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Non-Communist Affidavits: Taft-Hartley Sound and Fury

Gerald B. Greenwald*

The inclusion of Section 9(h) in the Taft-Hartley Act was paradoxical. Under that subsection union officers are required to execute affidavits disavowing membership in or affiliation with the Communist Party and belief in forcible overthrow of the government. Execution of such an affidavit is a condition precedent to union participation in National Labor Relations Board proceedings involving matters of representation and unfair labor practices.¹ The statutory pattern of the Wagner Act, while

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1. The affidavit requirement was held constitutional in *American Communications Association v. Douds*, 339 U.S. 382 (1950); *Osman v. Douds*, 339 U.S. 846 (1950). "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section [filing of petitions for certification and decertification proceedings],* and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of Section 10 [filing of unfair labor practice complaints], unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35(a) of the Criminal Code shall be applicable to such affidavits." Labor Management Relations Act of 1947, § 9(h), 61 Stat. 146, 29 U.S.C.A. § 159(h) (Supp. 1951), hereinafter cited as LMRA. The subsection was amended by Act of October 22, 1951, Pub. L. 189, 81st Cong., 2d Sess., which deleted the words, "no petition under Section 9(e)(1) shall be entertained" (see asterisk), reflecting elimination of the union security contract election requirement in the original Taft-Hartley Act.

Denial of NLRB facilities severely limits the non-complying union's reliance on state labor boards. The board has held that a state's failure to impose filing restrictions comparable to Section 9(h) precluded cession of NLRB jurisdiction to a state board under Section 10(e) of the Taft-Hartley Act, and refused to give effect to a state labor board representation election won by a non-complying union. *Kaiser-Frazer Parts Corp.*, 80 NLRB 1050 (1948). A state board has refused its processes to a non-complying union. *Eau Claire Press Co.*, 21 L.R.R.M. 1085 (1947). An interstate employer succeeded in enjoining another state board from certifying a non-complying union as the exclusive bargaining representative. *Linde Air Products Co.*, 77 F. Supp. 656 (D.C. Minn. 1948).

preserving the right to strike and lock-out, strongly promoted the peaceful settlement of industrial disputes by orderly administrative processes. The amendatory Taft-Hartley Act, though it expresses a far less optimistic mood, reaffirmed its predecessor's desire for governmental stabilization of labor-management relations.

In contrast, Section 9(h), by denying NLRB facilities to non-complying unions, fosters a certain measure of reliance on economic coercion, with its resulting industrial unrest. Non-compliers are required to act forcibly to gain many of the objectives achieved peacefully by their rivals. The legitimization of economic coercion as a tactic of non-complying unions was assured by the Taft-Hartley Act's failure in any way to abridge the right of labor organizations to strike or picket for otherwise lawful objectives.² Effectiveness of economic coercion depends ultimately upon the firmness of muscle which responds to union flexing. Under the present statutory scheme evaluation of NLRB policy must stress those areas which affect the development of the non-complying labor organization's economic power.

The essential paradox was accompanied by uncomfortable perplexity. In a single act, Congress provided elaborate mechanisms to insure peaceful development in labor-management relations, only to withdraw such mechanisms from a single group of active participants in the labor scene. Congress unfortunately left undefined the paramount issue of just how much was given, and how much taken away. Usual indications of legislative intent were obscured by virtue of the subsection's origin.³ The present affidavit requirement first appeared in the conference bill, and

2. "Nothing of this Act, *except as specifically provided for herein*, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." NLRA § 13, 29 U.S.C.A. § 163 (Supp. 1951). (Italics supplied.) Section 8(b)(4)(c) provides that strikes in defiance of an existing certification are unlawful. Even this limitation may be qualified. Such a strike was not held unlawful where the strikers sought to compel the employer to bargain on matters not settled by an existing collective bargaining contract with the certified representative. *Douds v. Local 1250, Retail Wholesale Department Store Union*, 173 F. 2d 764 (2d Cir. 1948). But several state courts have used Section 9(h) as a ground upon which to enjoin strikes and picketing of non-complying unions. *Scranton Broadcasters, Inc. v. American Communications Association*, 13 CCH Lab. Cases (Pa.) ¶ 64,124 (1947); *Fulford v. Smith Cabinet Manufacturing Co.*, 118 Ind. App. 326, 77 N.E. 2d 755 (1948).

3. The original House bill contained no provision for the filing of affidavits, but forbade certification of a union if one or more of its officers was a member of the Communist Party or believed in or supported teaching forceable overthrow of the government. Consult H.R. 3020, 80th Cong., 2d Sess. (1947), § 9(f)(6).

remained unchanged in the final Taft-Hartley Act. The secrecy of conference sessions, the relatively slight mention of Section 9(h) in ensuing debate, and the haste with which the compromise bill was passed all contribute to minimize the reliability of any claim to clear congressional intent.

Discussion of board affidavit policy will clearly reveal the ambiguous draftsmanship of Section 9(h). But there is a valuable lesson implicit in this long trail of intra-statutory conflict. The difficulty of designing legislation which immobilizes a small but active segment of the labor movement without weakening organized labor as a whole should be recognized at the outset. The following examination seeks to answer two basic questions. First, was the affidavit requirement designed so as to eliminate opportunities for circumvention of its proscriptions? Second, has the statutory denial of board facilities to non-compliers reduced the industrial impact of politically suspect unions?

CIRCUMVENTION OF SECTION 9(H)

Sanctions against non-compliance with the affidavit requirement appear formidable and easily suggest situations in which employers or rival unions would desire to establish the non-compliance of a labor organization in order to frustrate its objectives. Compliance procedure is controlled by the board, which early assumed that "in view of the language [of Section 9(h) which precluded] *the Board* from investigating any question concerning the representation of employees where the requirements have not been met, the matter of compliance is clearly one for the Board to determine in any manner suited to the circumstances."⁴ The manner found best suited to the circumstances was one which avoided delay and confusion of issues in board proceedings. Compliance was declared an administrative matter not litigable before the NLRB by the parties in either a complaint or representation proceeding.⁵ However, information concerning compliance can be brought directly to the administrative attention of the board, and might stimulate reconsideration of the union's status.⁶ In supporting the board's view, the courts have indicated that evidence of non-compliance may be presented in a judicial enforcement proceeding of a board order, since the

4. *Lion Oil Co.*, 76 NLRB 565 (1948).

5. *Shawnee Milling Co.*, 82 NLRB 1266 (1949).

6. *Sunbeam Corp.*, 94 NLRB 844, No. 134, C.C.H. Lab. Law Rep. (4th Ed.) ¶ 10,849, hereinafter cited CCH (1951).

issue of compliance directly challenges the board's jurisdiction to grant relief.⁷ Although the board was easily able to eliminate attendant delay, it could not evade the more difficult problem of devising policies which would defeat union attempts to circumvent the affidavit requirement itself.

Frustration of the statutory purpose implicit in Section 9(h) might proceed on either of two levels. Formal compliance with the filing requirements may conceal continued Communist leadership. In the alternative, the use of "compliers" and persons not covered by the language of 9(h) to further the goals of non-complying unions could render the sanctions of the act largely ineffective. This latter conduct is known as "fronting." The former method encompasses outright perjury, and the more subtle technique of modifying union structure to remove union leaders from the burdensome class of "officers," thus excluding them from the literal scope of Section 9(h).

