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Seymour Cohen

Indiana University School of Law

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THE MINORITY UNION'S RIGHT TO STRIKE

SEYMOUR COHEN*

One of the many questions which arise in construing and interpreting the labor policy declared by Congress in the Norris-LaGuardia Act¹ and the National Labor Relations Act² concerns the right of a minority union to strike.³ The N. L. R. A., by incorporating the concept of majority rule, established for the government of labor relations the democratic principle of our political institutions. But it thereby brought forth the problem of minorities. That particular sections of the two acts may conflict in determining the solution to this problem will appear.⁴

Labor strife by the minority is caused almost wholly by jurisdictional⁵ and dual-union⁶ disputes over representation. Together they apparently give rise to a relatively minor num-

* Student Research Assistant, Indiana University School of Law.

¹ 47 STAT. 70 (1932), 29 U.S.C.A. §§ 101-115. About one-half of the states now have laws which similarly limit the granting of labor injunctions by the state courts.

² 49 STAT. 449 (1935), 29 U.S.C.A., §§ 151-168 (Supp. 1938). Six states have enacted similar labor relations acts: Massachusetts (MASS. ANN. LAWS, Mitchie Supp. 1939, c. 150A); Minnesota (Minn. Laws, 1939, c. 440); New York (N. Y. LABOR LAW, 1937, § 700); Pennsylvania (PA. STAT. ANN., Purdon 1937, tit. 43, § 211.1); Utah (UTAH REV. STAT., 1939, § 49); Wisconsin (WIS. STAT., 1937, § 111.00), repealed in 1939 (Laws 1939, c. 57).

³ The term "right to strike" probably should be considered to include also the right to picket and boycott.

⁴ §§ 1, 7 and 13 of the Norris Act and §§ 2(9), 7, 8(1) (2) (5), 9, 10(a) (h) and 13 of the N.L.R.A. are particularly applicable.

⁵ "Jurisdictional dispute" refers to a dispute arising between unions affiliated with the same national federation. Originally both the Board and courts refused to exercise jurisdiction over these disputes. *California State Brewers' Institute v. International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers*, 19 F. Supp. 824 (N.D. Calif. 1937). But it has recently been declared that the Board does have and should exercise such jurisdiction. *International Brotherhood of Teamsters, etc. v. International Union of United Brewery, etc. Workers of America*, 106 F. (2d) 871 (C.C.A. 9th, 1939). Cf. *Blankenship v. Kurfman*, 96 F. (2d) 450 (C.C.A. 7th, 1938); *United States v. Hutcheson*, 32 F. Supp. 600 (E.D. Mo. 1940); and see generally, Jaffe, *Inter-Union Disputes In Search of a Forum* (1940) 49 Yale L.J. 424.

⁶ "Dual-union dispute" refers to a dispute arising between rival unions affiliated with different national federations.

ber of strikes,⁷ but their importance is not thereby lessened. Representation disputes will become a relatively more important cause of labor unrest, and unfair labor practices less so, as employers come to accept the principle of collective bargaining.⁸

The question may be specifically posited thus: May a union representing a minority⁹ of the employees in an appropriate unit lawfully strike (1) where no majority union exists or is recognized by the employer, (2) where a majority of the employees have designated their representatives for collective bargaining and have been so recognized by the employer, (3) where proceedings for the certification of majority representatives are pending before the National Labor Relations Board, and (4) where majority representatives have been certified by the Board. Two recent cases provided an opportunity for the Supreme Court to discuss these questions, but the Court refused to do so.¹⁰

Minority Rights Where No Majority Exists or is Recognized

Where no organization claims to represent a majority

⁷ The Monthly Labor Review, May, 1938—p. 1200, 1939—p. 1125, and 1940 discloses that jurisdictional and dual-union disputes account for a small percentage of labor controversies:

Year	No. Strikes	No. Workers Involved	Man-Hours Lost
1937	3.7%	4.5%	2.4%
1938	5.4%	5.1%	9.5%
1939	5.9%	4.2%	3.4%

See also Padway, *The Norris-LaGuardia Act and the National Labor Relations Act* (1940) 2 Nat'l L.G. Q. 227, 232.

⁸ "Over the course of four years the relative proportion of election and unfair labor practice cases has reversed itself in formal Board decisions. During the first year decisions and representation cases were a small minority. Increasing resort to the Board to resolve representation disputes has, when the entire four-year period is considered, brought it about that unfair labor practice rulings amount to about 40% of all Board decisions." N.L.R.B. Release R-2236, Oct. 30, 1939. See also *Hearings Before Committee on Labor*, 76th Cong., 1st Sess. (1939) 580.

⁹ A union, none of whose members are employees in the unit—frequently spoken of as an "outside" union—would probably have the same rights as a minority union in the light of such cases as *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323 (1938) and *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938). See (1940) 15 Ind. L. J. 455.

¹⁰ *Fur Workers Union, No. 21238 v. Fur Workers Union, Local No. 72*, 308 U.S. 522 (1939)—a *per curiam* opinion affirming 105 F. (2d) 1 (1939); *Retail Food Clerks & Managers Union v. Union Premier Food Stores, Inc.*, 308 U.S. 526 (1940)—a *per curiam* opinion reversing 98 F. (2d) 821 (1938) because the question had become moot (the A.F. of L. union had meanwhile been certified by the Board and contracts between the union and employer entered into).

of the employees in an appropriate unit, or has not been recognized as such, unionization activities should be permitted the widest scope. The policies of the Norris Act and the N. L. R. A. require that "full freedom of association, self-organization, and designation of representatives" for the purposes of collective bargaining be allowed the employees. Any resulting injury to the employer would seem to be "incidental" and "within the allowable area of economic conflict."¹¹

Here there may be active one or more unions or employee organizations, none of which represents a majority of the employees.¹² These may be carrying on strike activities to persuade other employees to join their organization, to force the employer to coerce his employees to do so, or to enforce a demand on the employer to enter into a contract with them.¹³ The employer is under no duty to engage in collective bargaining or to enter into a contract with a minority,¹⁴ but he may do so if he wishes and probably should be encouraged to do so,¹⁵ at least in the absence of a rival minority group.¹⁶ A minority labor organization can act as the representative of only its members in the execution of a bargaining contract, but the contract must accord equal treat-

¹¹ *Stillwell Theater v. Kaplan*, 259 N.Y. 405, 182 N.E. 63 (1932), *cert. denied* 288 U.S. 606 (1933).

