A NEW APPROACH TO LABOR LAW

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Business & Engineering Administration

1947

THESIS AUTHORIZATION

Date March 24, 1947

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Topic Possibilities of a Uniform Labor Statute

This is your authority to proceed with the thesis investigation as outlined in your preliminary report. Please return this sheet with the original copy of the finished thesis.

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Dear Sir:

In accordance with the requirements for graduation, I submit a thesis entitled "A New Approach to Labor Law."

Sincerely yours,

Robert N. Creek

PREFACE

This is an attempt to appraise the present-day labor policies and law and to present suggestions for modifications and changes that will be for the good of all parties--particularly the consumer.

The Introduction is an attempt at explaining the author's general position. Part I is a brief summary of the history which leads up to present-day policies and also an attempt to define the government's policies. Part II deals with the inadequacies and complexities which can be found in the law. Part III proposes to set up machinery that will effectively handle all labor troubles, and Part IV is composed of specific recommendations for legislative action.

INTRODUCTION

During the last fifteen years, public opinion with respect to labor has fluctuated widely. Before the great depression, neither the public nor government manifested much concern over the weakened bargaining position of labor. But in the Thirties, the Federal Government, supported by public opinion, undertook to promote the extension of unionism throughout the economy, to broaden the scope of collective agreements, and in every way possible to increase the power of labor organizations in the bargaining process.[1]

We are today faced with the inescapable problem of labor strife, the battle between labor and capital. It has become so wide a problem with so many ramifications that it comes into each and every home, by newspaper and radio propaganda, by direct contact with one or the other of the parties; and inevitably by our position as consumers.

Many people will draw their views upon the subject according as they are lined up with labor or capital; many more will align themselves with the pro-labor forces or management because of sympathies that spring from their work and education. But everyone is drawn into the conflict, unwillingly and unknowingly, perhaps, as a consumer.

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1. Metz and Jacobstein, A National Labor Policy, Brookings Institute, Washington, 1947; quoted from the preface.

Labor costs are generally direct costs of a product and as such are reflected in the selling price of the item. If wages go up, prices must go up, unless management has been making abnormally large profits or operating at poor efficiency. There is a wide divergence of opinion on this economic theory[1]; nevertheless, it is the one that is taken here. To argue this single point would take volumes.

It is an almost impossible thing to remain "neutral" when examining such a controversial subject as labor law; one is inevitably led to become pro-this or anti-that. In this case the closest thing to a neutral position with respect to labor and capital is to be "pro-consumer." That will be the attitude taken in this thesis.

Labor Unions

With the passage and subsequent successful constitutional testing[2] of the Wagner Act in 1935, we have expressly given toleration to an institution directly at odds with what many have traditionally cherished as the American way--namely, free competition and enterprise. Labor unions are candidly monopolistic organizations and are anti-competitive in almost all cases. Still labor

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1. Unions must "debunk the stupid economic theory that you cannot raise wages unless you get a comparable price increase. The whole history of American industry belies this contention." Walter Reuther in a speech at Atlantic City, November, 1946.

2. Jones & Laughlin Steel Corp. v NLRB, 301 U.S. 1

unions must appear to all except the most prejediced as valuable and necessary institutions in our industrial society. They are, as Justice Holmes points out, necessary to obtain that equality of bargaining power in which real liberty of contract begins. For years, however, many employers defeated efforts of their workers to organize by discharging union leaders, by black lists, by forcing workers to sign yellow dog contracts, by setting up company unions, and the like. To make collective bargaining possible to all, the Wagner Act was passed.

As a practical matter then, we have committed ourselves to toleration within our midst of a monopolistic force wielding tremendous economic power. This does not mean, however, that we are helpless in dealing with this force or subjecting it to those restrictions considered necessary for the good of all. With management the restrictions on unfettered power came fifty years ago with the Sherman Act. Recent indications that the public thinks that unions, too, must be limited in their activity have been seen in the Ball-Burton-Hatch Bill and the Taft-Hartley Act.

The Strike

No one can now deny the union of the use of its most potent weapon--the right to strike. It is not only politically impossible, but socially dangerous, to try to completely abolish the strike. Yet Congress has tried to

prevent strikes on interstate carriers[1] by providing what almost amounts to compulsory arbitration. As a result of the disasterous coal strikes in November 1946, many people called for this same sort of arrangement to be applied to certain industries.

The right to strike is necessary for labor to accomplish its legitimate objectives, generally regarded as higher wages, shorter hours, and better working conditions. But just as most rights are limited by the rights of others, is it not reasonable to suppose that there are times when the right to concerted action should be limited? How far these limitations should go, we will attempt to find out.

A Labor Law

There are many who argue that legislation and laws will effect no cure upon the present labor strife[2]; they would argue that all turmoil will disappear when labor and capital cease to regard one another as enemies and join in a common goal of more production with less effort. However this is not the case at the present time--all is not in "apple pie order." To argue that we need no murder laws since very few people would commit murder is

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1. Railway Labor Act of 1926, amended 1934, USCA 151 et seq.
2. The President of the United States among them.

obviously unsound; so long as we have even a few potential or actual trouble makers on the labor scene, we will need a law to protect the majority. If in time, the need for such a law disappears, the law itself will also fade away.

In the effort to determine just what should compromise a labor law we look to the ideas which seem to have developed in the administration of justice from as far back as the time of Demosthenes. Some responsibility for our conduct is a minimum requirement for social life in our world; considerations should be given interests which should be free from interference (such as health, etc.); a law should deal in a consistent way with the conflicting desires which create disputes and law suits; yet circumstances must always be taken into account[1]. These ideas have been bred into us so deeply that we are perhaps normally unaware of their existence, but let one of them be endangered and we very quickly awaken to the danger.

Keeping within the bounds of our cherished ideas of law, we still wish to see industrial strife ended, or at least reduced to a minimum. From a layman's point of view, a law should be stable, intelligible, on record for public reference, and designed for the greatest good of the greatest

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1. This is an extremely brief summary of 22 pages from Sharp & Gregory, Social Change and Labor Law, University of Chicago Press, 1939, 1-22.

number. Of necessity it should be capable of easy enforcement in principle and letter.

We are looking, then, for a means of solving the many labor problems that confront us, solving them with dispatch and with no hard feelings.

PART I

A history showing the development
of present-day labor policies.

I. Brief History of American Labor Law

Before attempting to evaluate the present-day labor law, it is first necessary to consider the development and origins of the Federal labor policy. Changing economic forces have brought about entirely new concepts within the past one hundred years. The major events in the evolution of these new concepts will be traced in this section.

Early English Law

The three cases often called the "House of Lords Trilogy"[1] established the English concept of labor unions at the turn of the century; namely, that intentionally inflicted harm is actionable unless justified, the justification depending largely upon the judge's social and economic predilections. The judges were quite opposed to labor self-help and developed the "criminal conspiracy" doctrine. Only through judicious use of their ever growing political power did the British trade unions develop their programs. So careful has been this use that until quite recently the British labor scene has been relatively quiet.[2] It was only natural that the early concepts of English law would be carried to America.