The board has consistently refused to inquire into the truth or falsity of affidavits on the ground that the subsection's criminal sanction makes this a question for the Department of Justice.⁸ In taking this position the board finds support in congressional debate of the subsection's proponents.⁹ But it becomes increasingly evident that the language of Section 9(h) has been so drafted as to make successful perjury prosecution nearly impossible. The justice department must establish that *at the time of the making of his affidavit* the affiant was a member or affiliate of the Communist Party, or believed in and supported forceful overthrow of the government. Congressional desire to encourage labor leaders' disavowal of communist ideology disregarded consideration of conduct immediately prior to execution as an index of affiant's sincerity. Further, in the light of *sub rosa* party operation, proof of membership or affiliation after the date

7. NLRB v. Greenboro Coca Cola Bottling Co., 180 F. 2d 840 (4th Cir. 1950).

8. Metropolitan Life Insurance Co., 86 NLRB 428 (1949); American Seating Co., 85 NLRB 269 (1949); Sunbeam Corp., 89 NLRB 469 (1950).

9. In congressional debate Senator Taft explained, "This provision [Section 9(h)] making the filing of affidavits with respect to Communist Party affiliation by its officers a condition precedent to use of the processes of the Board has been criticized as creating endless delays. It was to prevent such delays that this provision was amended by the conferees. Under both the Senate and House bills the Board's certification proceedings could have been infinitely delayed while it investigated and determined Communist Party affiliation. Under the amendment an affidavit is sufficient for the Board's purpose and there is no delay unless an officer of the moving union refuses to file the affidavit required." 93 Cong. Rec. 7002 (1947). Cf. 93 Cong. Rec. 6602, 04 (1947).

of affidavit execution is particularly difficult to establish. In publicly criticizing the subsection, former Attorney General McGrath has cited the development of simple devices which successfully avoided the consequences of the statute.¹⁰ In one case an affiant, apparently immune from perjury prosecution, resigned from the Communist Party and publicly announced his continued adherence to Communist doctrines and his right to advocate them.¹¹ Publicity attendant on such notorious recantations demoralized administration of the act. Only recently has the attorney general recommended to Congress a solution which would in his opinion permit effective challenge of the veracity of Section 9(h) affidavits.¹² For four years the subsection's criminal perjury sanction has been a sham. The board refused to examine affidavits; the attorney general deemed himself unable to prosecute doubtful affiants.¹³ From the first, serious doubt was cast upon the effectiveness of Section 9(h).

The practice of redesignating certain union offices as administrative positions without changing their union leadership duties was a common means of effecting formal compliance with 9(h) requirements. When A.F.L. vice-president John L. Lewis refused to execute an affidavit, the federation, in convention, voted to

10. New York Times, p. 17, col. 3 (July 1, 1951).

11. New York Times, pp. 1, 7 (June 6, 1949). See also New York Times pp. 7 (August 16, 1949) and 20 (September 8, 1950). In a sharp dissent Board Member Gray challenged his colleagues' failure to apply "appropriate administrative sanctions" where such publicity accompanied execution of the affidavit. "If as I believe to be the case, the public statement contradicts the affidavit, we are not required to give effect to the affidavit. . . . To me as a member of this Board charged with the administration of the Act, the effrontery of the Union's officer is too offensive, too subversive of the objectives of this Act to permit his conduct to go unnoticed." In a footnote to his dissent Gray commented: "It is difficult to imagine any more open invitation to circumvention of the Act than the position taken by the majority in the present case." American Seating Co., 85 NLRB 269, 275-76 (1949).

12. The attorney general proposed the following addition to Section 9(h): "and that for the preceding twelve-month period he has not been a member of the Communist Party, or affiliated with such party, and has not believed in or been a member of or supported any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods." New York Times, note 10, supra.

13. Affidavits suspected of being false were sent to the Department of Justice by the board. NLRB, Release R-202 (June 14, 1949). "Recurring reports of Department of Justice action on the twenty-five or thirty questionable affidavits have proved groundless, to date." Shair, How Effective Is the Non-Communist Affidavit?, 1 CCH Lab. Law J. 935, 942 (1950). Consult Levinson, Left-Wing Labor and the Taft-Hartley Act, 1 CCH Lab. Law J. 1079, 1090 (1950). The NLRB has made fifty-five referrals of suspect affidavits to the Department of Justice since 1947. Statement of NLRB, presented by Chairman Paul M. Herzog at Hearings of Senate Sub-Committee of Labor and Labor Management Relations, on Communist Domination of Certain Unions (March 18, 1952).

abolish the offices of vice-president, although "former" vice-presidents retained their place as members of the A.F.L. executive board.¹⁴ But more often, union changes which occurred involved officers far left of John L. Lewis. Initially, the board held itself concerned merely with formal compliance, refusing to by-pass the affidavit and examine union structure.¹⁵ Subsequently, however, the board appeared so shocked by such a redesignation as to cause their issuance of a rule to show cause why certain members should not be deemed officers, thus preventing union compliance status.¹⁶ The resulting hearing in which the union failed to make the required showing dramatically illustrated the adverse effects of board concentration on mere formal compliance without regard to union structure. NLRB procedure was hastily amended to require affidavits from all persons *reasonably considered officers* regardless of their organizational position.¹⁷

The second, and potentially more damaging, form of eluding statutory sanctions is "fronting." Here the labor organization seeking access to the board obtains its objectives without effecting affidavit compliance. Rather it depends upon the assistance of compliants or persons not subject to 9(h) proscriptions. Thus the board's primary concern lies in defining the true party, looking behind the formal petitioner to determine the interest which would most benefit from operation of government processes.

14. Levinson, *supra* note 13, at 1085.

15. "The contentions made by the respondent illustrate the possibility under existing law that unions, by abolishing offices under their constitutions but assigning identical duties to officials who shall no longer be denominated as 'officers,' may frustrate the Congressional intent to drive Communists from positions of leadership in the labor movement. As the Board reads the statute, however, these considerations cannot properly deter it from processing a case when the statutory requirements have been met." Craddock-Terry Shoe Corp., 76 NLRB 842, 843 (1948).

16. The union failed to make its showing, but was subsequently declared in compliance when the member in question filed an affidavit. NLRB, Fifteenth Annual Report 21 (1950).

17. "In determining who is occupying an office and must, therefore, file an affidavit as an 'officer,' the Board will normally rely upon the designation of offices appearing in the constitution of the labor organization. Where, however, the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements of section 9 (h) of the act, the Board may require affidavits from additional persons." 29 Code Fed. Regs. S.102.13 (c) (Cum. Supp. 1950). Upon reexamination of a local's union compliance status, NLRB resolved an ambiguity in the local's constitution by references to the constitution of its international, holding that the local improperly failed to designate certain members as officers. Consequently, the local was not, and had never been, in compliance. Local 1150, United Electrical Workers, 96 NLRB, No. 164, CCH ¶ 11,199 (1951).

Early statutory construction by the NLRB insured that this inquiry would be crucial in a substantial number of situations.

Reading Section 9(h) literally, the board concluded that the filing requirement was applicable only to labor organizations and not to individuals seeking board access.¹⁸ While the board was unquestionably on strong ground, the effect of its construction was to permit individual labor union members that free access to board facilities which the clear language of Section 9(h) denied to their non-complying labor organizations. The statutory scope of individual employee activity had been defined without reference to Section 9(h) considerations. Any individual may seek representation status on the mere showing that such status is sought for purposes of collective bargaining.¹⁹ He may initiate decertification proceedings²⁰ or bring unfair labor practice charges in protection of statutory rights of employees under the act.²¹ Thus the act permitted individual employee action in all basic areas of NLRB operation. It was inevitable that the wide scope of individual rights coupled with a corresponding exemption from the affidavit requirement would give rise to frequent allegations of fronting and circumvention in all types of board proceedings.

