

LEGISLATION AND ADMINISTRATION

THE BACKGROUND OF THE LABOR PROVISIONS OF THE N.I.R.A.

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NO OTHER part of the National Industrial Recovery Act¹ has aroused so much controversy as Section 7(a).² This section has been given radically different interpretations by labor leaders and the spokesmen of organized business. Disagreements over this section delayed the steel, automobile, and coal codes. At one time the entire Industrial Advisory Board threatened to resign because General Johnson at the instance of the Labor Advisory Board issued a statement that no qualifications of this section would be permitted in any future code. Thereafter, the Industrial Advisory Board and a majority of the Labor Advisory Board reached an agreement upon an interpretation to be included in all codes, but this was blocked by the President, who took the position that any advance interpretation "leads only to further controversy and confusion."³ Since then it has been understood that interpretations will be made only by the National Labor Board and the courts as concrete cases arise demanding decision. Following this decision of the President the controversy over Section 7(a) remained quiescent for some months, but recently has again flared brightly. Several large employers have openly defied the National Labor Board and numerous industrial leaders have boldly asserted that they will deal only with company unions and that they are within their rights in taking such an attitude. The National Association of Manufacturers has even advanced the claim⁴ that the National Industrial Recovery Act renders closed shop agreements illegal. The American Federation of Labor has countered by demanding that company unions be definitely outlawed and Senator Wagner has announced his intention of introducing a bill to clarify and strengthen Section 7(a).

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¹ Public Act No. 67, 73d Congress; 48 Stat. c. 90, approved June 16, 1933.

² Really subsection (a) of section 7, but referred to as Section 7(a) in all discussions, and hence so designated in this article.

³ Letter to General Hugh S. Johnson, Administrator for National Recovery, Oct. 19, 1933.

⁴ New York Times, Nov. 19, 1933, p. 15.

Throughout this controversy, Section 7(a) has been treated as though it represented a new and radical departure, entirely without precedent. In fact, however, both of the essential provisions of this section—the affirmative recognition of the right of workingmen to bargain collectively through representatives of their own choice and the prohibition of interference by employers with the exercise of this right—are but restatements of principles previously recognized in several acts of Congress and, earliest of all, by the National War Labor Board during the World War, when that board was the supreme authority upon industrial relations in a large part of American industry.

The board, of which ex-President William Howard Taft and Frank P. Walsh were the joint chairmen, included the following among the Principles and Policies to Govern Relations between Workers and Employers in War Industries for the Duration of the War which it promulgated on March 29, 1918, to govern "its mediating and conciliatory action and the umpire in his consideration of a controversy":

1. The right of workers to organize in trade unions and to bargain collectively through chosen representatives is recognized and affirmed. This right shall not be denied, abridged, or interfered with by the employers in any manner whatsoever.
3. Employers shall not discharge workers for membership in trade unions, nor for legitimate trade union activities.

Next, these principles were expressed in the Railway Labor Act of 1926:⁵

Representatives, for the purposes of this chapter, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.

This provision of the Railway Labor Act was sustained and construed by the United States Supreme Court in the *Railway Clerks'* case,⁶ decided in 1930. In this case the evidence conclusively established that the railroad company involved organized and all but operated the company union and in every manner sought to make its employees members of this union in preference to the railway clerks' union. Upon this evidence and on the basis of the section of the Railway Labor Act quoted, the court affirmed the order issued by the district court prohibiting the company from interfering with the right of employees to join the railway clerks' union and directing it to dissolve the company union. In its decision the

⁵ 44 Stat. 577 (1926); 45 U. S. C. Supp. § 152, "Third" (1933).

⁶ *Texas and New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 50 Sup. Ct. 427, 74 L.Ed. 1034 (1930).

court not only upheld the statute but expressed approval of its evident purpose, saying that "collective action would be a mockery if representation were made futile by interference with the freedom of choice." It construed the provision quoted as involving no interference with "the normal exercise of the right of the carrier to select its employees or to discharge them," and as being directed only against "interference with the right of employees to have representatives of their own choosing."