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1. Mongul Steamship Co. v McGregor, 23 QBD 598; Allen v Flood, (1898) A.C. 1 (H.L.); and Quin v Leathem, (1901) A.C. 495 (H.L.Ir.)

2. Sharp & Gregory, Social Change and Labor Law, University of Chicago Press, 1939, p94.

Early American Law

In 1806, in the first American labor law case, the judge adopted the criminal conspiracy doctrine without reservation.[1] However, the history of this doctrine was quite brief in America. In 1836, the conviction of twenty journeymen tailors in New York in the case of People v Fisher resulted in demonstrations by mobs and hangings of judges in effigy. The judiciary began to see that some new concept was needed.

In 1842, the Chief Justice of the Massachusetts Supreme Court dealt this doctrine a resounding blow which all but exterminated the idea of criminal conspiracy. In Commonwealth v Hunt[2], a milestone in U. S. labor law, Chief Justice Shaw made the end of the strike the thing to be tested. In this case, a strike for making certain non-union employees join the union, the end was held to be legitimate. Indirectly, the use of self-help tactics was approved.

Unions were quick to use this new found help and began organizing on a large scale. A strike could make an employer come to terms before the long, drawn out processes of a criminal prosecution could be completed; thus the employer began to look for a new weapon.

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1. Philadelphia Cordwainers' Case, Commons & Gilmore, Doc. Hist. Amer. Soc. (1910), III, 59-248

2. 4 Metc. III (Mass. 1842)

The Injunction

The American bar met this seeming crisis with the most powerful weapon in the history of labor disputes--the labor injunction and restraining order. During the heyday of the injunction, roughly from 1880-1932, the judiciary was overwhelmingly lined up on the side of business. Most of the time, the question seemed to be the legality of the collective bargaining practices. Union pressure upon the political scene made some stir but produced no results. "We especially object to government by injunction as a new and highly dangerous form of oppression by which Federal judges, in contempt of the laws of States and rights of citizens, become at once legislators, judges and executioners."[1]

Judges used no juries, and issued injunctions ex parte, because it was felt that speed was the real test. Even if a union was in the right, there was no sense in risking great damage to the company. If the unions were proved wrong in a criminal proceeding, "the remedy at law would be inadequate." So, strikes must be prevented.

Industrial Conflicts

It was said that labor unions should abandon coercive practices in favor of orderly recourse at the polls.

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1. Proceedings of the Democratic National Convention, 1896

But labor must first organize before it can present united policies to be voted upon. The biggest struggle was the uphill climb to organization. The strike had become a familiar phenomenon in our history ever since the 1790's; but prior to the Civil War, strikes had been localized and, on the whole, peaceful. "The Great Strike of '77" was the first great outburst, the first large-scale battle between labor and capital. Others followed: the Pullman Strike in '94, the Haymarket Riots, the Homestead battles in '92; the outbreaks in the coal fields of Pennsylvania in '02; and many others. The Pullman strike put the Federal government in direct opposition with labor. Warfare has ever been continuous on the labor scene; thirty-eight thousand strikes between 1881 and 1906; twenty-six thousand between 1916 and 1935.[1]

Legislation and the Courts

If the warfare was continuous, so were the attempts at peace. Both labor and capital showed that they were anxious for peace. Employer "paternalistic" approaches dominated one side of the scene, while labor placed its reliance upon collective bargaining and self-help tactics. The government, Congress, approached the problem with various legislative acts.

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1. Quoted from Morrison and Commager, The Growth of the American Republic, Oxford University Press, New York, 1942, II, 166. The description of the American labor movement in Chapter VII is much more detailed than this brief outline.

The Erdman Act of 1898 which provided for the arbitration of labor disputes on interstate carriers was declared unconstitutional as an abbrogation of the freedom of contract.[1] In 1890, Congress passed the Sherman Act which, though it aroused the fears of labor leaders, was thought by the authors not to affect labor. The suspicions of the labor leaders were soon confirmed in the famed Danbury Hatters' case.[2] The Clayton Anti-trust Act of 1914 contained a special clause[3] forbidding the use of the injunction in labor disputes, except "to prevent irreparable injury," but a series of court decisions, especially the Duplex Case, nullified this provision.

By now it is seen that the government was attempting to take control of labor disputes, and that the courts were trying equally as hard to preserve their control over the labor scene. In 1932, an effective act was passed, the Norris-LaGuardia "Anti-injunction" Act, which prevented the federal courts from issuing injunctions in labor disputes, did away with the legality of the "yellow-dog" contracts, and attempted to define the term "labor dispute." This was the first federal declaration of the federal policy with respect to collective bargaining--labor was to be free from interference, restraint,

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1. Adair v U.S. 208 U.S. 161 (1908)

2. Loewe v Lawlor, 208 U.S. 274. This and the ensuing cases are discussed again, infra, Part II

3. Section 20

or coercion. . .for the purposes of collective bargaining or other mutual aid or protection.[1]

Federal Intervention

The Sherman and Clayton Acts were not designed exclusively as labor legislation; the Norris-LaGuardia Act was. But even before this there were other federal attempts to handle labor problems. The Erdman Act of 1898 has already been mentioned. Labor's first real experience with federal intervention came in the First World War. At the request of President Wilson, representatives of the AFL met with employers in a labor conference at which was formulated a set of principles to be used as a guide during the war emergency. The basic ideas agreed to by both parties were that labor would not strike, and in return that employers would not try to fight labor organization moves; and they would not discriminate against union members. The National War Labor Board was to administer the program, and consisted of five labor members, two members to represent the public, and five members from management.

After the war came the depression of 1920-21 in which large scale unemployment came in; and by 1923 union membership had dropped 30 per cent. Management became anti-union, but at the same time tried to improve the worker's conditions. This was the era of the "company union." Once again

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1. 29 U.S.C.A. Section 102

there were fights for organization.

The first important move in the direction of federal protection of the right to organize came with the enactment of the Railway Labor Act of 1926. (From the point of view of labor, this act was strengthened by amendments adopted in 1934.) The government had returned the railroads to private ownership in 1920; Congress simultaneously created the Railway Labor Board which was purely advisory--it had no power to enforce anything. This Board was in effect ignored, and a drastic strike in the industry rose after the wage cuts necessitated by the depression of '21. It was for the purpose of preventing strikes and avoiding interruption of railway service that the railways and the unions jointly appealed to Congress to enact the Railway Labor Act of 1926.

This Act created a Board which was to seek peaceful settlement of disputes wherever possible by voluntary arbitration. In case of trouble, the Board could appeal to the President who was then to appoint a fact-finding commission. This law imposes upon both railroads and unions the obligation to make every sincere effort to enter into and maintain collective bargaining agreements.

The second major step in the development of the policy of federal intervention came with the passage of the Norris-LaGuardia Act which has been discussed previously. Besides relating to the injunction and the yellow-dog contract, it is significant in that it contained the first declaration of a congressional

labor policy with respect to collective bargaining for all cases coming within the jurisdiction of the federal courts. It wasn't long before Congress would try to extend this policy over the entire national labor picture.