Frequently, individual members of non-complying unions sought intervention in representation proceedings initiated by rival complying unions. This created a troublesome situation since Section 9(h) barred the non-complying union itself from participation, irrespective of its membership strength in the unit. If the individual intervenor belonged to a non-complying union which included a majority of the unit's employees, his victory as exclusive bargaining representative seemed assured. If, on the other hand, his union had minority membership, the intervenor, campaigning in his individual capacity, would seek to attract sufficient non-union votes to win the election. Assuming that an employee-member is genuinely interested in representing fellow employees, his election does not concern our discussion of Section 9(h). But victory by an individual fronting for his

18. *Acme Boot Manufacturing Co.*, 76 NLRB 441 (1948).

19. *Hofmann Packing Co.*, 87 NLRB 601 (1949).

20. National Labor Relations Act, § 9(c)(1)(A), 49 Stat. 449 (1935), as amended, 61 Stat. 136 (1947), 29 U.S.C.A. § 159(c)(1)(A) (Supp. 1951), herein-after cited NLRA.

21. NLRA §§ 7, 8(a), 29 U.S.C.A. §§ 157, 158(a) (Supp. 1951). The effect of Section 9(h) upon disposition of individually initiated unfair labor practice proceedings is discussed in detail at p. 422 et seq.

non-complying union would seriously frustrate the operation of the act. In so far as the individual's representative status is used to advance the policies of his union it is the non-complying union itself which has benefited from the board proceeding. The board is under a duty to assure that certification of an individual employee, which is lawful, is not in fact tantamount to certification of a non-complying union. The board investigates the would-be intervenor's conduct with painstaking care, relying largely on whether he solicited authorizations from employees in his own behalf or in that of his union. Where the board makes a finding of fronting, the petition for intervention is, of course, dismissed.²²

Initiation of decertification proceedings by individual members of non-complying unions raises much the same problem. A non-complying union might attempt to destroy the exclusive representation status of a certified rival union as a prelude to asserting its own demand for recognition. Early board cases summarily rejected allegations that individual petitioners were fronting for non-complying unions on the ground that the desire of employees was paramount and could be best ascertained by the ensuing election.²³ This policy clearly reflected congressional intent behind the act's decertification provision.²⁴ Although employees' desires concerning exclusive representation should be respected, it contradicts the language and spirit of Section 9(h) to subject a compliant union to board administered decertification at the behest of persons acting in the interests of a rival non-complying labor organization. Board action in these cases was clearly inconsistent with rigorous application of the real-party-in-interest *rationale* in representation proceedings, since decertification proceedings equally raise questions of representation subject to the requirements of Section 9(h). In order to effectuate the policies of the subsection, limitations upon individual origination of decertification was required. With uncharacteristic tranquillity the board subsequently adopted this view, reversing its ground without explanation or dissent. Successive

22. Campbell Soup Co., 76 NLRB 950 (1948); Oppenheim-Collins & Co., Inc., 79 NLRB 435 (1948). While intervention was the common pattern, the same situation would arise where individual members of non-complying unions *initiated* representation proceedings.

23. Whitin Machine Works, 76 NLRB 998 (1948); Auburn Rubber Corp., 85 NLRB 545 (1949); Radix Wire Co., 86 NLRB 105 (1949). Cf. Allied Chemical and Dye Corp., 78 NLRB 408 (1948), where petitioner's office-holding in a rival non-complying union shortly after filing for decertification of the incumbent union was insufficient evidence of fronting.

24. NLRA § 9(c)(1)(A), note 22, *supra*. Consult Senate Report No. 105, 80th Cong., 2d Sess. (1947), p. 10.

cases rejected individual petitions relying upon evidence of employee conduct in behalf of his non-complying union.²⁵ The forces which caused NLRB vacillation reflect the extensive conflict between 9(h) and other sections of the act which pervade board affidavit policy. Implicit in reversal is recognition of the conflict between Section 9(c) (1) (A) solicitude for employees' desires as to their representatives and the lending of board processes to bolster the strategic position of non-complying unions in opposition to Section 9(h) proscriptions. Thus the board has been placed in the delicate position of determining the area of policy which is to be favored. In choosing to stress 9(h) considerations the board has made consistent its efforts to prevent the favored position of individuals from immunizing non-complying labor organizations in all proceedings raising questions of representation.

More difficult issues of fronting were raised by virtue of the federated structure of American trade unionism. Although local unions normally engage in collective bargaining for employees, international unions with which they are affiliated have been anxious to step in and seek certification in place of their non-complying locals. Their objective is easily understandable. Certification of the international union would assure members of the non-complying local affiliate of continued participation, or at the least, representation, in collective bargaining. Local membership would be preserved, and with it the economic strength of both the local and international unions. Employers and rival unions have steadily objected to this practice. It was forcefully argued that since local unions invariably deal with employers, the non-complying local involved may be presumed to continue as an interested party even where its international formally negotiated the collective bargaining agreement which results from international certification. Initially, the board refused to apply familiar fronting criteria in such situations.²⁶ Later, however, the board agreed to look behind the international's petition for certification and consider such factors as bargaining limitations contained in the international's constitution,²⁷ the purpose of the international in initiating its petition,²⁸ and the collective bargaining

25. Knife River Coal Mining Co., 91 NLRB 176 (1950); Hammond Bag & Paper Co., 94 NLRB, No. 147, CCH ¶ 10,866 (1951).

26. Warshawsky & Co., 75 NLRB 1291 (1948); Lion Oil Co., 76 NLRB 565 (1948).

27. United States Gypsum Co., 77 NLRB 1098 (1948).

28. Lane-Wells Co., 77 NLRB 1051 (1948).

history of the non-complying local.²⁹ Denial of international petitions on the ground of fronting for non-complying local affiliates often followed such inquiries.

Another board shift was heralded by the important second *Lane-Wells Company* case which grew out of a non-compliance situation, though it did not involve that issue. On evidence of a non-complying local's interest in a representation proceeding the board initially denied the parent international's petition for certification.³⁰ Shortly thereafter the board learned of the local's compliance prior to its decision, and by supplemental decision thereafter directed the requested election.³¹ Notwithstanding the local's demonstrated interest the board permitted the international, alone, to seek certification as exclusive bargaining agent, ostensibly on the ground that the local's compliance extinguished any possibility of evasion of Section 9(h). But two board members, dissenting, urged that either the local be substituted for the international, or, at least, that both participate as joint parties in interest. The dissenters then argued that it is unrealistic to believe that international unions will ever be the sole party in interest in units in which they maintain local affiliates, an argument which was unanimously rejected by those members in early cases. Recognition of this fact required local certification, for "Participation in grievance procedures traditionally has been a matter peculiarly of interest to and within the grasp of local union officers and members."³²

The majority agreed that if the local affiliate was, in fact, to participate in collective bargaining, the board may exercise its power to recall the international's certification.³³ In reaching its decision the majority obviously relied upon legislative intent inherent in congressional rejection of a proposed amendatory section "that would have severely limited our authority to certify

29. *Oppenheim-Collins & Co., Inc.*, 79 NLRB 435 (1948); *Lynchburg Gas Co.*, 80 NLRB 1237 (1948); *International Harvester Co.*, 80 NLRB 1279 (1948).

30. *Lane-Wells Co.*, 77 NLRB 1051 (1948).

31. *Lane-Wells Co.*, 79 NLRB 252 (1948).