Enacted after this decision but drafted before it was handed down, the Norris-La Guardia (anti-injunction) Act,⁷ in its "declaration of policy" declared that

. . . it is necessary that he [the worker] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for purpose of collective bargaining or other mutual aid or protection. . . .⁸

This act further provided that contracts in which workingmen obligate themselves not to join a labor union violate this policy and shall not be enforced in any court of the United States.

In the following session of the same Congress a similar provision was inserted in the Bankruptcy Act,⁹ which, like the Norris-La Guardia Act, was approved by President Hoover:

(p) No judge or trustee acting under this title shall deny or in any way question the right of employees on the property under his jurisdiction to join the labor organization of their choice, and it shall be unlawful for any judge, trustee, or receiver to interfere in any way with the organization of employees, or to use the funds of the railroad under his jurisdiction, in maintaining so-called company unions, or to influence or coerce employees in an effort to induce them to join or remain members of such company union.

(q) No judge, trustee, or receiver acting under this title shall require any person seeking employment on the property under his jurisdiction to sign any contract or agreement promising to join or to refuse to join a labor organization; and if such contract has been enforced on the property prior to the property coming under the jurisdiction of said judge, trustee, or receiver, then the said judge, trustee, or receiver, as soon as the matter is called to his attention, shall notify the employees by an appropriate order that said contract has been discarded and is no longer binding on them in any way.

Coming now (chronologically) to the special session of the present Congress, these principles were again affirmed in the Emergency Railroad Transportation Act of 1933,¹⁰ which was approved on the same day as the

⁷ 47 Stat. 70 (1932), 29 U. S. C. Supp. §§ 101-115 (1933).

⁸ 47 Stat. 70 (1932), 29 U. S. C. Supp. § 102 (1933).

⁹ 47 Stat. 1474 (1933), 11 U. S. C. Supp. § 205 (1933).

¹⁰ Public Act No. 68, 73d Congress; 48 Stat. c. 91, approved June 16, 1933.

National Industrial Recovery Act. This act included a clause to the effect that all "carriers, whether under the control of a judge, trustee, receiver, or private management, shall be required to comply with the provisions of Chapter 8 of Title 45 [the above quoted provision of the Bankruptcy Act] and with the provisions of paragraphs (o), (p) and (q) of Section 205 of Title 11 [the sections of the Railway Labor Act of 1926 involved in the *Railway Clerks'* case]." To carry out this requirement, Coordinator of Transportation Joseph B. Eastman early in September notified all of the railroad companies that they must divest themselves of all connection with company unions.

This brings us to the National Industrial Recovery Act, Section 7(a) of which is the provision whose background we have traced. Very significantly, this act is reported to have been drafted by Donald R. Richberg, now Chief Counsel of the N.R.A. Earlier Mr. Richberg was the draftsman of the Railway Labor Act, attorney for the labor unions in the *Railway Clerks'* case, and one of the draftsmen of the Norris-La Guardia Act. Thoroughly familiar with all the earlier enactments cited, Mr. Richberg incorporated the same principles in the original draft of the National Industrial Recovery Act.¹¹ In the original form the much debated Section 7(a) read:

Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) that employees shall have the right to organize and bargain collectively through representatives of their own choosing; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any organization or to refrain from joining a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other working conditions, approved or prescribed by the President.

When this bill came on for a hearing before the Ways and Means Committee of the House of Representatives it was indorsed both by H. I. Harriman, President of the United States Chamber of Commerce, and William Green, President of the American Federation of Labor. Mr. Green, however, suggested amendments to Section 7(a)¹² to make the first two subdivisions read:

(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representa-

¹¹ H. R. 5755 and S. 1712, 73d Congress, 1st Sess. (1933).

¹² Hearings before the Ways and Means Committee of the House of Representatives on National Industrial Recovery, May 1933, 117-132.

tives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection;

(2) That no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

These suggestions were accepted by the committee and incorporated in the bill which it reported to the House. This bill then passed without change and without any discussion of Section 7(a).