The Government Guarantees the Rights of Labor

The long and disasterous depression which began in 1929 caused organized labor for the first time to appeal to Congress for aid in the fixing of hours and wages; in the emergency, self-help had proven of little value. Whereas Congress did not enact the proposed thirty-hour week, a plan for the general recovery of the nation was passed, the National Industrial Recovery Act of 1933, better known as the NRA. Even though this act was declared unconstitutional,[1] it contained the labor provision which was to become the basis of the Wagner Act, the famous section 7 (a). It was provided that employees should have the right to organize, bargain collectively, choose their own representatives, that they should be free from employer restraint, interference, or coercion, free from discriminatory practices, and free to freely choose whichever union, if any, they wanted.

When the NRA was held invalid, organized labor abandoned their traditional policy of self-help and sought enactment of a law which would embody the provisions of

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1. Schechter Corp. v U.S., 295 U.S. 495 (1935)

section 7 (a). This goal was accomplished on July 5, 1935, by the passage of the National Labor Relations Act, better known as the Wagner Act, "Labor's Basic Charter."

The expressed policy of the Wagner Act is based on two considerations: one, that by strengthening the bargaining power of labor the free flow of commerce would be facilitated; and, two, that the national economic welfare would be helped by the increased ability of labor to secure a larger share of the national income.

The Wagner Act extends to all industries which can be classed as engaged in interstate commerce, and also provides enforcement provisions. It spells out in considerable detail (in section 8) what would be considered unfair labor practices on the part of the employer. It can enforce its decrees by appeal to the Circuit courts; and, if an employer then refuses to follow its orders, he stands in contempt of court.

One of the primary functions of the NLRB is to designate proper representatives and bargaining units. The administration of this function as had considerable influence in the selection of the bargaining representatives in plants and industries.[1]

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1. The rules and methods used in determining these bargaining units will be found in NLRB, Third Annual Report (1939), 157-190 and in the succeeding annual reports.

The Wagner Act was frankly designed for the exclusive benefit of labor; the employer had too long held the upper hand over his employees. There was no such thing as an unfair labor practice by labor within the meaning of the act. Even though this act is designed to encourage and promote collective bargaining, the obligation to bargain collectively is not imposed on labor, but is a "must" for the employer.[1]

World War II

Since the NLRB had no authority to deal with labor disputes, many new ideas were tried and new machinery set up. The object of all was, of course, the furtherment of the war effort through the maximum efficiency of labor--i.e., no strikes. First came the Office of Production Management with Mr. Knudsen and Mr. Hillman representing management and labor respectively. Then there was created a National Defense Mediation Board, which broke down on the question of the closed shop when the CIO withdrew from the Board.

Then the National War Labor Board was created by executive order. Congress soon after enacted the War Labor Disputes Act which prohibited the encouragement, etc, to strike in government operated plants. The War Labor Board, under Mr. Wirtz, was deluged with cases that arose under the

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1. The history here presented has been taken largely from two sources; Morison and Commager, Op Cit; and Metz, The Labor Policy of the Federal Government, The Brookings Institution, Washington, 1945.

provision of the thirty days cooling-off period in all industry provided by this Act. The outstanding defect of the WLB has been said to be that it had no body of principles on which to base its decisions. By November, 1946, all controls were lifted off labor with the exception of the existence of a National Labor Relations Board which was from many sides declared to be outmoded.

The Taft-Hartley Act.

"The Taft-Hartley Act is on the books today because no free people can tolerate any great and powerful group, as labor unions are today, being above and beyond the law. Prior to June 23, 1947[1], there were federal laws governing employers in labor relations, but virtually none governing the conduct of unions. The power which this situation gave to the leaders of the big unions was tremendous. Small employers and individual workers were at their mercy. They had to go along with patterns set by a few union leaders in negotiations with a few great corporations."[2]

Thus we can see the picture of labor law as a great pendulum. When it became evident that labor was completely at the mercy of capital the pressure of public opinion and congressional action swung the pendulum far over to labor's side. Gradually this pendulum has swung back, quite rapidly within the last few months, to a position where management is

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1. The day of the Taft-Hartley Act was passed
2. The Honorable Joseph Ball in an address from Washington, July 10, 1947

recognized to have been harmed by labor. During these swings a great body of law has been built up; some doctrines have appeared and have been short lived, others have prospered. From the brief history presented here, the essence of what is today our national labor policy can be drawn.

II. The Federal Labor Policy and Law

Since the enactment of the Wagner Act the federal government has sought to enable employees to gain higher wages and shorter hours of work by increasing the bargaining power of labor. It has attempted to promote the peaceful solution of labor difficulties, and has given the employees the right to organize in their own way. Naturally there have been clashes between these objectives. One objective has prevailed over the other two--bargaining power has been preserved at all costs.

Concerted Action

The federal government sought by increasing bargaining power and promoting concerted action to raise the wages and lower the working hours of the American workingman. Efforts have been made to protect the employee in the use of various forms of concerted action: the organization of unions, the right to strike[1], picket and boycott. Not only have employees been given the right to organize, but they are actually encouraged by the government to exercise that right on the premise that an increase in union membership will result in increased union bargaining power. At present, the right to strike is almost unlimited (again, excepting the Taft-Hartley Act as untried). In a number of ways the government has made it hard for the employer to operate his plant while his employees are on strike.

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1. "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." Section 13, National Labor Relations Act.

Few limitations have been placed upon the workers' use of the various forms of concerted action. Even though interstate commerce is affected and restricted, these various self-help methods are condoned.

The ultimate end of concerted action by unions is supposedly the negotiation of a collective bargaining agreement. It is, however, almost impossible for an employer to enforce the provisions of an agreement and recover damages as a result of breach of contract. Even though a union agrees not to picket, strike, or anything else, it can without any trouble do just what it has contracted not to do. One of the reasons an employer enters into an agreement with a union is to free his establishment from the losses incurred by union activity. Many employers see little to be gained from a collective agreement if there is no way of enforcing its provisions.

Self-Organization

The second of the three fundamental objectives of the federal government is the worker's right to self-organization. In order to help this along as much as possible, the employer is forbidden to do or say anything that would even indirectly interfere with this right. The National Labor Relations Board is set up to do further this aim, to protect the employees in their self-organization.