32. *Id.* at 259.

33. "The Board has the power to police its own certifications and can thereby fully effectuate the policies of Section 9(f)(g) and (h). If changing circumstances should give rise to a situation in which the Board for policy reasons would not issue a certification in the first instance, it has power, either on its own motion or that of the employer, to recall the certificate." *Id.* at 256. See Section 10(d) wherein board modification of its orders and findings is expressly permitted. 29 U.S.C.A. § 160(d) (Supp. 1951). *Cramp Shipbuilding Co.*, 52 NLRB 309 (1943), contains an early elaboration of this position.

national or international labor organizations and would have meant the certification of local unions only, except in a very narrow area."³⁴ In so doing, the board affirmed employees' statutory rights "to bargain collectively through *representatives of their own choosing*."³⁵

Shortly thereafter, *Prudential Insurance Company*³⁶ reversed NLRB policy in earlier fronting cases and fostered another division of board opinion. Expanding the *Lane-Wells* cases beyond recognition, the majority declared, "[W]e believe that these cases stand for the proposition that where there is in existence a local having members in the appropriate unit, its compliance is required without regard to the extent to which it may participate in collective bargaining. In any event, we believe that such a doctrine is required in order to effectuate the policy of Section 9(f) (g) and (h) of the Act."³⁷ Alongside the *Prudential* rule, the vitality of the *Lane-Wells* holding, which permits exclusive certification of international unions with (complying) local affiliates having members in the unit, continues unabated.³⁸

It is elementary that certification of an international union strengthens its affiliated local in the unit. The power of a local union lies in its ability to influence the terms and conditions of its members' employment. Even though the international union formally negotiates the collective bargaining contract, its terms must reflect demands of employee-members of the local. Where the local remains non-compliant at the time of its international's certification, it has gained strength through the operation of board processes, a result formerly rejected by the board in early 9(h) cases. The *Prudential* rule, though a marked departure from prior cases, was justified as a legitimate extension of fronting

34. *Lane-Wells Co.*, supra note 33, at 255.

35. NLRA § 7, 29 U.S.C.A. § 157 (Supp. 1951).

36. 81 NLRB 295 (1949).

37. *Id.* at 297. Although subsequent cases relied upon record evidence of the non-complying local's joint interest in any contract ultimately achieved by its international (*U.S. Gypsum Co.*, 81 NLRB 292 [1949]; *Empire Furniture Manufacturing Co.*, 82 NLRB 427 [1949]; *Wells Manufacturing Corp.*, 85 NLRB 23 [1949]) the rule of the *Prudential* case was unanimously affirmed, and continues as board policy. *John Hancock Mutual Life Ins. Co.*, 82 NLRB 179 (1949). But the board permitted a complying international's petition for certification in the absence of evidence that its non-complying local with members in the unit had any interest in the proceeding, relying upon board power to police its certifications. The opinion, written by a three-man board which included Chairman Herzog, did not mention the *Prudential* rule. *Manistee Salt Works*, 85 NLRB 147 (1949). Cf. *Minneapolis Knitting Works*, 84 NLRB 826 (1949).

38. *General Motors Corp.*, 88 NLRB 450 (1950); *Sunbeam Corp.*, 89 NLRB 469 (1950).

doctrine. But implicit in this requirement that *every* affiliated local with unit members comply regardless of its bargaining role prior to certification of the international union is the *sub silentio* acceptance of the *Lane-Wells* minority premise that a local is inevitably "interested" in any certification obtained by its international. Logically, then, the local should assume responsibility commensurate with its interest and become a required party to certification as joint bargaining agent. This result is denied by the *Lane-Wells* board's solicitude for seeming congressional desire that employees be free to select an international union as sole bargaining agent if they so choose. The NLRB has assumed an anomalous position. While the local and its petitioning international are treated as joint applicants for the use of board facilities, resulting in required compliance of both, the NLRB abandons the "real party in interest" criterion in the later stage of certification, certifying the international union as sole bargaining agent.³⁹ The dilemma observed in reading the *Lane-Wells* and *Prudential* cases together is the price paid for strict board enforcement of legislative intent implicit in the conflicting policies of Sections 7 and 9(h).⁴⁰

39. The party-in-interest *rationale* pervades almost all other fronting situations. Where the international union petitioner plans to establish a local in the unit upon achieving its own certification, the board characterizes employer demands that the future local should comply as "premature" on the ground that at the time of certification the international is the only interested party. *Granite Textile Mills, Inc.*, 76 NLRB 613 (1948); *Cribben & Sexton Co.*, 82 NLRB 1409 (1949). Likewise organizing committees are not required to file affidavits in proceedings initiated by complying international or local unions where activities of organizing committees cease upon granting of recognition and do not extend into the area of collective bargaining. *Mississippi Products, Inc.*, 78 NLRB 873 (1948); *Tin Processing Corp.*, 80 NLRB 1369 (1948). *Contra*, where an organizing council had a non-complying member who previously attempted to organize employees in the same unit. *Sampsel Time Control, Inc.*, 80 NLRB 1250 (1948).

40. Another indication of this quandary can be found in the cases. When a compliant international union shows an interest in representing employees which are not usually included within its jurisdiction, employers have contended that certification is sought in behalf of a non-complying international which is barred from the proceeding. The board apathetically reminded employers that they are obligated to bargain only with the certified union. *Stokely Foods, Inc.*, 83 NLRB 795 (1949); *Morrison Turning Co., Inc.*, 83 NLRB 687 (1949). But where the employer alleged that a petitioning international intends to use its certification in the interests of a non-compliant local affiliate, the board emphasizes its power to withdraw certification in the event of subterfuge. *Oppenheim-Collins Co., Inc.*, 79 NLRB 435 (1948); *Manistee Salt Works*, 85 NLRB 147 (1949); *Minneapolis Knitting Works*, 84 NLRB 826 (1949). The board obviously recognizes that it is unrealistic to tell an employer that he need not bargain with a non-complying local whose international union is the certified representative.

BOARD POLICY IN MATTERS OF REPRESENTATION

Although Section 9(h) denies a non-compliant's participation in any representation proceeding, the board has apparently reasoned that it does not serve as a bar to participation in activity auxiliary to, but not a part of, NLRB proceedings. Accordingly, non-compliants are permitted to campaign freely against the election and consequent certification of a rival union.⁴¹ The non-compliant has been provided with a vehicle for maintaining its command of economic resources, since the advantage derived from defeat of rival certification is substantial. Under the act, the non-complying union is insulated from another certification contest for at least one year.⁴² The employer, of course, remains free to refuse negotiation of a collective bargaining contract with any union. If the failure of rivals to gain a majority in the election is due to a lack of employee enthusiasm for unionization, the employer's refusal will be decisive. But if the defeat of certification indicates the vigor and support of the barred non-complying union, the employer's freedom to refuse the non-compliant's demands for recognition might be severely curtailed.⁴³

The anomaly is apparent. Theoretically the election includes all lawful candidates, and the non-compliant is denied an opportunity to compete for statutory certification. But defeat of rival certification might operate both as insulation from further rival challenges and as a vehicle for establishing the non-compliant's strength, and ultimately the employer's voluntary recognition. In another context, the board has recognized that, for all practical purposes, employer recognition and bargaining are tantamount to NLRB certification as exclusive representative.⁴⁴ Both crystallize a continuing relation between the employer and his employees' union. In the case of certification the board stands ready

41. Woodmark Industries, Inc., 80 NLRB 1105 (1948).

42. NLRA § 9(c)(3), 29 U.S.C.A. § 159(c)(3) (Supp. 1951). Cf. Mengel Co., 80 NLRB 705 (1948).

43. It has been suggested that, in fact, the strength of a non-compliant is largely dissipated by the effort expended to achieve voluntary employer recognition, the loss being reflected in the terms of the contract itself. "An employer's grant of recognition to a majority union, when the right to recognition is unenforceable by law, has no value as a *bargaining point*. Once this right became a matter of the employer's grace in the case of non-complying unions, its granting assumed importance and value to the union, with the frequent result that such a union often modified substantially other collective bargaining demands to assure the continuation of its contractual right to recognition through a signed collective bargaining agreement." Kearns, *Non-Communist Affidavits Under the Taft-Hartley Act*, 37 Geo. L. J. 297, 304 (1948).