¹² *Cf. Sharp & Dohme, Inc. v. Storage Warehouse Employees Union*, 24 F. Supp. 701 (E.D. Pa. 1938).

¹³ Note that a contract with an employer is of great value to a union in securing new members.

¹⁴ *Segall-Maigen Co.*, 1 N.L.R.B. 749 (1936); *Mooresville Cotton Mills*, 2 N.L.R.B. 952 (1937); *Semet-Solvay Co.*, 7 N.L.R.B. 511 (1938).

¹⁵ See, ROSENFARB, *THE NATIONAL LABOR POLICY AND HOW IT WORKS* (1940) at p. 240: "The need for collective bargaining with minorities until a majority arises as a means of discouraging employers from attempting to prevent a majority from emerging has become imperative since the inadequacy of the board's sanctions in the case of a failure to bargain collectively has become apparent."

¹⁶ The execution of a contract between the employer and one of two rival minorities may well amount to employer discrimination even if the contract is for its members only and non-discriminatory in terms. Such a contract may be the deciding advantage in the competition for membership. A very small number of employees obtained by one union, however, should not prevent the making of a contract with a union commanding a substantial number but not a majority of the employees. See ROSENFARB, *op. cit. supra* note 15, at 258 ff.

But if the contracting minority union is being assisted by the employer by an unfair labor practice, the resulting contract would constitute coercion in violation of the N.L.R.A. whether or not there is a rival union. *Cf. Consolidated Edison Co.*, 4 N.L.R.B. 71 (1937).

ment to all employees, for Section 8 (3) of the N. L. R. A. prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Nor may the contract contain a closed-shop provision.¹⁷ Where two or more minority organizations are seeking contracts, the employer may well make separate contracts covering the respective memberships, with a provision included in each that it shall terminate upon the securing of a majority status by one. From the standpoint of the employer, it would be desirable for the contracts to require the majority status to be shown by a certification by the N. L. R. B. and provide that the remaining minority union will not strike while such majority remains or during the existence of the contract made pursuant to certification.

Clearly, in the absence of a majority, a controversy arising between the employer and the minority union or between minority unions concerning terms of employment or representation would be a labor dispute as so defined in both the Norris Act and the N. L. R. A.¹⁸ The Norris Act would then be applicable to restrict granting injunctive relief.¹⁹

Minority Rights Where Majority Exists But is Not Certified

No Certification Proceedings Pending. No Board or court decision has as yet affirmatively discussed the rights of minorities under the N. L. R. A. where majority representation exists. Section 9 (a) of the N. L. R. A.²⁰ provides that, "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the

¹⁷ A closed-shop contract is valid under N.L.R.A. § 8(3) only when made with the majority union.

¹⁸ This must be so under the broad interpretation given to the term "labor dispute" in *Senn v. Tile Layers Protective Union*, 301 U.S. 468 (1937); *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323 (1938); *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938). The two statutes define the term almost identically. Compare 29 U.S.C.A. §§ 113 and 152. See *Pauly Jail Bldg. Co. v. International Assn. of Bridge, etc. Workers*, 29 F. Supp. 15 (E.D. Mo. 1939) (fraudulent representations enjoined, requirements of Norris Act having been complied with).

¹⁹ See generally, Comments (1938) 47 Yale L. J. 1136, (1937) 50 Harv. L. Rev. 1295.

²⁰ 29 U.S.C.A. § 159(a).

purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment." This has been construed to impose a duty upon the employer to treat exclusively with the majority representative and the negative duty to refrain from entering into a collective labor agreement with anyone else.²¹ This duty to bargain collectively comes into being upon the appearance of representatives chosen by an organized majority in an appropriate unit and is in no way affected by certification. The refusal to bargain collectively with an uncertified majority is an unfair labor practice.²² However, the employer need not guess at his peril as to the appropriateness of the unit nor the validity of the majority where he is reasonably doubtful as to either.²³ But the employer may not ask the courts to determine these questions since the Board has initial exclusive jurisdiction in such matters.²⁴

The employer may find relief under the new rules of the Board which now permit him to petition the Board for an election and certification where two rival labor organizations claim to represent the majority,²⁵ or by contract. Where only one union is claiming a majority, he may execute a temporary agreement in which exclusive recognition is conditioned upon a Board certification.²⁶ Where rival unions each claim to represent the majority, he may enter into dual contracts with each union for its members only to become exclusive with the one certified, with a provision, if it can be secured,

²¹ N.L.R.B. v. Jones & Laughlin Steel Corp. 301 U.S. 1 (1937). *Cf.* Virginian Ry. Co. v. System Federation, No. 40, 300 U.S. 515 (1937); Texas & N. O. R. Co. v. Railway Clerks, 281 U.S. 548 (1930).

²² Bradford Dyeing Ass'n, 4 N.L.R.B. 604 (1937); Griswold Mfg. Co., 6 N.L.R.B. 298 (1938); *see dictum in* N.L.R.B. v. Remington Rand, Inc., 94 F. (2d) 862, 868 (C.C.A. 2d, 1938), *cert. denied* 304 U.S. 576 (1938), *rehearing denied*, 304 U.S. 590 (1938). So also bargaining collectively with a minority group where a majority exists is an unfair labor practice. Zenite Metal Corp., 5 N.L.R.B. 509 (1938).

²³ *Cf.* Huch Leather Co., 11 N.L.R.B. 394 (1939).

²⁴ Lund v. Woodenware Workers Union, 19 F. Supp. 607 (D. Minn. 1937).

²⁵ N.L.R.B. Rules and Regulations, Art. III, §§ 1, 2 (Series 2—Effective July 14, 1939), and *see post*, note 45.