When the bill as amended came on for a hearing before the Senate Finance Committee, it was subjected to a concerted attack by spokesmen for business interests.¹³ Mr. Harriman now advised the committee: "In my judgment, changes should be made in Sections 6 and 7 to make it perfectly clear that the principles of true open-shop operation are not contravened." This was also the sum and substance of the plea of R. P. Lamont, representing the American Iron and Steel Institute. E. L. Michael of the Virginia Manufacturers' Association and Charles R. Hook of the American Rolling Mill Company protested the clause relating to the company union, urging that it would be construed as making the company union illegal.¹⁴ James A. Emery, representing the National Association of Manufacturers, suggested an amendment to the effect that Section 7 be eliminated and that instead there be added to Section 3(a) the following clauses, as conditions to be incorporated in all industrial codes:

(1) That employers and employees shall have the right to organize and bargain collectively in any form mutually satisfactory to them through representatives of their own choosing.

(2) That no employee and no one seeking employment shall be required as a condition of employment to join or refrain from joining any legitimate organization, nor shall any persons be precluded from bargaining individually for employment.

The Senate Finance Committee did not accept the Emery amendment, but it recommended an amendment in the form of a proviso to be added to Section 7(a), which read:

Provided that nothing in this title shall be construed to compel a change in existing satisfactory relations between the employers and the employees in any particular plant, firm, or corporation, except that the employees of any particular plant, firm, or corporation shall have the right to organize for the purpose of collective bargaining with their employees as to wages, hours of labor, or other conditions of employment.

¹³ Hearings before the Senate Finance Committee on Sen. Rep. 1712 and H. R. Rep. 5755 (National Industrial Recovery), May-June 1933, 407-408 (Harriman), 394-395 (Lamont); 377-382 (Michael), 388-390 (Hook), 288-291 (Emery).

¹⁴ John L. Lewis, President of the United Mine Workers of America, answered this argument by saying that the act did not prohibit company unions but only coercion of employees to belong to a company union. Hearings before the Senate Finance Committee on Sen. Rep. 1712 and H. R. Rep. 5755 (National Industrial Recovery), 404-405.

When the bill reached the Senate floor on June 8, the amendment of the Finance Committee was adopted without explanation or roll call. Later in the same day, Senator Norris, who had been absent when this amendment was adopted, asked for and secured a reconsideration. A prolonged debate followed,¹⁵ which throws much light upon the intent of Congress in enacting Section 7(a). Senators Norris, Wheeler, Costigan, Bone, Robinson (Ind.), and Wagner all attacked the amendment, while Senators Reed, Hastings, and Clark defended the committee. The critics centered their attack upon the fact that the proviso qualified the right of collective bargaining and gave the appearance of governmental sanction of the company union, which Senator Norris described as "one of the great evils that labor has had to fight against." None of the senators speaking for the amendment said one word in favor of the company union but based their case upon the fact that General Johnson and Mr. Richberg had been present when the committee agreed upon this amendment and offered no objections. At the conclusion of the debate, the Senate, by a roll call vote of thirty-one to forty-six, refused to readopt the Finance Committee amendment. No further attempt to amend Section 7(a) was made at any stage, so that this section reads in the final act precisely as it passed the House of Representatives.

Note must here be taken of a statement issued by the National Association of Manufacturers in November, 1933, to the effect that closed shop contracts were rendered illegal by two Senate amendments to the National Industrial Recovery Act.¹⁶ One of these was the Borah amendment to Section 3(a), which added the proviso: "That such code or codes shall not permit combinations in restraint of trade, price fixing or other monopolistic purposes" (changed by the conference committee before final passage to read: "That such code or codes shall not permit mo-

¹⁵ 77 Congressional Record 5412-5417 (June 8, 1933). The roll call vote on the Finance Committee amendment is given on 5417.

¹⁶ This statement was published in the *New York Times*, Nov. 19, 1933, p. 15. For the Borah amendment and the debate thereon, see 77 Congressional Record 5381-5382 (June 8, 1933); on the Long amendment, *ibid.*, 5424.