44. Marshall and Bruce Co., 75 NLRB 90 (1947).

to enforce the relationship against the resistance of either party. Voluntary recognition tends to reflect the same coercive stability, since the fruits of the non-compliant's economic strength, the collective bargaining contract, is lawful, and fully enforceable against either party in judicial proceedings.⁴⁵ The Taft-Hartley Act permits suits for violation of collective bargaining contracts and recovery of damages sustained by reason of the breach. Section 9(h) merely denies the non-compliant's access to board processes; it does not affect the jurisdiction of the federal district court to protect rights afforded under Section 301 of the act.⁴⁶

The collective bargaining contract, once achieved, operates to immunize the union from statutory consequences of its non-compliance. This result follows from the board's view that "The stability of labor relations that the statute seeks to accomplish by the encouragement of the collective bargaining process ultimately depends upon the channelization of the collective bargaining relationship within the framework of the collective agreement, and the adherence thereto by both employers and employees."⁴⁷ A non-compliant may become party to such a contract by virtue of certification acquired prior to the effective date of the Taft-Hartley Act, or during a period of compliance, presently lapsed,⁴⁸ or through voluntary negotiation following its successful request for recognition. Again, in this sphere, both compliants and non-compliants reap identical benefits from NLRB policy.⁴⁹ In *Reed Roller Bit Company*,⁵⁰ the board established the

45. Consult letter by Labor Solicitor Tyson to the Secretary of Labor, January 23, 1948, reprinted at 21 LRRM 62. *United Public Workers v. University of Chicago*, 16 CCH Lab. Cases ¶ 64,998 (Ill. Cir. Ct., Cook Cty.; 1949), upholds such a contract.

46. LMRA § 301(a) and § 303(b), 29 U.S.C.A. §§ 185(a), 187(b) (Supp. 1951). Cf. *United Steel Workers v. Shakespeare Co.*, 84 F. Supp. 267 (D.C. Mich. 1949). See *Reed v. Fawick Airflex Co.*, 86 F. Supp. 822 (D.C. Ohio 1949); *United Auto Workers v. Wilson Athletic Sporting Goods Manufacturing Co.*, No. 49C1533, June 21, 1950, 18 CCH Lab. Cases ¶ 65,867. Also, the inclusion of arbitration provisions within the contract provides another means of enforcing contract terms without dependence upon NLRB remedial facilities.

47. *United Electric Corp.*, 84 NLRB 768, 773 (1949).

48. Section 9(h) requires the execution of an appropriate affidavit "within the preceding twelve-month period." Thus an affidavit assures compliance for only one year. New officers must file immediately upon their election; old officers must renew their affidavits annually. NLRB, Fifteenth Annual Report 17 (1950).

49. The board has been criticized on the ground that "the statutory effect of non-compliance seems to indicate clearly that Congress was not concerned with stability of a non-complying union's bargaining relationship." Note, 64 Harv. L. Rev. 781, 794 (1951).

50. 72 NLRB 927 (1947). Cf. *Chandler and Price Co.*, Case No. 8-RC-299, Ad. Dec. of NLRB, CCH ¶ 8578 (1948). Contracts of greater than two years duration bar representation proceedings for two years. *Puritan Ice Co.*, 74 NLRB 1311 (1947).

rule that a two-year contract will ordinarily be considered of reasonable duration, and constitute a bar to NLRB representation proceedings throughout its term. Accordingly the board permits a non-complying union's intervention in representation proceedings initiated by a rival to enable the non-compliant to assert its contract as a bar to the proceedings.⁵¹ The non-compliant must initially establish its contractual interest. Once permitted intervention, the union participates freely in the proceeding. As the board has stated, assertion of its contract as a bar raises complex issues which makes it impractical to limit the scope of intervention.⁵² Where the non-compliant is successful, the rival petition is dismissed; if assertion of the bar fails, the representation election is ordered, and the intervenor, by virtue of its non-compliance, is denied a place on the ballot.⁵³

The board has long justified its elaborate contract-bar policy as necessitated by the act's encouragement of both stable industrial relations essential to effective collective bargaining and employees' free selection of bargaining representatives. Existence of a contract requires the board to weigh clashing interests in the balance. Application of the contract-bar policy to non-complying unions is indefensible in terms of this *rationale*. As noted at the outset, the most conspicuous feature of statutory affidavit policy is the withdrawal of mechanisms for stability and peaceful settlement of disputes from non-compliers. In this regard Section 9(h) has neutralized the conflict, thus encouraging full freedom of certain employees to select and change their representatives at will.

Board policies, developed in proceedings instituted to decertify a non-complying union certified prior to the act or during a period of compliance which subsequently lapsed, also tend to insulate the non-compliant from disadvantageous statutory con-

51. Heyden Chemical Corp., 85 NLRB 1181 (1949). Northern Indiana Public Service Co., 91 NLRB 172 (1950). Ford Motor Co., 95 NLRB, No. 27, reversed, 95 NLRB, No. 121 (1951), indicates the difficulty in asserting a contract bar.

52. American Chain & Cable Co., Case No. 4-R-2752, Ad. Dec. of NLRB digested at CCH Lab. Law Rep. ¶ 6356 (3d ed. 1948). Cf. Aluminum Co. of America, 85 NLRB 915 (1949).

53. Norcal Packing Co., 76 NLRB 254 (1948). In Woodmark Industries, Inc., 80 NLRB 1105 (1948), the board invalidated write-in ballots cast in the representation election in favor of the non-complying union "lest there be accomplished indirectly that which the union itself could not have accomplished directly." In the absence of a contractual interest, a non-complying union may not object to any aspect of the proceeding. Dadourian Export Corp., 80 NLRB 1400 (1948); H. O. Canfield Co., 80 NLRB 1027 (1948).

sequences.⁵⁴ The certified non-complying union is a necessary party to decertification proceedings and is entitled to full participation in the decertification election.⁵⁵ But should the non-complying union maintain its majority, Section 9(h) precludes the board from approving its certification. The NLRB will merely certify the arithmetical results of the election unless the union makes timely compliance.⁵⁶ Although the non-complying union is unable to maintain its status as exclusive bargaining representative, certification of a rival union has been avoided for at least one year under statutory policy which makes election results binding for that period.⁵⁷ As in the certification proceeding discussed above, the majority non-complying union is in a much better strategic position to demand effectively employer's voluntary recognition than defeated minority compliants. The strategic advantage gained by non-compliants who have successfully weathered a decertification proceeding and prevented rival certification indicates the importance of strict application of fronting criteria to individual decertification petitions. Under board policy the non-compliant's role in *bona fide* decertification proceedings instituted by others is substantial. At the very least, the non-compliant must be prevented from manipulating the initiation of decertification proceedings so as to maximize its own bargaining advantage.⁵⁸

UNFAIR LABOR PRACTICE PROCEEDINGS

Section 9(h) specifically denies the issuance of an NLRB complaint arising out of an unfair labor practice charge filed by a non-complying union. By this technique Congress apparently sought to exclude concerted activities of non-compliants from the scope of statutory protection. Section 7 of the National Labor Relations Act grants individual employees the right to engage

54. Initially non-complying unions argued unsuccessfully that their status insulated them from decertification proceedings instituted by rivals on the ground that such proceedings required non-complying unions' access to board processes. But here the question of representation was not raised by the non-complying union but by the party seeking its decertification. *Harris Foundry & Machine Co.*, 76 NLRB 118 (1948).