The Federal Government helps this as much as possible. It even picks the proper bargaining units in an industry or a company and regulates the election for the proper representatives. This is necessary, for if the employer is

to know with what unit he is to bargain, somebody must select this unit; who else but the government. But in a sense this contradicts the right of self-organization; the selection of the bargaining unit is oftentimes tantamount to the selection of the representatives.[1]

Peaceful Solution of Labor Difficulties

Concerted action and Self-organization have been encouraged because it was felt that through these two means, there would be a substantial cessation of labor hostilities. Various types of governmental machinery has been at one time or another set up to mediate, investigate, and arbitrate industrial disputes. But in almost all cases where such machinery has existed, the employees have had a free choice as to whether or not they would use the facilities. They could at any time resort to stoppages of work in order to gain their demands. In almost no case, has the workers' rights to strike been limited or regulated (with the possible exception of wartimes measures.)[2]

As actually applied these three objectives frequently conflict. When the desire of the government to increase the bargaining power of employees has clashed with its efforts to secure peaceful settlement of labor disputes, practically always the objective of increasing the bargaining power of

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1. Somewhat similar to the old practice of gerrymandering.
2. But the NLRB was beginning to come around to the idea that some strikes were illegal, and the Supreme Court held that in effect the "sit-down" strike was illegal in NLRB v Fansteel Metallurgical Corp. 306 U.S. 240

laborers has prevailed over all other considerations. It is felt by many that bargaining power has now given away to "bludgeoning power." Almost always the party threatening to break the industrial peace has a definite advantage, because any conciliating agency tends to feel that peace at any price is better than strife. In almost all cases the workers are the ones who are threatening to break the peace and they are thus in the most advantageous position.

Recently, the opposition to these policies scored a victory, the extend of which is still to be seen, in the passage--over presidential veto--of the Taft-Hartley Act. It is clearly obvious that it is time to re-examine these views and policies and the labor law in general with an eye to possible modifications and amendments.

PART II

Showing the complexities
and inadequacies of our
present labor law.

I. Complexities in the Law

Constitutional Problems

Partly because of the limitations put upon Congress by the Federal Constitution , the labor relations policy of the national government is embodied in many acts which were made at many different times. When a policy is embodied in many laws. the only result is that inconsistencies develop in interpretations and in the laws themselves.

One of the major causes for the lack of a uniform federal policy toward labor is the Constitution. The problem of a labor policy has always been attacked by round-about ways and necessarily so. This is due to two factors; first, only certain powers have been given to the federal government; and secondly, the form of our government has complicated matters even more. These two reasons are perhaps one and the same, but a separation helps clarify the problems a little bit.

Nowhere in the Constitution can be found authority for the federal legislature to regulate labor relations, nor is this authority denied the states. According to the Tenth Amendment, this would mean that the power to regulate labor would belong to the states. As a consequence, the federal government can act in this field only within limits of its other powers. As a result the national labor policy has been expressed somewhat indirectly. The Sherman Anti-Trust Act and the Railway Labor Act are justified as applied to labor only by the powers of the federal government to regulate

commerce. The Norris-LaGuardia Act is justified only under the powers of Congress to control the jurisdiction and procedures of the Federal Courts. The federal courts have from time to time expressed themselves on the legalities of various self-help devices used by unions. This is only because the courts have the jurisdiction over cases involving Constitutionality of state laws and of cases in which the parties involved are citizens of more than one state. The Wagner Act was passed under the guise of regulating inter-state commerce.

There is nothing in the world to prevent a Supreme Court someday to undo all that the Congress has done in this field by saying that they no longer think that these acts are legitimate regulations of interstate commerce.

The position of the supreme court as to the boundaries of inter-state commerce has varied as the swing of a pendulum; "Commerce," it said in an early case, "comprehends. . every species of commercial intercourse;" while later on the court became more restrictive as to the bounds within which the Congress could act. The NIRA was held unconstitutional as regulating transactions not directly affecting interstate commerce[1]; a few years later the court began to broaden the scope of the concept again, until today it is hard to find cases which are not somehow tied to interstate commerce.[2]

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1. Schecter Corp v U.S. 295 U.S. 495

2. A wealth of cases illustrating this point may be found on page 395, Handler, Cases on Labor Law, West Publishing Co. St. Paul, Minn.

If the pendulum swings back to the restrictive position once more, as it could easily do, gone would be all attempts at a national labor policy.

The form of government of the country also poses difficulties in formulating a unified labor policy. The Wagner Act protects the worker's rights to join a union, but the legality of those unions rest in the authority of states. Employers under the national law must bargain collectively, but the legal status of the agreements reached is determined by state law. Federal law makes it legal for a trade union and an employer to enter a closed shop agreement, but a state law may make it illegal.

Conflicting Jurisdictions

We have in our governmental system forty-eight states, one federal district, and a federal government (not to mention territories) in all of which there are many labor problems. Each state has its own labor laws, and is, at the same time, subject to the federal authority. Many of these state laws are in complete disagreement. By way of example, consider the closed shop. Until the LMRA[1] it was considered a legitimate object of a strike by the federal government; prior to 1947 it was illegal in five states (Ariz., S.D., Neb., Ark., and FLA.); and as of March 1947 it was illegal in seven more (Tex., Tenn., N.C., N.D., Va., Ga., and N. Mex.) and legislation

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1. Labor Management Relations Act, 1947, the Taft-Hartley Act

was pending in six others while anti-closed shop moves had been turned down in four states (Id., Colo., W. Va., and Wyo.). That this sort of thing leads to incredible confusion is clear to all. How to sue a union was answered in almost forty-eight different ways in the various states. The federal courts have from time to time found it necessary to agree or disagree with various state laws relating to labor practices. It said "Yes" to Wisconsin[1] and "No" to Arizona.[2]

Labor Law may be said to be the traffic controls on union-management conduct. If the rules and signs change from state to state, there isn't much chance for the drivers to remain unconfused.

Someone may argue that this criticism is lacking in force because many of our laws are almost hopelessly snarled. Look at the divorce laws, the traffic laws, etc., etc. Because these laws are confused and are snarled is no argument that they are right. There have been many moves, unfortunately unsuccessful, to consolidate these laws into one federal code or at least a uniform law.

Until the passage of the Taft-Hartley Act there were no restraints upon the unions--no union unfair labor practices in the federal policy. But there were many states

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1. Senn v Tile Layers Protective Union, 301 U.S. 468. Upholding Constitutionality of statute which allowed picketing.

2. Truax v Corrigan, 257 U.S. 312. Declares Arizona Sup. Ct.'s decision in interpreting Arizona anti-injunction statute invalid.

which had put certain restrictions upon the employees. Wisconsin's Little Wagner Act did so, and the Barnes Bill in Massachusetts also tried to take steps toward the regulation of unions.[1]

Court Decisions in Conflict

When various courts hold different views upon almost identical cases, it is a bit hard for management or unions to find out what is correct and what is illegal under various circumstances. An Oregon Court held in the case of an "outside" union picketing employers, none of whose employees were members of the picketing union, that there was no labor dispute.[2] Five years before, in 1936, in Oregon the same thing was found to be a labor dispute.[3] Many more such cases of circumstances and different answers can be found.[4] With the many, many courts that have jurisdiction over labor disputes handing down decisions over a period of years, there is bound to be a confusing end result. Once again, it may be argued that this is so

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1. The variations between State and Federal legislation are discussed in Smith and DeLancy, "The State Legislatures and Unionism," 38 Mich. L. Rev., 987, 996-1023. "Labor relations acts have been enacted in Massachusetts, Michigan, Minnesota, New York, Pennsylvania, Utah, and Wisconsin." (This was in 1940.) In Michigan and Minnesota "trial by battle" is outlawed for a "cooling off" period in which time state officials try to effect a conciliation. With the exception of the New York and Utah statutes, every labor relations act contains employee restrictions. The quantum of the restrictions in the state acts varies markedly. These employee restrictions are, generally speaking aimed at specific types of misconduct, and do not purport to authorize a flood of blanket injunctions.
2. Schwab v Moving Picture Machine Operators, etc. 165 Or. 602 1941
3. Wallace Co. v International Assoc. of Mechanics, 155 Or. 652 1936
4. A list of divergent cases on the meaning of "labor Dispute" can be found in Handler, op. cit.

in any type case that comes before a large number of different courts; but in answer, does this make it right? Because other parts of the law are confused, is that an argument for a confused labor law?