²⁶ *Cf.* Southgate-Nelson Corp., 4 N.L.R.B. 307 (1937).

to the effect that the losing union will not strike or picket for a specified period of time.²⁷

Where the employer has bargained collectively with the purported representatives of the majority, does the N. L. R. A. protect any rights accruing to the parties under the Act or under a contract executed pursuant thereto?²⁸ Do the provisions of the N. L. R. A. and the Norris Act so conflict that it must be implied that the provisions of the latter were intended to be suspended or repealed by the former in certain situations?

It has been held that the execution of a valid bargaining contract between the employer and the majority of his employees gives rise to no right under the N. L. R. A. to the protection of such contract by the federal courts and that no proceedings between an employer and his employees under the Act are entitled to any protection by the courts until some affirmative action has been taken by the Board.²⁹ Also, the N. L. R. A. creates no federal rights, the violation of which entitles the aggrieved party to injunctive relief in the federal courts under the Act.³⁰ Yet under Section 9 (a) of the N. L.

²⁷ See, *Horton Mfg. Co.*, 7 N.L.R.B. 557 (1938); *Kinnear Mfg. Co.*, 4 N.L.R.B. 773 (1938). .*Cf.* Comment (1938) 51 Harv. L. Rev. 520, 528.

²⁸ Whether a collective bargaining agreement has resulted from negotiations between the employer and the purported majority union may well make a difference. The *Jones & Laughlin* decision emphasized specifically that the N.L.R.A. does not compel any agreement whatever to be consummated between employers and employees, and that it does not prevent the employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine." Where failure to reach an agreement through collective bargaining causes the majority to strike, there would be a labor dispute even under the narrowest interpretation of that term. The minority should also have the right to strike to aid the majority through whom it is required to bargain, or to gain majority status themselves.

²⁹ *Lund v. Woodenware Workers Union*, 19 F. Supp. 607, 611 (D. Minn. 1937). The court said, "If plaintiff's construction of the act is to be sustained then an employer could organize a company union and by injunction prevent a so-called employees' union from gaining any foothold, which result would be absolutely contrary to the intent and aims of the act in question."

³⁰ *Blankenship v. Kurfman*, 96 F. (2d) 450, 454 (C.C.A. 7th, 1938) (injunction sought by majority union to restrain the defendant union from interfering with and intimidating its members). "It seems clear that the only rights which are made enforceable by the Act are those which have been determined by the National Labor Relations Board to exist under the facts of each case, and when these rights have been determined, the method of enforcing them

R. A., the employer is required to bargain only with the majority representatives, and it is an unfair labor practice to refuse.³¹ It would seem then that the employer who complies with the Act and bargains in good faith and executes a contract with the majority representatives should be protected in the performance of such duty and the enjoyment of the rights and privileges secured thereunder.

But the policy and provisions of the Norris Act deny him the protection afforded by injunctive relief. If a labor dispute exists, the procedural requirements of the Norris Act must be complied with if the activities against which an injunction is asked are unlawful; an injunction cannot be secured at all against certain lawful activities such as striking and peaceful picketing.³² Lower federal courts have held that no labor dispute can exist after the employer has consummated a contract with the majority either because no demand may lawfully be made upon the employer by any organization other than the majority³³ or because no true labor dispute between the employer and his employees can thereafter exist.³⁴ But these decisions were made before the Supreme Court indicated the broad interpretation to be accorded the term "labor dispute" in *Lauf v. Shinner* and the *New Negro Alliance* case. By the weight of authority a labor dispute does exist where the employer has entered into a collective bargaining agreement with the majority (1) whether or not the striking minority claims to represent a majority,³⁵ (2) although there is no dispute between the employer and any of its employees as to rates of pay, wages, hours of employment and any other conditions of employ-

which is provided by the act itself must be followed." *But see* *Grace Co. v. Williams*, 20 F. Supp. 362 (W.D. Mo. 1937), *aff'd*, 96 F. (2d) 478 (C.C.A. 8th, 1938).

³¹ See *supra*, note 22.

³² 29 U.S.C.A. §§ 104, 107, 108.

³³ *Donnelly Garment Co. v. International Ladies' Garment Workers' Union*, 21 F. Supp. 807 (W.D. Mo. 1937), *reversed on jurisdictional grounds*, 304 U.S. 243 (1938). But note the vigorous dissent of Judge Otis at 824 ff.

³⁴ *International Union of United Brewery, etc. Workers of America v. Calif. State Brewers' Institute*, 25 F. Supp. 870 (S.D. Calif. 1938), *rev'd*, 106 F. (2d) 871 (C.C.A. 9th, 1939).

³⁵ *Houston & North Texas Motor Freight Lines, Inc. v. International Brotherhood of Teamsters, etc. of America*, 24 F. Supp. 619 (W. D. Okla. 1938).

ment,³⁶ and (3) although the dispute is really between two unions as to which shall be the sole bargaining agency in the outcome of which the employer is indifferent.³⁷

The Norris Act then restricts injunctive relief unless the later N. L. R. A. impliedly suspends or modifies its provisions in those situations in which the employer has proceeded under the N. L. R. A. where to do otherwise would violate its provisions. Only in Section 10(h) of the N. L. R. A.³⁸ are the limitations of the Norris Act on the power of the circuit courts of appeal suspended. Under the doctrine of *expressio unius* the inference can be made that in all other respects the effect of the Norris Act upon the jurisdiction of "courts sitting in equity" is left unimpaired.³⁹ Nowhere else in the N. L. R. A. does it appear that Congress intended to give the federal courts a broader power than that permitted by the Norris Act to decree injunctive relief in labor disputes.⁴⁰ The employer probably need not allege compliance

³⁶ *Grace Co. v. Williams*, 20 F. Supp. 263 (W.D. Mo. 1937) (closed shop contract), *aff'd* 96 F. (2d) 478 (C.C.A. 8th, 1938); *Donnelly Garment Co. v. International Ladies' Garment Workers' Union*, 23 F. Supp. 998 (W.D. Mo. 1938), *rev'd on other grounds*, 99 F. (2d) 309 (C.C.A. 8th, 1938).