55. *Bethlehem Steel Co.*, 79 NLRB 1271 (1948). Full participation assures the non-compliant a place on the ballot, consideration of its objections to any aspect of the proceeding on its merits (*Univis Lens Co.*, 82 NLRB 1390 [1949]), and full freedom to campaign in behalf of its own election (*Woodmark Industries, Inc.*, 80 NLRB 1105 [1948]).

56. *Allied Chemical & Dye Corp.*, 78 NLRB 408 (1948).

57. NLRA § 9(c)(3), 29 U.S.C.A. § 159(c)(3) (Supp. 1951). *Service Products Corp.*, Case No. 35-RC-386, Ad. Dec. of NLRB, CCH ¶ 10,245 (1950).

58. See discussion p. 414, *supra*.

in self-organization and concerted activities for the purpose of collective bargaining. The specific content of Section 7 has been developed in the mass of board cases charging employer interference with employee rights. Such interference violates Section 8(a) (1) which makes it an unfair labor practice, subject to board relief, for employers to "interfere with, restrain or coerce employees in the exercise of rights guaranteed in Section 7."⁵⁹ Successive provisions of Section 8(a) make unlawful employer domination of a labor union and discrimination against union members, and protect employees giving testimony under the act.⁶⁰ Finally, Section 8(a) (5) subjects an employer to unfair labor practice prosecution upon his refusal to bargain collectively with the chosen representatives of his employees.⁶¹ Congressional failure to qualify its grant of employee rights (and corresponding remedial procedures for their enforcement) in light of sanctions against 9(h) non-compliance presaged the development of board policy in the unfair labor practice cases. Here, as in the representation and decertification cases, mediation of statutory conflict was its chief concern. For purposes of analysis, board cases arising out of alleged unfair labor practices of employers may be separated into two groups: violation of individual employee rights under Section 8(a) (1) (2) (3) and (4), and denial of the right of employees' representatives to employer recognition under 8(a) (5), a distinction adopted by the board in early cases raising issues of Section 9(h) compliance.⁶²

Relying upon a prior holding that Section 9(h) is only applicable to labor organizations, the board has reasoned that the affidavit requirement leaves unaffected the protection of rights statutorily created for individual employees in Section 7. Since Section 7 rights are protected by unfair labor practice provisions of Section 8(a) (1) - (4), the board unanimously upheld 8(a) (1) and 8(a) (3) charges filed by individual employee-members of non-complying unions.⁶³ It has been consistently held immaterial that such individuals have been directly assisted by their non-complying unions in the preparation and presentation of charges alleging violation of individual rights.⁶⁴ Union officers were permitted to prosecute

59. NLRB § 8(a)(1), 29 U.S.C.A. § 158(a)(1) (Supp. 1951).

60. NLRA § 8(a)(2), (3), (4), 29 U.S.C.A. § 158(a)(2), (3), (4) (Supp. 1951).

61. NLRA § 8(a)(5), 29 U.S.C.A. § 158(a)(5) (Supp. 1951).

62. *Marshall & Bruce Co.*, 75 NLRB 90 (1947); *Pioneer Electric Co.*, 75 NLRB 117 (1947).

63. *Andrews Co.*, 87 NLRB 379 (1949).

64. *Globe Wireless Ltd.*, 88 NLRB 1262 (1950).

unfair labor practice charges involving their own individual rights even though, as officers, they had failed to file the required affidavits.⁶⁵ The situations just mentioned have usually given rise to contentions that the filing of individual charges constituted "fronting" for the complainant's non-complying union which is denied board access. The Court of Appeals for the Fifth Circuit, in enforcing a board order, supported the board's position that the protection of individual rights is unaffected by Section 9(h) and thus cannot provide an opportunity for circumvention of the affidavit requirement.⁶⁶ The board has long held it immaterial "that the [non-complying] union might derive an incidental benefit from a finding that unfair labor practices were committed."⁶⁷ Supporting the board, in stronger language, a reviewing court commented that any benefit accruing to a labor organization in granting such individual relief was, at most, remote and unsubstantial.⁶⁸

The board's literal rendition of both Section 9(h) and the unfair labor practice provisions of Section 8(a) has created a situation hardly foreseen by the drafters of the affidavit requirement. The removal of individual employees from the scope of 9(h) proscriptions, coupled with the charter of individual rights of Section 7, forced the board to depart from rigorous application of fronting criteria to attempted utilization of NLRB processes by individuals. The departure substantially defeated the 9(h) denial of unfair labor practice facilities to non-complying unions, for the overwhelming number of alleged employer unfair labor practices concern individual, as distinct from union, rights.⁶⁹ The statutory scheme developed to protect individual participation in concerted activity regardless of union affiliation; but the end of

65. *NLRB v. Clausen*, 188 F. 2d 439 (3rd Cir. 1951).

66. *NLRB v. Augusta Chemical Co.*, 187 F. 2d 63 (5th Cir. 1951).

67. *Olin Industries, Inc.*, 86 NLRB 203 (1949).

68. *NLRB v. Clausen*, 188 F. 2d 439 (3rd Cir. 1951). Only one court of appeals has denied enforcement of an order remedying an 8(a)(1) violation on the ground that a complainant was fronting for his non-complying union. But here the order was based on a complaint filed by the president of a non-complying union which alleged employer interference with the rights of over thirty employees, all members of his local union. Had each member filed a separate complaint, the board would easily have gained enforcement of its reinstatement and back pay order. See *NLRB v. Alside, Inc.*, 20 CCH Lab. Cases ¶ 66,645 (Nov. 26, 1951).

69. There were 4,472 cases showing specific allegations of employer unfair labor practices filed with the board in 1950. These cases contained 8,353 allegations of employer interference with "individual" employee rights, as compared with 1,309 charges of employers' refusal to bargain with appropriate employee representatives. NLRB, Fifteenth Annual Report 222, Appendix B, Table 2 (1950).

all such activity has usually been the achievement of union representation. Board critics argue that logical statutory construction requires a contrary board policy.⁷⁰ Such criticism overlooks the basic dilemma presented in the unfair labor practice cases. Section 9(h) sought to impede the collective bargaining activities of Communist-led unions. It did not deny even Communists the right to join a union or to participate in concerted activities in its behalf. To interpret 9(h) as barring 8(a) (1) and (3) charges would have left individual members of non-complying unions subject to loss of employment and employer reprisals. But in protecting individual employee-members in their statutory rights to engage in concerted activities for purposes of collective bargaining, the board necessarily protects the non-complying union from employer obstacles to its organizational activities. Reprisals against organizers are prevented by board reinstatement and back-pay awards ordered in 8(a) (3) proceedings. Since the concerted activities of union members are prerequisite to the union's ultimate demand for recognition, it is difficult to accept the court's claim that the benefit derived by the non-compliant from a finding of employer's unfair labor practice is, at most, remote and unsubstantial. Employee-members of the union remain protected in all of the activities which characterize the gradual strengthening of the union; under the catch-all provision of Section 8(a) (1) the union indirectly obtains redress for employer misconduct literally denied it under the terms of 9(h).^{70a}