It may also be argued that the National Labor Relations Board has continuity in its decisions, that they never conflict. Even if this is so, it is unfortunate that only certain types of labor cases may come before the Board; namely, cases involving representation by unions and cases of alleged unfair labor practices by the employer. (The Taft-Hartley Act changes this picture a great deal. Now, the employer may bring unfair labor practice charges against his employees.) Other cases which are not within the purview of the Wagner Act must be decided by the courts.

Supreme Court's Role

In spite of Congress's intents, it appears very much as if the future of any labor relations policy lies in the decisions of the Supreme Court. What they may do next is almost impossible to conjure; as already mentioned, the next move may be away from the interstate commerce theory that permits Congress to attempt a national labor relations policy.

When we see what the court has done in the way of assuming legislative prerogatives in shaping a labor law, it is easily seen that Congress's position is a little uncertain--quite a bit so. Why draft laws if the court is going to change them around to its way of thinking; the Congress is supposed

to have the mandate of the people, not the courts. It would seem that the Supreme Court is determined to have a large share in shaping a national labor policy. The Apex Case[1] and the Hutcheson Case show just how the court is moving.[2] "By a process of construction," dissents Justice Roberts in the Hutcheson Case, "never, as I think, heretofore indulged by this court, it is now found that, because Congress forbad the issuing of injunctions to restrain certain conduct, it Intended[3] to repeal provisions of the Sherman Act. . . . .I venture to say that no court has ever undertaken so radically to legislate where Congress has refused to do so."

Congressional leaders had thought that there was no need to put a "safety clause" in the Sherman Act for the protection of labor. They found out differently in 1908 when the Court decided the Danbury Hatters' Case.[4] So Congress in 1914 passed the Clayton Act which was to exempt labor from the provisions of the Sherman Act. It was, however, as Professor Gregory says "a boomerang, since the only thing it accomplished was to permit private individuals to secure injunctions under the Sherman Act."[5] The Congress soon found

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1. Apex Hosiery Co. v Leader, 310 U.S. 469. Justice Stone points out that the court never changes its mind even though it may look that way.
2. U.S. v Hutcheson, 312 U.S. 219
3. Italics Added
4. Loewe v Lawlor, 208 U.S. 274 "The Act provided that every contract, combination or conspiracy in restraint of trade was illegal," said the court and thus fined the union almost a quarter of a million dollars.
5. Social Change and Labor Law. Sharp & Gregory, University of Chicago Press, 1939, p 124.

that the Clayton Act was so much wasted effort since in the Duplex Case[1] the court's first opportunity to pass on the Clayton Act--it indicated that as far as labor was concerned, the Act merely recited what was already law and did not remove labor from the application of the Sherman Act.

The end result was pressure that led up to the passage in 1932 of the Norris-LaGuardia "Anti-Injunction" Act. It was to free labor from the injunction in "labor disputes." To make sure that courts unfriendly to labor would not emasculate this Act as the Supreme Court did Section 20 of the Clayton Act by a narrow construction of labor dispute; Congress went to considerable pains to define "labor dispute" in the Norris-LaGuardia Act. Yet some of the lower Federal Courts including some circuit courts did their best to undermine this statute by construing labor disputes to be only between employers and those persons in proximate relationship of employment;[2] always it would seem that the courts and Congress are in opposition.

Adherence to Precedent Dangerous

There is not much doubt that the law has as its object a stable order; but if conditions and technology change continually why not change the law to meet the changing con-

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1. Duplex Printing Co. v Deering, 254 U. S. 443.

2. Again see Handler, op. cit., p 159, for a list of what has, what has not been determined a "labor dispute."

ditions? This should really be the job of our legislatures. In proof of the fact that the public is no respector of traditional concepts and precedent, let's look at Judge Parker's Case.

"The reaction against the ("Yellow-Dog") contract culminated in the spring of 1930 in the rejection by the Senate of the nomination of Judge Parker to the United States Supreme Court. Senator after senator attacked Parker for having enforced the contract, but as a lower court judge it was Parker's duty to follow the Supreme Court's decision in the Hitchman Case. When the Senate on May 7, 1930, finally voted to reject Parker, it was in reality passing judgement, not upon him, but upon the Yellow-dog Contract."[1]

Once a legal principle has been applied the greatest difficulty is experienced in changing it; courts do not rule contrary to precedent. Judge Pound mentioned this in a case in 1932--"We would be departing from established precedents if we upheld this injunction"[2]--in further applying a doctrine of law first enunciated in 1853.[3]

Is there any good reason for sticking to precedent when times have outmoded that precedent? Because the

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1. Seidman, The Yellow Dog Contract, John Hopkins Press. 1932, p34-36
2. Stillwell v Kaplan 259 N.Y. 405
3. Lumley v Gye, 2 E.& B. 216

courts at times try to hold to precedents and at the same time to meet new situations, great complexities in thought arise.[1]

Great Amounts of Time Involved in Litigations

Another factor which adds to the complexities experienced in labor litigations of today is the great amount of time oftentimes necessary before the case is finally closed. As a necessary corollary is the fact that a great deal of money will be needed for legal fees, etc. The following cases give in brief an idea of how long the proceedings sometimes are: Milk Wagon Drivers Union case,[2] strikes in 1934--final decision in 1941; Hitchman case,[3] suit commenced in 1907--judgement in 1917; Apex case,[4] sit down strike in 1937--court decision in 1940; and so on.

Cases, as a rule, go through the NLRB much faster; but, again, the NLRB has jurisdiction over only certain cases.

When, in many cases the issues are finally settled, the cases themselves were all but forgotten in the minds of the individual participants. Mr. Wirtz of the War Labor Board recently said,[5] "Generally court proceedings take two years to finish suit and render judgement, by which time there is a new collective bargaining agreement which wipes out the

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1. The Coronado Coal Cases, for example. These are discussed in Gregory, Labor and the Law, W.W. Norton & Company, New York, 1946, pp211-218. It is shown how the court exercises gymnastics to stay within a precedent and at the same time tried to keep from applying it.