³⁷ *Fur Workers Union, Local No. 72 v. Fur Workers Union, No. 21238*, 105 F. (2d) 1 (App. D.C., 1939), *aff'd per curiam* 308 U.S. 522 (1939). "The essential predicate of the argument (plaintiffs) is that once a majority of the employees of a particular employer have, without coercion on his part, made their choice of a bargaining unit, any labor dispute which may be said to have been involved theretofore has ended; therefore the restrictions of the Norris-LaGuardia Act upon the issuance of injunctions are inoperative. * * * But this argument rests upon the assumption that the Federal courts have power to determine the lawful selection of a bargaining agency by the employees. * * * We think that the assumption that the trial court had power to make the determination in question is invalid and that the appellees' whole argument therefore falls." *But cf. United Electric Coal Companies v. Rice*, 80 F. (2d) 1 (C.C.A. 7th, 1935), *cert. denied* 297 U.S. 714 (1936).

³⁸ "When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101 to 115 of this title." 29 U.S.C.A. § 160 (h).

³⁹ *See Donnelly Garment Co. v. International Ladies' Garment Workers' Union*, 99 F. (2d) 309, 315 (C.C.A. 8th, 1938). The court also pointed out that the only jurisdiction conferred by the N.L.R.A. upon federal courts is conferred by §§ 160 (e), (f) upon the circuit courts of appeal with respect to enforcing, modifying, and setting aside orders of the Board.

⁴⁰ *Sharp & Dohme, Inc. v. Storage Warehouse Employees Union*, 24 F. Supp. 701, 703 (E.D. Pa. 1938); *Donnelly Garment Co. v. Inter-*

with Section 8 of the Norris Act⁴¹ for a resort to all reasonable efforts to settle the dispute would require him to bargain or negotiate with the minority union which the N. L. R. A. prohibits;⁴² i.e., it would be unreasonable to require the employer to violate the N. L. R. A. as a prerequisite to securing relief under the Norris Act.⁴³

Certification Proceedings Pending. Proceedings for investigation and certification of representatives by the N. L. R. B. may be instituted by an employee organization,⁴⁴ or by the employer where two or more rival organizations claim to represent the majority.⁴⁵ A contract existing between the employer and a purported majority is no bar to representation proceedings,⁴⁶ regardless of the remaining duration of the contract.⁴⁷ Two situations may present themselves here: (1) the Board unlimited by judicial review may dismiss the petition for election, or (2) the union or unions involved may

national Ladies' Garment Workers' Union, 21 F. Supp. 807, 828 (W.D. Mo. 1937).

⁴¹ "No restraining order or injunctive relief shall be granted to any complainant . . . who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." 29 U.S.C.A. § 108.

⁴² 29 U.S.C.A. § 159 (a); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

⁴³ Grace Co. v. Williams, 20 F. Supp. 263 (W.D. Mo. 1937), *aff'd* 96 F. (2d) 478 (C.C.A. 8th, 1938); Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 99 F. (2d) 309 (C.C.A. 8th, 1938), *cert. denied* 305 U.S. 662 (1939). *Cf.* dissent in Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 21 F. Supp. 807, 830 (W.D. Mo. 1937).

⁴⁴ 29 U.S.C.A. § 159 (c) provides that "whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected."

⁴⁵ N.L.R.B., Rules and Regulations, Art. III §§ 1, 2 (Series 2, Effective July 14, 1939). Similar provisions allowing employer petitions are found in the laws of Minnesota, Minn. L.R.A. §16(b); New York, N.Y. LABOR LAW, §705 (3), (4); Pennsylvania, Pa. L.R.A., § 7 (c)—by employer "who has not committed an unfair labor practice"; Wisconsin, Wis. Employment Peace Act, § 111.05 (4).

⁴⁶ Pacific Greyhound Lines, 22 N.L.R.B. No. 12 (1940). *See generally*, Rice, *The Legal Significance of Labor Contracts Under the National Labor Relations Act* (1939) 37 Mich. L. Rev. 693, 712. Nor is an agreement between an employer and a minority union applicable to the members only of such union a bar to certification proceedings. Pressed Steel Car Co., 7 N.L.R.B. 1099 (1938).

⁴⁷ Rosedale Knitting Co., 23 N.L.R.B. No. 43 (1940) (more than 1½ years of contract's 3-year term had expired).

continue to strike while representation proceedings are pending.

The N. L. R. A. does not provide for judicial review of any of the steps taken by the Board in a representation proceeding,⁴⁸ because these steps do not constitute final orders.⁴⁹ Judicial review may be secured indirectly under Section 9(d) where there is a petition for enforcement or review of a Board order restraining an unfair labor practice under Section 10 (c),⁵⁰ since the certification proceeding becomes a part of the record upon which the decree of the reviewing court is to be based.⁵¹ A dismissal of its petition⁵² or a direction of election which it considers to be prejudicial to its rights⁵³ may thus cause a union to resume or continue its strike or picketing activities.

Where the strike continues after the Board has assumed jurisdiction and certification proceedings are pending, can a labor dispute over representation continue to exist and the Norris Act apply? It has been held that, where the Board has taken jurisdiction and is determining a representation question, a labor dispute can not exist if the dispute concerning representation is solely between two unions and does not involve the employer, so that the Norris Act does not bar the

⁴⁸ N.L.R.B. v. International Brotherhood of Electrical Workers, 308 U.S. 413 (1940), *rev'ing* 105 F. (2d) 598 (C.C.A. 6th, 1939) (direction of election); A.F. of L. v. N.L.R.B., 308 U.S. 401 (1940), *aff'ing* 103 F. (2d) 933 (App. D.C. 1939) (actual certification); *cf.* Cupples Co. Manuf'rs v. N.L.R.B., 103 F. (2d) 953 (C.C.A. 8th, 1939).

⁴⁹ "The statute on its face thus indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting unfair labor practices . . ." A. F. of L. v. N.L.R.B., 308 U.S. 401, 409 (1940).

⁵⁰ 29 U.S.C.A. § 160 (c). *Cf.* N.L.R.B. v. Whittier Mills Co., 111 F. (2d) 474, 477 (C.C.A. 5th, 1940).

⁵¹ See A.F. of L. v. N.L.R.B., 308 U.S. 401, 406 (1940), *aff'ing* 103 F. (2d) 933 (App. D.C. 1939).