The second group of unfair labor practice cases concern alleged violations of an employer's duty to recognize and bargain with the chosen representatives of a majority of his employees. In this regard the majority status of the union is

70. Kearns, *supra* note 43, at 310.

70a. The application of fronting criteria to individual unfair labor practice complaints demonstrates this dilemma. The employer permitted members of a union to circulate petitions aimed at setting aside the election of a rival union as exclusive bargaining agent. Upon employer's denial of similar permission to members of a non-complying union which was barred from participation in the election, individual members of the non-compliant filed unfair labor practice charges. Upholding the employer's refusal, the court reasoned that the complainants were unlawfully seeking in their individual capacities to invoke board action with respect to a controversy to which their non-compliant union was a party. Accordingly, the act did not require the employer to permit his premises to be used for purposes in contravention of the act. In other words, certain employees, by virtue of membership in a non-complying union, may lawfully be denied an opportunity to publicize valid bases for setting aside the election of their exclusive bargaining representative. Such a view is a substantial limitation upon the act's wide grant of individual employee rights. *Stewart-Warner Corp. v. NLRB*, 4th Cir., 21 CCH Lab. Cases ¶ 66,674, Feb. 5, 1952.

crucial, since the employer's duty to bargain does not arise until the union's majority membership is established. The operation of board policy in the cases just studied assists the non-complying labor organization in preserving individual rights of its members. The finding of an individual unfair labor practice is also significant in evaluating the "refusal to bargain" cases. Board policy safeguards the union itself since a loss of majority status following the employer's commission of an unfair labor practice is generally attributed to the employer's unlawful conduct.⁷¹ The non-complying union which gains its majority is always in the position to seek voluntary employer recognition through economic coercion, thus bypassing NLRB processes. But is the majority union able legally to require employer recognition in an 8(a) (5) proceeding if it has not achieved compliance at the time of its demand? Since the act contains no explicit derogation from the employer's duty to bargain with a majority union regardless of its compliance status under Section 9(h), the board has been forced to resolve this situation as best it could.⁷²

*Marshall & Bruce Company*⁷³ arose out of a complaint filed prior to the effective date of the Taft-Hartley Act, alleging employer's refusal to bargain with a certified union, a clear violation of both the original and amended NLRA. By the time the case reached the board, Section 9(h) was in full force and effect. The remedial order which issues in such cases is clearly in the nature of a mandatory injunction calling for affirmative action, namely, bargaining. A majority of the board considered such an order "often tantamount in practice to a certification . . . as bargaining representative," and since the board was clearly forbidden to certify a non-complying union, the resulting order in the *Marshall & Bruce* case was conditioned upon the complainant's timely compliance with Section 9(h).

Minority board members considered the conditional nature of the order unwarranted by the policies of the National Labor Relations Act, as a whole, since it permitted employer deroga-

71. *West Texas Utilities Co. v. NLRB*, 184 F. 2d 233 (D.C. Cir. 1950), and cases cited therein.

72. In the reverse situation, the union's refusal to bargain with the employer in violation of Section 8(b)(3), the board ordered non-compliance to bargain collectively with the employer, but only upon employer's request, thus minimizing the effect of such order in strengthening the union's bargaining position. *National Maritime Union*, 78 NLRB 971 (1948); *Great Atlantic & Pacific Tea Co.*, 81 NLRB 1052 (1949).

73. 75 NLRB 90 (1947).

tion of a public right created by the certificate so long as the union remained out of compliance. They argued that Congress sought to solve problems presented by Communist leadership in labor unions by "erecting certain procedural barriers" while the substantive emphasis of the act encouraged strengthening the institution of collective bargaining.

The *Marshall & Bruce* case foretold the result of *Andrews Company*⁷⁴ which arose after Section 9(h) had become effective. The union had demanded recognition prior to its compliance and was refused. Upon achieving compliance the union filed an 8(a) (5) charge against the employer. A majority of the board dismissed the complaint, although absent union's non-compliance at the time of the demand, they would have found an 8(a) (5) violation. The majority reasoned that since the statute created the right of exclusive representation and then forbade certification of non-complying unions, "a limitation on the remedy is to be treated as a limitation on the right itself." The dissenters again denied that Section 9(h) affected the substantive emphasis of the amended act.

The *Andrews* rule was reversed by the board in the following year, indicating the influence of an intervening dictum of the court of appeals in *West Texas Utilities Company v. NLRB*.⁷⁵ Section 9(h) provides, in part, non-access to NLRB facilities "unless there is on file with the Board an affidavit executed *contemporaneously* or within the preceding twelve-month period." Criticizing the result of the *Andrews* case, the court reasoned that "contemporaneously" implied that the unfair labor practice occurred prior to the filing of an affidavit. Thus a complying union may invoke board processes to remedy employer's wrongful refusal to bargain at a time prior to union compliance. Section 9(h) was held not to relieve an employer of the paramount obligation to bargain collectively in good faith. The act's only sanction for non-compliance is denial of board facilities. Thus enforced, the court's "procedural" interpretation of Section 9(h), urged by minority members in the *Marshall & Bruce* and *Andrews* cases, was established by the board, two members dissenting, in *New Jersey Carpet Mills, Inc.*⁷⁶

74. 87 NLRB 379 (1949). Cf. Comment, 18 U. of Chi. L. Rev. 783, 786, n. 26 (1951).

75. 184 F. 2d 233 (D.C. Cir. 1950).

76. 92 NLRB, No. 122 (1950). Cf. *Tennessee Egg Co.*, 93 NLRB, No. 846 (1951), wherein the board unanimously affirmed the *New Jersey Carpet* rule. The board thus reversed its trial examiner who, in reliance upon *Marshall &*

Chairman Herzog, speaking only for himself in one part of the majority opinion, suggested that he would have dismissed the complaint had the employer contemporaneously notified the union that his refusal to bargain was based on the union's non-compliance. Such a position, he argued, would be consistent with both the basic principle of collective bargaining and board encouragement of union compliance. Although Chairman Herzog speaks alone, it seems obvious that his position would be decisive in the situation he envisions, considering the 3-2 lineup in the *New Jersey Carpet* case. His view is noteworthy, for it is the only one which seeks a solution to the mystery of congressional intent by explicit compromise between conflicting statutory provisions.⁷⁷ Chairman Herzog's own elaboration of the compromise position suggests reliance upon employer motivation, thus placing a premium upon the employer's sophistication in publicizing his refusal to bargain.⁷⁸ In so complicating the rule's application much of the value of compromise is dissipated. More important, the court's procedural construction, now adopted by the board, finds strong support in the language of the subsection. "Contemporaneously" requires that the act complained of occur prior to compliance. Since, under prior statutory construction, the only unfair labor practice for which unions *qua* unions seek redress are employer refusals to bargain in violation of Section 8(a) (5), this must be the act contemplated by Section 9(h). Conversely, acceptance of the substantive view that the act does not later punish employers' refusal to bargain with a majority non-compliant renders meaningless the subsection's sanction that "no complaint shall be issued" until the union complies.

As with the individual unfair labor practice cases, the board's resolution of the conflict between employee rights and non-compliant disabilities in the refusal-to-bargain cases greatly

Bruce, stated, "If the Board would not require an employer to bargain with the Union during a period of non-compliance, I cannot see how an employer later may be held chargeable for an unfair labor practice for not doing that which he would not then have been legally required to do."

