witnesses on an important issue while the other party had subpoenas and witnesses much more freely. Now the Board has no choice but to issue the process.

The effect of the Act on the right to strike will require interpretation in some classes of cases. The N.L.R.A. simply

provided that it should not affect, impede or interfere in any way with the right to strike. Section 13 of the new Act uses the same language with the addition that nothing in the act except as specifically provided therein shall affect the right to strike or the limitations or qualifications on the right to strike. It is supposed that this addition is for the purpose of preserving the former rulings of N.L.R.B. and the courts that employees forfeit the protection of the Act by striking for illegal objects.

Section 14 provides that the Act shall not be construed as permitting union shop contracts in any state or territory having statutory prohibitions against compulsory union membership. This is apparently included within the limitations on the right to strike in Section 13 and it is argued by some that it was intended that various state anti-strike laws may not now be challenged as being in conflict with the Act containing Section 13. Section 14 also permits supervisors to join labor organizations but relieves employers from recognizing such supervisors as employees.

Sections 102 and 103 seek to prevent retroactive punishment and effect of the unfair labor practices sections and to preserve for at least a year certifications and contracts growing out of certificates under the old law.

Title II—Conciliation of Labor Disputes and National Emergency Strike Control.

To conserve time and for the purpose of devoting attention to the more important changes in the act we will pass over the voluntary mediation and conciliation sections of the act with the observation that the former functions, with some comparatively minor changes, of the Conciliation Service of the Department of Labor is transferred to a new and independent agency, The Federal Mediation and Conciliation Service, created for the purpose of encouraging peaceful settlement of labor disputes but with no obligation on the part of the parties involved to agree to anything. A National Labor-Management Panel is constituted to advise in the avoidance of industrial controversies, particularly those affecting the general welfare.

National Emergency Relief:

Sections 206 through 210 furnish the procedure for

the well known but probably not well understood "cooling-off" period and injunctive processes available in national emergencies. In cases where the President finds a threatened or actual strike or lock-out will affect an entire industry or substantial part thereof, in commerce, so as to endanger the national health or safety he may appoint a board of inquiry which makes a report of its findings with no recommendations. This report must be made public. The board of inquiry is given powers of investigation. Upon receiving such report the President may direct the Attorney General to petition for an injunction which the Court may grant free from the restrictions of the Norris-LaGuardia Act if it finds as true the bases on which the President initiates the inquiry.

After an injunction or order is entered by the District Court the parties are duty-bound to meet for mediation and conciliation with the assistance of the Mediation Service but are under no obligation to accept any proposal of the Service. Also, upon the issuance of the injunction the board of inquiry is reconvened and at the end of sixty days reports the current position of the parties to the President, together with a detail of the efforts made toward settlement, a statement by each party of its position and a statement of the employer's last offer of settlement, which report must be made public. Within fifteen days from the date of the report the N.L.R.B. takes a secret ballot of the employees of each employer involved as to whether they wish to accept the employer's last offer of settlement and certifies the result to the Attorney General within five days. Upon such certification the Attorney General moves the court to discharge the injunction and it must be discharged, whereupon the President reports the entire proceedings to Congress with his recommendations.

It is apparent that this provision does not end strikes, even those of national emergency; it merely postpones them with some publicity as to what the issues are. Can a nation-wide industry be compelled to continue to operate during the eighty-day injunction period where it claims it is losing money? Is the waiting period actually to be 80 days or is there a chance for some postponement in actual operation of the act? How does the national emergency cooling-off period affect the contract termination cooling-off period? May

one be tacked on to the other so that the sixty days under the one will first run and then the 80 days under the other?

Title III. Suits by and against Labor Organizations:

Under Title III of the Act appear those provisions long prayed for by employers and their counsel on the theory that they would guarantee union responsibility. Of course we must be reminded that Title III provides both for suits against and *by* labor unions. Section 301(a) gives the federal district courts jurisdiction of suits for violation of contracts and of the parties without regard to the amount in controversy or the citizenship of the parties. Section 301(b) provides that a suit by or against a labor organization is by or against it, as an entity, on behalf of the employees it represents and that a judgment against a union is only against it as such and against its assets and not against its individual members. Again the legal rule of agency is emphasized in defining the responsibility of parties. Section 301(c) gives jurisdiction of a labor organization in the district in which it maintains its principal office or in the district where its officers or agents represent and act for employee members.

Restrictions on Payments:

Under the "anti-shakedown clause" set out in Section 302, payments to representatives of employees are strictly forbidden with criminal penalties for violation. The section is not applicable to existing contracts until the expiration of the contract but not later than July 1, 1948. Exceptions are given in the cases of pay for services, paying judgments or claims and bona fide sales or purchases of commodities, tools and supplies. Check-off is permitted only where individual written assignments of wages are given which are good for one year or the life of the collective bargaining agreement, whichever is shorter. Contributions to trust funds established by the labor representative are permitted but are particularly hedged about by conditions, including requirements for particular purposes such as medical and hospital care, death benefits, pensions on retirement or various kinds of insurance, requirements for a detailed written agreement, equal representation by employers and employees in administration with arbitration for disputes, requirements for annual audits

and publication of the same and that such payments are made to a separate trust dedicated to no other but the prescribed purposes. This section carries criminal penalties and may be enforced by injunction regardless of the provisions of the Clayton and Norris-LaGuardia Acts.

The boycotts and strikes made unfair labor practices in Section 8(b)(4), including secondary boycotts and jurisdictional strikes, are forbidden in Section 303 and may be made the subject of actions for damages and cost of suit by whoever may be injured in his business or property. It is thought by some that making such actions unlawful "for purposes of this section only" eliminated a private right for injunction. That remains to be seen. We must not forget that aside from this private damage cause, the Board has the right to enjoin.

Political Contributions:

Section 304, the restriction on political contributions, amends the Federal Corrupt Practice Act and forbids a labor organization to "make a contribution or expenditure" in connection with elections to certain national offices and provides criminal penalties. Labor organizations are defined so as to refer to "bargaining organizations." It has been suggested that this was done to permit contributions by non-bargaining groups such as the C.I.O. Political Action Committee and similar non-bargaining affiliates of unions. Certain it is that here is a source of much argument and interpretation over constitutional questions. It is also certain that the committee reports and conference reports indicated an intention to go much farther in interpretation of this section than the courts are likely to go. It was indicated in the debates and discussions that payment for radio time for speeches against or for a candidate for national political office would be forbidden unions or corporations, that publication of newspapers containing articles for or against national political candidates would be prevented, if paid for out of union funds. This section will probably be one of the first to come up for interpretation as the unions generally have indicated they have decided to challenge it as one of the weakest points of the law.

It is possible to venture into the fields of philosophy, psychology, political science and dramatics over the new law.

I adopt the sage observation that was repeated over and over after the passage of the N.L.R.A. It applies to management and labor alike, now as it did then. At that time the representatives of N.L.R.B. and various others at institutes, seminars and lectures all over the country prefaced their remarks, in an attempt to soften the impact, upon employers especially, of tradition and precedent-wrecking legislation, with substantially these words, "We may not like it but we have it and we will have to learn to live with it."

Lawyers have to relearn the law frequently, that is our job and we accept it. Industrial and labor clients do not accept changes as readily, especially unwelcome ones. As attorneys either for labor or management we will be doing our clients and our communities a service if we do all in our power over and beyond interpretation of the letter of the statute to prevent a recurring wave of industrial strife as a result of this law and to help effectuate the purposes of the Act to encourage peaceful collective bargaining.