⁵² Where the Board dismisses a petition for certification because no majority exists, seemingly the minority union or unions could legally strike in an effort to secure additional members or at least to secure a contract with the employer for their respective memberships. But where the Board dismisses a petition on the ground that the petitioner is clearly the exclusive bargaining agency, the situation is analogous to that in which a majority union has been actually certified. *Cf.* Oakland Warehouses and Mills, N.L.R.B. Case XX-R-152 (1937), C.C.H. Labor Law Serv. ¶ 21, 528 (not officially reported); *Stalban v. Friedman*, 171 Misc. 106, 11 N.Y.S. (2d) 343 (1939), *rev'd* 259 App. Div. 520, 19 N.Y.S. (2d) 978 (1940).

⁵³ N.L.R.B. v. International Brotherhood of Electrical Workers, 308 U.S. 413 (1940), *rev'ing* 105 F. (2d) 598 (C.C.A. 6th, 1939).

granting of injunctive relief.⁵⁴ Under the Supreme Court's interpretation of a "labor dispute,"⁵⁵ however, this situation would be considered a labor dispute. It may be contended that the employer has a right to non-interference while the Board determines the agent with whom it must bargain, even though there must be compliance with the procedural requirements of the Norris Act.⁵⁶ Or it may be argued that an injunction should issue to preserve the status quo pending the Board's determination.⁵⁷ Yet logically union activity should greatly increase just prior to the actual election⁵⁸ and until that time at least, the parties should be left to exercise their relative economic strength.⁵⁹

Minority Rights Where a Majority is Certified

Where a union has been certified by the N. L. R. B.⁶⁰ the equities may change. One federal court⁶¹ and several state courts⁶² have granted injunctive relief against minority

⁵⁴ *Union Premier Food Stores, Inc., v. Retail Food Clerks & Managers Union*, 98 F. (2d) 821 (C.C.A. 3rd, 1938); *rec'd per curiam as moot* 308 U.S. 526 (1940). But see 7 I.J.A. Bulletin 25 (1938).

⁵⁵ See *supra*, note 18.

⁵⁶ *Cupples Co. v. A.F. of L.*, 20 F. Supp. 894, 897 (E.D. Mo. 1937). The defendant unions here attempted to withdraw their petitions for investigation and certification.

⁵⁷ See *Fur Workers Union, Local No. 72 v. Fur Workers Union*, No. 21238, 105 F. (2d) 1, 13 (App. D.C. 1939), *aff'd per curiam* 308 U.S. 522 (1939).

⁵⁸ An injunction issued during the pendency of certification proceedings would in effect permit the employer to temporarily determine the issue for a period averaging from two to six months which is required by the Board to complete a certification proceeding. Such a provisional determination may vitally affect the final outcome. Comment (1939) 48 Yale L. J. 1053, 1056.

⁵⁹ See *Black Diamond S.S. Corp. v. N.L.R.B.*, 94 F. (2d) 875, 879 (C.C.A. 2nd, 1938). Note that where unions continue to strike despite the pendency of Board proceedings, the employer may recognize them for their members only without violating the Act since majority representation has not been satisfactorily established. Comment, *supra* note 58, at 1056.

⁶⁰ Under § 9 (c) the Board can certify representatives with or without an election. See the Board's Fourth Annual Report, Ch. VII, and *cf.* (1939) 8 I.J.A. Bulletin 14.

⁶¹ *Oberman & Co. v. United Garment Workers of America*, 21 F. Supp. 20 (W.D. Mo. 1937) (the court held the dispute was in connection with the procedure for collective bargaining under the N.L.R.A. and was not a labor dispute on the ground that the Board had settled the only possible labor dispute in the case).

⁶² *Bloedel Donovan Lumber Mills v. International Woodworkers of America*, 102 P. (2d) 270 (Wash. 1940) (held no labor dispute on the authority of the *Oberman* decision); *Euclid Candy Co. of*

strikes under these circumstances. Other federal courts merely recognize that such a situation may arise⁶³ or indicate that relief might be given.⁶⁴

Certification itself creates no rights or duties.⁶⁵ It is merely an administrative determination of fact by the Board that the representatives certified have been lawfully chosen by a majority of employees in an appropriate unit.⁶⁶ The duty of the employer to bargain with the certified representatives is created by the N. L. R. A. and exists before the certification.⁶⁷ It is an unfair labor practice to refuse to bargain collectively with the majority representatives whether they have been certified or not.⁶⁸ And a certification is not reviewable by the courts until the Board petitions the circuit court for enforcement of its order requiring the employer to cease its unfair labor practice of refusing to bargain with the certified representative,⁶⁹ or until the employer or other

N. Y., Inc. v. Summa, 174 Misc. 19, 19 N.Y.S. (2d) 382 (1940) (certification terminated labor dispute; here however, prior to certification it was agreed by both unions and the employer that the losing union would not strike during the life of the closed-shop contract to be executed by the employer and union certified).

⁶³ Fur Workers Union, Local No. 72 v. Fur Workers Union, No. 21238, 105 F. (2d) 1, 13 (App. D.C. 1939); Lund v. Woodenware Workers Union, 19 F. Supp. 607, 611 (D. Minn. 1937).

⁶⁴ "However, if the relationship . . . certified by the Board, be unlawfully interfered with . . . it may well be that under the principles of equity the aid of the courts may be invoked." International Brotherhood of Teamsters, etc. of America v. International Union of United Brewery, etc. Workers of America, 106 F. (2d) 871, 876 (C.C.A. 9th, 1939); Houston & North Texas Motor Freight Lines, Inc. v. International Brotherhood of Teamsters, etc. of America, 24 F. Supp. 619, 640 (W.D. Okla. 1938).

⁶⁵ Comment (1940) 28 Geo. L. J. 666.

⁶⁶ The Board is authorized to hold elections under § 9 (c) of the N.L.R.A. and to determine the appropriate bargaining unit under § 9 (b). Certification is not *res adjudicata* in a subsequent proceeding for unfair labor practices. American-Hawaiian Steamship Co., 6 N.L.R.B. 678 (1938). Section 9 (d) provides that the certification and the record of the investigation preliminary thereto made by the Board shall become part of the record reviewable by the circuit courts of appeal.