77. "While the 'substantive' rule attempts to solve the conflict between the intent behind Section 9(h) and the over-all objectives of the Act by giving effect in all cases to the former, the 'procedural' rule recognizes the latter as paramount. The Herzog rule is an attempt to compromise between these extremes. Under that rule, no important sacrifice of the Act's broader objectives need be made, since the intent behind Section 9(h) will be effectuated only where the employer's conduct is consistent with his acceptance of the collective bargaining principle." Comment, 18 U. of Chi. L. Rev. 783, 789 (1951).

78. Tennessee Egg Co., 93 NLRB, No. 846, n. 13 (1951).

ameliorates the consequences of non-compliance. The employer's statutory duty to bargain arises upon proof that a majority of his employees have selected the union. Although the non-complying union is denied board certification of majority status, such a showing may be made informally by stipulated agreement, union membership lists, or strikers' roll, procedures that do not require union access to board facilities.⁷⁹ Having established its majority status the non-compliant lacks only the ability to enforce its right to recognition in a board proceeding. This sanction seems hardly sufficient since as the *Andrews* majority recognized, a non-complying union could compel recognition by the mere threat of subsequent compliance and filing of an 8(a) (5) unfair labor practice charge against an employer.⁸⁰ Faced with the prospect of a future unfair labor practice complaint, an employer will probably be more concerned with the economic alignment of rival unions than their compliance status. The *New Jersey Carpet* case has fashioned a weapon with which the majority non-complying union can support its demands for voluntary employer recognition, thereby defeating the superficially onerous proscriptions of Section 9(h).

COMMUNISM AND LABOR UNIONS

The board cannot be censured for ineptitude of legislative drafting. Nor is it subject to criticism for the ramifications of policies embodying multiple intents, no one of which is determinative in the crucial area of conflict. Had the board's early appreciation that employers' voluntary recognition is often tantamount to NLRB certification been shared by the drafters of Section 9(h), the basic weakness of an affidavit requirement might have been foreseen.

Examination of board policy supports the conclusion that Section 9(h) has been largely ineffective in lessening the impact of Communist-led unions upon labor-management relations.^{80a} Two other areas, intra-union political activity and union compliance conduct, appear to corroborate this contention. Although Communist leadership in the labor movement has declined

79. Consult CCH ¶ 3080.

80. *Andrews Co.*, 87 NLRB 379, 383 (1949). The union is under no duty to renew its request for recognition after it achieves compliance. *I. B. S. Manufacturing Co.*, 96 NLRB, No. 200, CCH ¶ 11,216 (1951).

80a. For a contrary view that the increasing pressure exerted by NLRB administration of Section 9(h) has resulted in sophisticated techniques of evasion which threatens the subsection's continuing effectiveness, see Statement of NLRB, *op. cit. supra* note 13.

markedly in the years following the enactment of the Taft-Hartley Act, it is probably true, as one commentator claims, that the non-Communist affidavit requirement has had slight influence on this trend. "[I]f the provision in question had never been enacted, the CIO, nevertheless, would have taken substantially the same action that it has. Issues such as the Marshall Plan, third-party politics, the union's international affiliations, presently, the Korean crisis would have made it impossible to tolerate the conduct of the leftists—regardless of the enactment of the non-Communist provision. Third, and conversely, in no instance was the CIO's expulsion of a union based upon that union's refusal to comply with the affidavit requirement; in fact, most of those unions had come into compliance prior to their expulsion from the parent union. In short, the conduct of the CIO is to be explained by something more fundamental than the mere enactment of a piece of legislation. Its conduct is a reflection of the deterioration of this nation's relations with Russia."⁸¹ It is significant that the CIO has not been satisfied with the mere execution of the Taft-Hartley affidavits. Opponents of left-wing union leadership have clearly rejected reliance upon a provision which Congress offered as a weapon in intra-union political struggles. Their conduct demonstrates that defection of politically undesirable forces in the labor movement cannot be accomplished by such simple statutory devices. On the other hand, the compliance conduct of unions indicates their own appreciation of the ineffectiveness of Section 9(h). On June 30, 1951, 15,678 local unions were in compliance with the affidavit requirement. But approximately ten thousand additional local unions which had complied in prior years had allowed their compliance to lapse.⁸² The magnitude of the lapse statistics indicates that large numbers of local unions who have no association with Communism have found it unnecessary to maintain observance of the act's requirements. This fact seri-

81. Levinson, *supra* note 13, at 1089-90.

82. COMPLIANCE WITH 9(h) REQUIREMENT

Affiliation	Local Unions in Full Compliance		Local Unions Whose Compliance Has Lapsed	
	Unions	Affidavits	Unions	Affidavits
A F of L	9,408	85,375	5,988	57,302
C I O	4,700	39,327	2,448	24,233
Independent	1,570	12,263	1,563	10,920
TOTAL	15,678	136,965	9,999	92,455

Source: NLRB Affidavit Compliance Branch, Monthly Report of Compliance for Month Ending June 30, 1951.

ously challenges the complacency of those legislators who envision Section 9(h) as a means of driving Communism out of the labor movement.

On another front, congressional action suggests current efforts to meet the threat of Communist activity in the labor movement with new legislation.⁸³ Earlier efforts in the Democratic Eighty-first Congress to amend the Taft-Hartley Act attempted to delete the affidavit requirement. Shortly after the bill's introduction a revised Section 9(h) was inserted.⁸⁴ This acceptance of non-Communist affidavits as a continuing feature of labor-management legislation must not go unchallenged.

Exposure of the impotency of Section 9(h) as a means of social control does not exhaust concern with its role in industrial relations. Legislation often plays a dual role; it is both a substantive regulation and the expression of a policy which itself influences public opinion. Enactment of the affidavits requirement highlighted public disapproval of Communist-led unions. To the extent that this disapproval was successfully exploited by employers and rivals to weaken such unions, Section 9(h) has been useful legislation.

Three alternatives follow: Retention of the present opinion-forming subsection; substantive regulation of politically suspect unions; and removal of any reference to such unions from the statutory scheme. Evidence of 9(h) influence upon public opinion is negligible and hardly susceptible to rigorous examination. On the other hand, experience under the present subsection suggests the difficulty of effective control without resort to drastic techniques which would jeopardize individual employee security as well as collective action. The third alternative, in effect, recognizes that evils attendant on Communist domination of labor unions can be remedied solely by private citizens and alert unionists. The recent rapid decline of Communist influence in the labor movement, cited above, lends credence to this contention. However, in the last analysis, a choice among alternatives will be determined by one's assumptions as to a democratic labor movement's ability to successfully absorb a revolutionary force which seeks its destruction. In a generalized

83. Senator Humphrey (D., Minn.) currently heads a Senate subcommittee which is investigating the extent to which Communist-controlled unions are in a position to endanger the defense effort. Consult *Communist Domination of Certain Unions*, Sen. Doc. No. 89, 82d Cong., 1st Sess. (Oct. 19, 1951).

84. Shair, *supra* note 13, at 944.

form this has been a problem confronting all democratic societies. Because it is both persistent and difficult, effort must be expended in sincere and enlightened deliberation. The exposure of Section 9(h)'s failure as a regulatory technique is merely a prelude to the enigma of fashioning effective public policy in this area.⁸⁵

85. "Essentially, communism's role in labor organizations is much more a part of the problem of communism's place on the entire American scene than it is part of the problem of labor-management relations. It should be dealt with accordingly." Statement of NLRB, *op. cit.* supra note 13.