Another contention in support of the view that closed shop agreements have been rendered illegal by the National Industrial Recovery Act is based upon clause (2) in Section 7(a), which provides that no employee or applicant for employment shall be required "to refrain from joining, organizing, or assisting a labor organization of his own choice." Assuming that a company union is a "labor organization," it is argued that employers are forbidden to enter into closed shop agreements if any employee prefers membership in a company union. Upon this contention nothing more needs to be said than that the term "labor organization" was understood at all stages of the National Industrial Recovery Act to refer to independent labor unions and that no member of Congress even suggested that this act might make closed shop agreements unlawful.

nopolies or monopolistic practices"). The other was the Long amendment, which added to Section 5 the following paragraph:

Nothing in this Act, and no regulation thereunder, shall prevent an individual from pursuing the vocation of manual labor and selling or trading the products thereof; nor shall anything in this Act, or regulation thereunder, prevent anyone from marketing or trading the produce of his farm.

What there is in these amendments which forbids the closed shop is not apparent and the debate on these amendments lends no support to the contention of the National Association of Manufacturers. Both amendments were adopted without a roll call and no one who discussed them so much as mentioned the closed shop. Both were presented as being designed to curb the abuses of price fixing, and it was not even suggested that they had anything to do with labor organizations.

While these amendments on which the National Association of Manufacturers based its contention that closed shop agreements were prohibited apparently were not thought of in Congress as having any bearing on industrial relations, there is one subsection besides Section 7(a) which clearly relates to the subject. This is subsection (b) of Section 7, which immediately follows the much controverted subsection (a). This reads:

(b) The President shall, so far as practicable, afford every opportunity to employers and employees in any trade or industry or subdivision thereof with respect to which the conditions referred to in clauses (1) and (2) of subsection (a) prevail, to establish by mutual agreement, the standards as to the maximum hours of labor, minimum rates of pay, and such other conditions of employment as may be necessary in such trade or industry or subdivision thereof to effectuate the policy of this title; and the standards established in such agreements, when approved by the President, shall have the same effect as a code of fair competition, approved by the President under subsection (a) of section 3.

While this subsection, strangely, has hardly been noticed in discussions of the labor provisions of the National Industrial Recovery Act, it clearly must be taken into consideration in determining the intent of Congress in enacting Section 7(a). Subsection (a), as we have seen, is not new in principle, but subsection (b) is new. In subsection (a) Congress merely reiterated the right of workmen to bargain collectively through representatives of their own choice and prohibited interference by employers with this right. In subsection (b) it made it the duty of the President to "afford every opportunity to employers and employees in any trade or industry or subdivision thereof" to formulate the labor provisions of industrial codes through collective bargaining and by "mutual agreement."

This completes the brief review of the background and history of the labor provisions of the National Industrial Recovery Act which it is the

purpose of this article to present. A few comments, however, may be apposite. The much debated Section 7(a) was not an innovation, nor was it "slipped over" by the labor unions or their congressional supporters. It was little more than a reiteration of principles which have frequently found expression in congressional legislation in recent years and was enacted after representatives of employing interests had warned Congress that it was putting its stamp of approval on the labor unions. In the labor provisions of the National Industrial Recovery Act were only two features which represented any change whatsoever from prior legislation: (1) the specific mention of company unions; (2) the affirmative direction to the President to afford every possible opportunity to employers and employees to bargain collectively on conditions of labor. These changes merely made more specific the policies previously expressed and were deliberate. If anything is clear from the congressional history of the labor provisions of the National Industrial Recovery Act, it is that Congress intended that employers signing codes must refrain from using company unions to block labor organizations and that such employers obligate themselves to deal or attempt to deal with the labor unions when a majority of their employees so desire. Upon what constitutes collective bargaining, particularly whether company unionism is collective bargaining, the record is less clear. No member of Congress said a kind word for the company unions at any stage of the consideration of the National Industrial Recovery Act, while several senators scored them unmercifully. This evidence, however, is insufficient to establish what was the intent of Congress on the crucial question of company unionism, aside from coercion. If Congress intended that dealing with a company promoted plant union is not to be recognized as collective bargaining, it should make this clear through an amendment to Section 7(a).