2. Milk Wagon Drivers Union v Meadowmoor Dairies, 312 U.S. 287

3. Hitchman Coal and Coke Co. v Mitchell 245 U.S. 229

4. Duplex Hosiery Co. v Leader 310 U.S. 469

5. In a speech to the Harvard Law School Forum, March 7, 1947

disagreement."

True, the cases cited settled--or attempted to settle--heretofore undecided matters of the law, and therefore took time for careful rendering of decisions. It cannot be said that the time was wasted;but neither can it be argued that quicker and less costly decisions would not have brought better results. There is ever present the danger that legal proceedings may become fouled with red-tape. This must not be permitted. Speedy decisions are to the best advantage of all just as are speedy resolutions of labor troubles.

This past section has been devoted to showing how great, and unnecessary, conflicts exist in our labor law, our national labor policy. The next section will attempt to show wherein that policy is lacking and weak.

II. Inadequacies in the Law

Parties to a Labor Dispute

In a recent New York World Telegram cartoon by D. H. Smith, organized labor dressed in overalls is seen pulling at the arm of the labor leader, a cigar-smoking, hulking bruiser who is crushing the life out of poor John Q. Public. The caption reads, "But, Boss! He's our Best Friend!" This illustrates the forgotten man in the labor dispute--the consumer.

Too often there is expressed, either directly or otherwise, the idea that there are but two parties to a labor dispute--the employer and his employees. This idea is correct in so far as it goes, but it stops woefully short of the mark. Some people will add two more "interested parties"--the government and those who might be termed prospective employees. Still others add another party--the public. Perhaps the best way of arriving at a proper classification of the interests in a labor dispute would be to examine a typical labor problem.[1]

Imagine, then, a case where a number of employees in a large power company (which employs relatively few operational employees) belong to a union. Another union decides to organize the remainder of the employees; even though aware of the fact that the first union has been certified by the NLRB

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1. Patterned after the recent public utility strike in Pittsburg, cited in Metz and Jacobstein, A National Labor Policy, Brookings Institution, Washington D.C. 1947, p45.

as the bargaining agency for all employees. When it thinks that it has sufficient strength this union demands that it be named the bargaining agent and upon the company's refusal to break its contract with the first union, calls a strike of its men. This shuts the plant down with attendant shutdown of power over all of the city and the stoppage of almost all light and power. No one is able to carry out normal business activities and great hardships are visited upon the everyday affairs of all citizens. Management has been caught in a seemingly insoluble dilemma and can appeal only to the government for help.

Employer, employee, government, and public--the consumers--are easily seen to be the parties effected in this case. Notice who it is that is the most effected--the consumer. It was taken as a basic premise in the Introduction that the consumer is the most important of all parties involved. But the government hasn't thought so.

Here there is a large area for argument that depends upon different ideas of government. The stand taken here is that the protection of the consumer is the most important function of the national labor relations policy. The consumer has a hard time getting a new car, a new this or a new that, because there just aren't many on the market. Why? Well, there is a parts shortage created by a strike in a supplier's factory, etc., etc., ad nauseam. Our industrial scene is one of ever more integration and constant intermeshings; all parts

are dependent to some degree upon another part or parts. Trouble in one gear cog slows down the whole machine. And the one person who always loses--the consumer--wonders why; so far it seems to be his task not to reason why, just do and buy (if possible).

An obvious fact that seems to have escaped detection by a large majority of people, especially the apostles of ever higher wages, it that without exception every single person in this country is a consumer whether he belongs to the NAM or the CIO, the NLRB or the plain voting citizenry with no affiliations. The consumer is the key piece in the jig-saw puzzle of our economy. Without the market that he himself is, the smokestacks of industry will cease to spout and the production lines will come to a halt.

Incidence of Strikes

Over 116,000,000 man-days idle as results of strikes in 1946![1] Just triple the amount of days lost in 1945 due to strikes. The 1946 figures were called a "normal" reaction in a postwar period by some. But other statistics belie this contention. A year which might be called "average," 1941*, had over twenty-three million man-days idle;[2] and in the war year, 1942, there were still over four and one-half million idle man-days,[3] as a result of strikes

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1. Work Stoppages Caused By Labor Management Disputes, 1946 U.S. Bureau of Labor Statistics, Monthly Labor Review, Vol64, #5 (1947) p.780
2. U.S. Bureau of Labor Statistics, 54 Monthly Labor Review, 1107, 1125 (1942)
3. Ibid. 55MLR 255 (1942); 56 MLR 292 (1943)

It is significant that less than 10 per cent of the strikes in 1942 were for recognition, whereas before the Wagner Act, most of the great strikes were for that purpose. The bloody Homestead strike in 1892 and the Pullman strike in '94 were essentially recognition strikes. The Wagner Act has accomplished its purpose; "It is hereby declared the public policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have been occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association. . . ."[1]

Only in so far as its expressed purposes has the Wagner Act been successful. True, it has eliminated a great deal of the obstruction of the free flow of commerce by causing a great cessation in bargaining and organizational strikes; but it also has helped create a monster--the jurisdictional strike, the closed shop fights, the sympathy strike, and others have not been prevented nor have causes been eliminated. The real intention of the authors of the Wagner Act was the protection of the worker's rights to organize and use unions for bargaining. This has been accomplished, but it has had little effect on settling the labor difficulties of the country.

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1. 29 USCA Section 151

Functions of the National Labor Relations Board

Until August 22, 1947, the NLRB had only two functions; namely, to hear "C" cases (Complaints under Section 8) and "R" cases (Representation cases). There was no machinery for dealing with any other disputes that might arise. That the functions of the Board under the Wagner Act were thought inadequate is easily seen in the passage of the recent Taft-Hartley Act. Whether the new powers of the Board under this Act will successfully mitigate labor strife, remains to be seen. A great many people think not, especially in the face of the refusal of the CIO and AFL to deal with the new Board.

Strikes Affecting the General Public

There has been no provision in the policy of the Federal Government about strikes which are contrary to the welfare of the general public. Only under special war-time powers did the Federal Government feel safe to move against John L. Lewis in the recent coal strike, and then what victory there was seemed very hollow. There is no provision in the Wagner Act or any other Act (with the exception of the untried Taft-Hartley Act) for the protection of the public from nationwide, crippling strikes, such as the recent telephone strike. Political and economic pressure by certain labor leaders and their direct dealings with the White House have all but destroyed the prestige of government agencies.

Unions have come to expect federal intervention when an industry-wide strike affects the general public. In fact, this has become a part of union strategy. When there is a complete stoppage of the production of a basic commodity, the strike is in reality a strike against the general public, including workers indirectly affected, quite as much as it is a strike against the employers. In cases where the employer is the United States Government, the strike or threat of strike is directly against the Government itself. This was the situation in November 1946 in the coal industry.[1] Whereas the government has no expressed powers other than those given it temporarily in the war, there have been many attempts at conciliation and settlement on the highest government levels. In the settlement of economic problems, political,expediency is likely to become the yardstick.[2]

Everyone is becoming aware that many strikes hit the public directly. There is no need for extended examples of how this can work; everyone is too familiar with the desparate situation occasioned by the coal strike of November, 1946.