⁶⁷ N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

⁶⁸ For decisions in which there was no certification, see cases cited *supra*, note 22. There was certification in N.L.R.B. v. Whittier Mills Co., 111 F. (2d) 474 (C.C.A. 5th, 1940); Black Diamond S. S. Corp. v. N.L.R.B., 94 F. (2d) 875 (C.C.A. 2nd, 1938).

⁶⁹ A. F. of L. v. N.L.R.B., 308 U.S. 401 (1940), *aff'ing* 103 F. (2d) 938 (App. D. C. 1939). See also, N.L.R.B. v. Cudahy Packing Co., 34 F. Supp. 53 (D. Kans. 1940). The Circuit Court of Appeals for the District of Columbia in the *Federation* case held that its decision was required by the N.L.R.A., but that the order might

person aggrieved by the order petitions the court for review.

But certification does safeguard the employer against having established relations upset because of inappropriateness of the unit or invalidity of the method of selection⁷⁰ and removes the possibility of the courts taking upon themselves the determination of these questions.

Although the rule of majority representation was established by the N. L. R. A., no definition of what constitutes a "majority" is to be found therein, nor has Congress or the Supreme Court since defined the term. Of three possible interpretations, the Board during the first year of the Act adopted the most stringent, requiring that a union must obtain a majority of the votes of all those eligible to vote to be certified.⁷¹ The second possibility, never followed by the Board, would require that a majority of the eligible employees participate in the election with the union receiving a majority of the votes cast entitled to certification. In 1936, the Board adopted its present interpretation that a majority of the eligible employees voting, whether or not a majority of the employees participate in the election, is entitled to certification.⁷² Those who do not participate are presumed to

be reviewable in an independent suit in equity in a district court in light of the holdings in *Shields v. Utah Idaho Central R. Co.*, 305 U.S. 177 (1938) and *Utah Fuel Co. v. National Bituminous Coal Commission*, 306 U.S. 56 (1939). Pursuant to that suggestion suit was subsequently brought in equity in the District Court for the District of Columbia which held that the suit could be maintained. *A. F. of L. v. Madden*, 33 F. Supp. 943 (D.C. 1940).

It has been suggested that collateral review of certification proceedings may be obtained by a union, having a contract with the employer but losing in the certification proceedings, by suing for specific performance of its contract. Comment (1938) 38 Col. L. Rev. 1243, 1254.

⁷⁰ *But see* (1939) 16 N.Y.U.L. Q. Rev. 306, 309, footnote 17. "Certification of the majority group does not always insure that such majority is not the result of unfair labor practices since such questions must be raised in a prior consolidated hearing, and cannot be raised in a 9 (c) representation proceeding. *Pennsylvania Greyhounds Lines*, 3 N.L.R.B. No. 622 (1937); *Sandusky Metal Prod. Corp.* 6 N.L.R.B. 51 (1938); Note (1938) 38 Col. L. Rev. 1243."

Where there is an alleged improper certification acquiesced in by the employer, the complaining labor union is without remedy, since it cannot compel the Board to issue a complaint against the employer. See Comment, *supra* note 65, at 680.

⁷¹ 6 L.R.R. Supp. 21 (1940).

⁷² *R.C.A. Mfg. Co.*, 2 N.L.R.B. 159 (1936); *New York Handkerchief Mfg. Co. v. N.L.R.B.*, 114 F (2d) 144 (C.C.A. 7th, 1940).

assent to the expressed will of the majority of those voting.⁷³ However, there has been no instance as yet in which a union was certified pursuant to a vote in which less than a majority of those eligible participated, in which employer interference or coercion was not found.⁷⁴ It is true that such an interpretation may lead to unfairness where a very small percentage of the employees participate in the election and a bare majority of those voting choose the union thereafter certified,⁷⁵ yet a stricter interpretation might give rise to greater inequalities.⁷⁶

If the employer and majority union are entitled to protection of the relationship created through collective bargaining or of a contract resulting therefrom under any circumstances, it most clearly would be after certification.⁷⁷ There can be no doubt or uncertainty then, so far as the employer is

⁷³ *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 560 (1937)—here however a majority of the employees participated in the election, although the winning union received less than a majority of the eligible votes; *accord*, *N.L.R.B. v. Whittier Mills Co.*, 111 F. (2d) 474 (C.C.A. 5th, 1940).

⁷⁴ *New York Handkerchief Mfg. Co. v. N.L.R.B.*, 114 F. (2d) 144, 148 (C.C.A. 7th, 1940) (56 employees voted out of 225 eligible to vote, with 53 voting for the union).

⁷⁵ It is not likely that an abuse of the rule will occur. See *New York Handkerchief Mfg. Co. v. N.L.R.B.*, 114 F. (2d) 144, 149 (C.C.A. 7th, 1940); GALENSON, *RIVAL UNIONISM IN THE UNITED STATES* (1940) 252 ff; and see generally, Rice, *The Determination of Employee Representatives* (1938) 5 *Law & Contemp. Prob.* 188.

Experience has shown that this rule has not been a device enabling closely-knit minorities to carry Board elections. About 90% of eligible employees usually vote in elections. The rule has eliminated the possibility of 10% of the employees not voting, whether because of employer coercion or indifference, preventing the choice of representatives in closely-contested elections. ROSENFARB, *op. cit. supra* note 15, at 234 ff.

⁷⁶ In *R.C.A. Mfg. Co.*, 2 N.L.R.B. 159, 176 (1936), the opinion pointed out that minorities, "by peacefully refraining from voting could prevent certification of organizations which they could not defeat in an election. Even where their strength was insufficient to make a peaceful boycott effective, such minority organizations by waging a campaign of terrorism and intimidation could keep enough employees from participating to thwart certification. * * * The 'quorum' interpretation thus introduces a qualification that places in the hands of employers and rival labor organizations a weapon which may easily defeat the collective bargaining sections of the Act."