It was taken as a basic premise that the general public--the consumer--must be protected. At present there is no articulate government policy on the position of the consumer. It would seem that the government leaders are swayed by the political power of the union leaders.

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1. Metz and Jacobstein, op cit., p.34

2. In October, 1946 present with J. L. Lewis and President Truman's advisers in conference over the coal contract was the chairman of the Democratic National Committee. New York Times 10-30-46

It is evident that the free flow of commerce can be seriously interrupted, even cut off, by labor activities over which the government has no control.

The Sherman Act, the Securities Exchange Act, and the Public Utilities Holding Comapany Act all were designed to protect the public from the monopolistic actions of large scale management activities. As yet, there is no Act or policy designed to protect the public from the activities of labor unions and management when engaged in industrial warfare.

Part II has tried to show the inadequacies and the complexities in the present picture of labor law. Part III will attempt to iron them out by a program of legislation and arbitration machinery.

PART III

Resolving the conflicts in labor law and setting up a system which will facilitate prompt solution of labor strife.

I. Objectives

Objectives

."We must always be aware that there is no logical or ultimate solution. We are almost unable to define exactly what social principles could be used in developing a logical answer. Our public leaders seem to have widely divergent ideas; they seem to be floundering in a sea of inconsistencies, uncertain of the next turn, while the participants of the struggle are still engaged in almost primitive forms of trial by combat."[1]

* * *

It is to be noticed that only the poor points in the labor law as it exists today have been brought forth. This is not an attempt to completely discredit the good points. The fact that unions and collective bargaining have been recognized as necessary parts of the American scene show that there has been an advance in the direction of a solution of labor troubles. The main trouble is that the steps have gone only so far and recognized but one side of a many-faceted problem.

Any solution, in order to be worthy of the name must be plausible and must also solve the problem at hand. Needless to say, no matter how perfect in theory, if an answer will not be acceptable to those people on whom the task of

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1. Gregory, op cit., p 444

actual operations falls, it is no answer at all. The possibilities presented here will be analyzed with this thought in mind, and will also hold to three fundamental ideas.

1. That labor unions and their legitimate objectives must not be emasculated is a primary idea, but that restrictive labor practices are undesirable is also important.

2. That labor conflicts must not be extended to a point where they will substantially injure innocent third parties is taken as fundamental.

3. That peaceful settlement of labor disputes must be facilitated, and if needs be, at times enforced is also fundamental.

* * *

That labor unions are desirable was discussed in the Introduction and the need for their development was shown in Part I. They have served the very useful function of bringing about an improved ratio between prices and wages. Yet even in 1942, the Bureau of Labor Statistics estimated that over 61 per cent of American families had an income which could not maintain a level of "health and decency."[1] There is still a large field for valuable union activity.

To attain a higher standard of living requires the production of more goods and services for consumption at a lower level of effort. But not infrequently the concerted

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1. In 1942 given as $2,060

action of labor is utilized to restrict production, fear of overproduction and unemployment being the cause for such action. There is generally an antagonism to improved technology. In many instances unnecessary workers must be hired--as in the Musicians Union and the railroad Brotherhoods; painters outlaw the use of wide brushes and sprayguns, and the UAW has stated at one time that it was their intention to lower man-hour output.[1]

At present there is a great unfilled demand for goods; there has been this same demand in the past; and yet labor tries to justify these practices on the grounds of possible overproduction. It is obvious that here we have a case of conflict between the short-term interests of a very few and the long-run interests of the whole community.

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Even in the areas where there has been no legal remedy for a wrong, force and violence have never been regarded as a proper means of satisfaction. The area of private warfare has always been limited by the considerations of the possibilities of injuring an innocent party or the general public. Yet in the labor picture such action is permitted--the sympathy strike, the boycott, the jurisdictional strike cause harm to many persons standing on the sidelines.

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1. TNEC Hearings, Vol. 30, p 16375

It is held here that labor conflicts must not give substantial injury to innocent third parties and that no small group should have power to inconvenience the general public.

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Work stoppages interfere with the productive processes; they injure the general public in very varying degrees. A small number of people in a small but necessary industry can profoundly influence the comfort and even the safety of the whole country. Because the general public has been drawn into the labor scene as an unwilling participant, moves should be taken to protect their interests. There is no reason why capital and labor cannot bargain like sensible people instead of resorting to trial by combat.

II Resolving the Conflicts

There are three possibilities of resolving the conflicts; two of which are rejected as impractical.

First, there is the possibility that within a short time there will no longer be any need for a labor law since the parties will become "enlightened" and treat each other as friendly rivals rather than as mortal enemies. This would be the ideal solution; but, unfortunately, even a cursory glance at the labor scene prevents one from adopting this view, at least for the present and the immediate future.

A more practical suggestion is that which proposes the formulation of a uniform state labor law much as has been done with the law of sales, negotiable instruments, etc. If this could be done, it would assuredly resolve the conflicts arising from various state statutes; but, getting forty-eight legislatures to agree on the same thing or even a reasonable facimile would be a gargantuan task, especially when we cannot get all of our national congressmen to agree. Even if we were finally to see the day in which the various state legislations were in agreement, the necessity for amending these laws to meet the changing times would soon see different states proceeding at different rates in changing their laws.

Then, too, there would still exist the difficulty with the federal legislation, since Congress seems determined to play the major part in shaping the labor policy of the land. These various objections doom this proposal.

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Proposition number three is perhaps the most interesting and attainable. Since we cannot obtain complete accord through state legislatures, and since the Congress is often hamstrung in dealing with labor policy by the various limitations imposed upon it, let us then delegate Congress complete legislative authority for labor matters. This is a large step and calls for an amendment to the Constitution, and will be attacked from many sides. There will be cries defending "states rights;" there will be those that scream that the Government is trying to take over all controls.

But a pause for consideration will convince many people that times are different; that to meet new conditions under a new technology, we need new or, at least, revised concepts to handle problems that have gotten out of hand under the old systems. As Justice Frankfurter put it, "It is idle to feel either blind resentment against government by commission or sterile longing for a golden past that never was. Profound new forces call for new social inventions, or fresh adaptation of old experience. The great society with its permeating influence of technology, large-scale industry, and progressive urbanization, presses its problems; the history of political and social liberty admonishes us of its lessons. Nothing less is our task than fashioning instruments and processes at once adequate for social needs and the protection of individual freedom."[1]

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1. Felix Frankfurter, Law and Politics, 1939, 234

Eventually, if not in fact, at least in effect, there will be such action taken as to amount to an amendment that gives Congress power to formulate a labor policy for the whole land--it is now under the guise of regulating interstate commerce. But doing things by such round-about means, inevitably, leads to confusion.

Congress, then, ought to be given the exclusive authority for the formulation and regulation of a national labor policy.