⁷⁷ See *Cupples Co. v. A. F. of L.*, 20 F. Supp. 894, 897 (E.D. Mo. 1937); the court said by way of dictum that the N.L.R.A. confers upon the employer the legal right to deal exclusively with the agency found by the Board to represent the majority after that fact has been determined by the Board. See also *Blankenship v. Kurfman*, 96 F. (2d) 450, 454 (C.C.A. 7th, 1938) where Judge Treanor suggested indirectly that there may be rights under the N.L.R.A. enforceable in the federal courts by the majority union after action by the Board.

concerned, as to the only labor organization he must bargain with. The certified majority union may secure a Board order requiring the employer to bargain with it which may be judicially enforced.⁷⁸ But can protection of status and contract rights against minority interference be secured here by injunctive relief?

It is submitted that, when a minority union strikes after a majority union has been certified as exclusive bargaining agency of all the employees in the appropriate unit, a labor dispute exists despite such certification and irrespective of the validity of the objectives or legality of such a strike.⁷⁹ The existence of a labor dispute does not depend on where the equities lie nor whether the party can lawfully comply with the demands made upon it.⁸⁰ Such a dispute exists where the parties involved and the subject of dispute come within the broad statutory definition to be found in both acts.⁸¹ True, it has been held that no labor dispute can exist after certification, but these decisions were made before the Supreme Court demonstrated the broad scope to be given the term in its interpretation⁸² or were reached by avoiding the legal questions involved in an effort to give relief where the employer faced intense economic hardship.⁸³

⁷⁸ Where the employer has conspired with the minority union to defeat the certified union's right to collective bargaining, the certified union cannot apply directly to the courts for relief but must apply to the Board for enforcement of the certification order under § 10 (b)—*United Electrical, Radio and Machine Workers of America v. International Brotherhood of Electrical Workers*, 30 F. Supp. 927 (S.D. N.Y. 1940).

⁷⁹ But no "labor dispute" exists within the terms of the N.L.R.A. in the sense that, for a reasonable period immediately following certification, the minority union cannot invoke the jurisdiction of the Board.

⁸⁰ *Cf.* the dissent in *Donnelly Garment Co. v. International Ladies' Garment Workers' Union*, 21 F. Supp. 807 (W.D. Mo. 1937), at p. 825 ff.

⁸¹ *See supra*, note 18. "The (Norris) Act does not concern itself with the background or the motives of the dispute." *New Negro Alliance v. Santary Grocery Co.* 303 U.S. 552, 561 (1938). A number of states have redefined the term "labor dispute" so as to facilitate securing injunctive relief in certain harsh situations: Ore. Laws 1939, c. 2; Wis. Laws 1939, c. 25; Pa. Laws 1939, Act 163.

⁸² *Oberman & Co. v. United Garment Workers of America*, 21 F. Supp. 20 (W.D. Mo. 1937); *accord*, *Bloedel Donovan Lumber Mills v. International Woodworkers of America*, 102 P. (2d) 270 (Wash. 1940).

⁸³ *See, e.g.*, *Stalban v. Friedman*, 171 Misc. 106, 11 N.Y.S. (2d) 343 (1939) (no actual certification, petition dismissed on ground that

If a labor dispute does exist, should injunctive relief be granted nevertheless? It has been shown that Section 10(h) of the N. L. R. A. suspends the applicability of the Norris Act only where the circuit courts of appeals are reviewing final orders of the Board, and that the N.L.R.A. did not impliedly repeal any seemingly inconsistent provisions of the Norris Act. Further evidence that no implied repeal was intended is to be found in Section 13 of the N. L. R. A. which provides that "Nothing in this act shall be construed so as to interfere with or impede or diminish in any way the right to strike." Granting injunctive relief against a minority strike by holding the Norris Act inapplicable where the N. L. R. A. has been complied with would be construing the latter act so as to at least "interfere with" or "diminish" the circumstances under which "the right to strike" could be exercised free from the threat of restraint by injunction.

Here then an injunction may issue only if it be held that the activities of the minority are unlawful because directed toward (1) forcing the employer to breach his duty under the N. L. R. A. and (a) bargain with the minority or (b) conclude a closed-shop contract with the minority, or (2) causing a breach of the contract entered into between the employer and the certified representatives of the employees. Activities directed solely toward such objectives⁸⁴ may conceivably be found unlawful.⁸⁵ But it may as logically be said that the activities are directed toward doing that which

plaintiff union was clearly the majority representative), *rev'd*. 259 App. Div. 520, 19 N.Y.S. (2d) 978 (1940) (labor dispute exists).

⁸⁴ Cf. *Pauly Jail Bldg. Co. v. International Association of Bridge, etc. Workers*, 29 F. Supp. 15, 18 (E.D. Mo. 1939); *Euclid Candy Co. of N.Y., Inc. v. Summa*, 174 Misc. 19, 19 N.Y.S.(2d) 382, 384 (1940) (" . . . since the picketing by the minority union is, in effect, an attempt to force the breach of the agreement which was entered into . . . , this court of equity should prevent the irreparable injury which flows therefrom."). See also *Eastwood Nealley Corp. v. Internat'l. Ass'n. of Machinists*, 124 N.J.Eq.274, 1 A(2d)477, 480(1938). In *Magruder, A Half Century of Legal Influence Upon the Development of Collective Bargaining* (1937) 50 Harv. L.Rev. 1071, 1107, the author suggests that if a minority union strikes despite a Board certification, such a strike might be held illegal as a matter of common law.

⁸⁵ Judge Otis, dissenting in *Donnelly Garment Co. v. International Ladies' Garment Workers' Union*, 21 F. Supp. 807, 828 (W.D. Mo. 1937), contends that the N.L.R.A. does not prohibit negotiations between an employer and a national or international union concerning the organization and ultimate representation of the employer's employees by that union.

is admittedly lawful—persuading other employees in the unit to join the minority union and thus change their bargaining representatives,⁸⁶ or informing the employees and the public as well of policies or practices of the employer with which it is dissatisfied or which it believes should be changed.⁸⁷

Probably a combination of these purposes actually lies behind a minority strike instituted or continued after certification. To allow a court to find, according to its determination of the objectives sought, whether the minority's activities are lawful and therefore non-enjoinable or unlawful and therefore subject to be enjoined under the Norris Act is to provide a standard vague and uncertain and subject to the greatest abuse. A strike should be legislatively declared either wholly enjoinable under these circumstances or not enjoinable at all.

Conclusion

The hardship upon the employer⁸⁸ in the situations discussed cannot be disregarded. It is true that substantial legislative aid to labor has come about but recently, but stability in labor relations, which is the ultimate objective of such legislation, is seemingly defeated where an employer continues to be faced with labor strife although he is in good faith fulfilling all the obligations required of him.⁸⁹ Certainly dis-

⁸⁶ The Board has declared the right to choose representatives "involves the liberty to change representatives." *Jefferson Electric Co.*, 8 N.L.R.B. 284 (1938).

⁸⁷ One writer suggests that the minority's labor activities if directed toward improving the terms of the existing collective agreement for all are not inconsistent with the majority's bargaining prerogatives. *Larson, The Labor Relations Acts—Their Effect on Industrial Warfare* (1938) 36 Mich. L. Rev. 1237, 1277. But it would appear that, since the act makes the representatives designated by the majority the representatives of all the employees in the unit for the purposes of collective bargaining, the minority union would have to bargain through them. See the dictum in *Humble Oil & Refining Co. v. N.L.R.B.*, 113 F. (2d) 85 (C.C.A. 5th, 1940). However, such a strike might be justified where the majority representatives have failed to protect the rights of the employees or have failed to secure the terms or conditions existent in the industry as a whole.

⁸⁸ See *N.L.R.B. v. Star Publishing Co.*, 97 F.(2d) 465 (C.C.A. 9th, 1938), enforcing *Star Publishing Co.*, 4 N.L.R.B. 498 (1937); *Combustion Engineering Co., Inc.*, 20 N.L.R.B. No. 62 (1940). But see (1939) 8 I.J.A. Bulletin 48 to the effect that in the great majority of cases the defeated union voluntarily acquiesces.

⁸⁹ There is always the danger, however, that the majority union may actually be company sponsored or dominated. The contracts sought to be protected in *Lund v. Woodenware Workers Union*,

putes over representation should cease, for a reasonable period at least, upon the Board's certification of the representatives with whom he must bargain collectively.

The argument most strongly emphasized against restraining minority strikes is that it will lead to a freezing or self-perpetuation of the majority.⁹⁰ The force of this contention is considerably lessened by present indications that the status established by certification or other determination of the existence of majority representatives will be considered conclusive only for the period of about one year, after which representation proceedings may again be instituted.⁹¹ This is true although the bargaining contract may be for a term longer than a year.⁹² But the representatives will be presumed to continue to represent the majority until it is affirmatively established otherwise.⁹³

It has also been said⁹⁴ that majority rule is essentially not prejudicial to minority rights because collective bargaining agreements cannot discriminate against minority groups and the majority must be organized to practice genuine collective bargaining. Policies, laws, and regulations must necessarily express the will of the greatest number, for collective

19 F. Supp. 607 (D. Minn. 1937) and *Grace Co. v. Williams*, 20 F. Supp. 263 (W.D. Mo. 1937), *aff'd.* 96 F. (2d) 478 (C.C.A. 8th, 1938) were subsequently held void by the Board as having been made with a company union. *Lund Co.*, 6 N.L.R.B. 423 (1938); *The Grace Co.*, 7 N.L.R.B. 766 (1938).

⁹⁰ *Cf.* Comment, *supra* note 58; Larson, *loc. cit. supra* note 87, at 1276; (1939) 6 U. Of Chi. L. Rev. 317.

⁹¹ See GALENSON, *op. cit. supra* note 75, at 256. The Board has held that a new certification is not barred by a certification made 14 months before. *New York & Cuba Mail Steamship Co.*, 9 N.L.R.B. 51 (1938); *cf.* *Showers Bros. Furniture Co.*, 4 N.L.R.B. 585 (1937); *Todd-Johnson Dry Docks Inc.*, 10 N.L.R.B. 629 (1938); *Whittier Mills Co.*, 15 N.L.R.B. 457 (1939). In New York certification is generally conclusive for one year.—N.Y.L.R.B., Preliminary Rules and Regulations, Art. III § 11.

⁹² The Board has indicated it will not grant a petition for election and certification where the contract has less than a year to run. *Superior Electrical Products Co.*, 6 N.L.R.B. 19 (1938); *National Sugar Refining Co.*, 10 N.L.R.B. 1410 (1939). Contracts for a term longer than a year existed in *Metro-Goldwyn-Mayer Studios*, 7 N.L.R.B. 662 (1938); *Columbia Broadcasting System, Inc.*, 8 N.L.R.B. 508 (1938).

⁹³ *N.L.R.B. v. Whittier Mills Co.*, 111 F. (2d) 474 (C.C.A. 5th, 1940).

⁹⁴ ROSENFARB, *op. cit. supra* note 15, at 226; LEISERSON, *RIGHT AND WRONG IN LABOR RELATIONS* (1938) 46-49. The proviso in § 9(a) of the N.L.R.A. preserves the right of minorities to present grievances to the employer.

bargaining concerns matters in which all of the employees have a common interest.

Nevertheless, the minority's right to strike exists (1) whether or not there is a majority union, (2) where certification proceedings are pending, and (3) even where majority representatives have been certified by the N. L. R. B.⁹⁵ Although this right to strike is protected by existing law, it is apparent, today, that excessive exercise of the right will bring general public disapproval. National union administration must settle its own minority disputes—failing in this, it can expect hostile courts and legislatures to curtail seriously existing rights.

⁹⁵ The point suggested in *Houston, etc. Freight Lines, Inc. v. International Brotherhood of Teamsters, etc. of America*, 24 F. Supp. 619, 640 (W.D. Okla. 1938), that the Board may be able to secure an injunction against the minority union in order to make effective its certification order, is of doubtful validity since the Board is only empowered to proceed against unfair labor practices of employers. See also Comment, *supra* note 69, at 1266 as to the possible use of the "Reconstruction conspiracy statute"—REV. STAT. § 5508 (1878), 18 U.S.C.A. § 51 (1934).