* * *

Our present-day society becomes more complex in all of its aspects, necessitating the creation of many new types of experts. The lawyer of fifty years ago who tried contract, will, criminal, equity, fraud, divorce, libel, and all other sorts of cases which came to his office, who appealed them to the highest courts if necessary; who did all sorts of legal drafting and personal work is no longer the dominating figure of his profession. A few are found here and there who still bear witness to the remarkable power and range of learning he developed, but as the lawyer who gave the profession its distinctive character during the last century, he belongs to history.[1] And is it not so with the judiciary as with the bar? What ordinary judge can hope to keep abreast of all the types of cases that will come before him.? Surely he cannot give each type the attention it deserves.

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1. Dean Green of Northwestern University Law School in a speech in February, 1936.

This fact was recognized to some extent in the creation of the National Labor Relations Board; a Board of three men, experts, who were to administer the act. This figure has been raised to five under the new labor relations act in anticipation of the increased number of cases that will come before the board.

No matter that the National Labor Relations Board is termed an administrative body; its functions make it to all intents and purposes the equivalent of a United States District Court. Appeal to a Circuit Court is the next step for any party if dissatisfaction is felt whether with a ruling of the Board or a decision of a District Court.

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The second proposal in assembling a smooth-running labor relations machine is to make this board an actual judicial body, inferior only to the Supreme Court, for the administering and judging of law pertaining to labor. Article III, Section 1, of the Constitution reads "The judicial power of the United States, shall be invested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Clearly there is no constitutional bar to such a move as this.

This would assure that (assuming proper appointments) the labor problems of the country would be at all times handled by qualified experts, men educated in labor difficulties and

able to devote their entire attention to the problems of labor alone.

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It has been said that the functions of the National Labor Relations Board makes it a quasi-district court. This imposes the job of handling labor matters upon the circuit courts when the unions, management, or the board itself is dissatisfied with one of the other parties' conduct. The decision to by-pass the Circuit Court by establishing a separate labor court to rank immediately beneath the Supreme Court has been made partly upon the grounds of judicial inability to handle such a wide variety of cases in a manner which will give sufficient attention to each. (As a matter of fact, most cases which are taken to the circuit courts over the NLRB reach the Supreme Court either in hearing or by denial of certiorari.) If carried to an extreme, this argument could lead to the position that not even the Supreme Court is capable of handling the various cases that come under its jurisdiction. Here the defense rests upon a matter for faith; faith that in the United States there will always be nine men of great intelligence and legal ability and experience who can judge any and all matters placed before them.

Very often criticisms have been leveled at our court system on the point that judges are generally appointed for life and may, if they live long enough, hold antiquated views

contrary to the large majority of public opinion. Thus the New Deal in its early stages was faced with an antagonistic court. To prevent extreme difficulties of this nature--where judges fail to develop with the times--it would be easy to limit the time of appointment; appointments could be for ten years, or more, or less.

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Labor problems will be found to vary from district to district; but under the present set-up all labor problems are presumably decided in the same lights, by the NLRB in Washington,D.C. Surely the labor problems in rural states such as Iowa are a great deal different from the problems in an industrial state such as Pennsylvania. If there were district labor courts, problems could be handled much more effectively and quickly by judges acquainted with local conditions. There will be a problem when it comes to apportioning the United States into labor districts, but this ought not to be so hard. The various types of labor troubles are generally functions of the type of industry; it is a fairly straightforward problem to divide the United States into industrial districts.

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The Wagner Act stated that the usual rules of evidence prevailing in the courts of law or equity shall not

be controlling in hearings before the Board.[1] The Taft-Hartley Act has put these rules back into effect. However, there has been considerable modification of the preceedings in the Federal Courts. Yet "No unions and certainly no individual, can now present a case before the new National Labor Relations Board without the assistance of an attorney.[2] A small union--and there are many--could not have its day in court if it could not pay for the services of an attorney. This is a real danger. If we make our law so complex that it stuffs the wheels and gears of our machinery with so much sawdust, what has been gained?"[3]

Great care must be exercised to prevent dangerous over-complications. Yet the charge that the services of a lawyer are needed for a day in court, proves nothing more than has already been pointed out--that our society has unavoidably become complex.

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What happens if an employer or an employee group commits what Congress has declared to be an unfair labor practice and the injured party refuses to complain but prefers to fight it out? Under the present law the Board is forced to sit by and watch the fracas. The framers and inter-

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1. Section 10. (b)
2. For this reason the bill has been dubbed the "Lawyers' Full Employment Bill."
3. C.J.Hagerty, Executive Secretary of Calif., State Fed. of Labor, in a speech on "Town Hall of the Air", July 10,1947

preters of the Taft-Hartley Act are faced with just that problem today; the unions have as yet refused to follow the rules of the general counsel of the new Board; they say they will ignore the Board. Commerce may be interrupted, goods cease to flow, and so forth, but the government is helpless to act. Once again it is the consumer who takes the beating.

In a case where there is substantial interruptions to the free flow of commerce and/or substantial injury to the general public the Federal Government should be allowed to take jurisdiction. In order to do this the Labor Court should have a District Attorney who is able to prosecute those who commit unfair labor practices, if the unfair labor practice is causing trouble. This will be mentioned again later on.

This so-called district attorney can also handle "R" cases--cases of representation. It was earlier pointed out that since someone other than the employees themselves had a hand in the selection of bargaining units, that there was not an absolutely free choice for the employees. The boundaries of a bargaining unit could very often determine the representatives thereof. Here is a case where someone must obviously take a hand, since the employees and management would no doubt have trouble doing the job themselves. It seems that the government must do the choosing. This is somewhat unfortunate, but necessary.

Conferences between labor and management with the "district attorney" as an arbitrator should be able to work

out the bargaining question without a great deal of trouble. There have been very few complaints about the NLRB's handling of "R" cases, and there is no reason to expect that this method will be any less successful.

Summary

Unfortunately the attainment of an enlightened attitude between labor and capital remains a long way off. Labor strife that injures any third parties must be minimized. The best way to do this is to eliminate all complexities in the law. Congress should be given the exclusive authority for the formulation of a national labor policy. In place of the NLRB a court system of expert judges should be set up and coupled with a district attorney for prosecuting those guilty of unfair labor practices.

The points in a national labor policy will be considered in Part IV.

PART IV

Specific recommendations for an immediate legislation on a national labor policy.

RECOMMENDATIONS

Goals

Even though there be wide divergence in opinion about the methods to be used, there exists an almost overwhelming solidarity of views as to the basic aims and goals of our modern society.[1] It is this group of aims that might perhaps be called the "American Way."

The goals which relate to the formulation of labor policy are; an ever-expanding national income, a progressively wider distribution of income, reduced effort in production, reward based upon effort, full development of individual capacities, rights of association, avoidance of violence, and free speech.[2] Most of these aims have been expanded elsewhere in this paper; those that have not are so obvious that they need no exposition.

To this is added the goal that is foremost in this paper--the protection of the consumer interests by preventing interruptions of the free flow of commerce.

The Strike

No strike must be allowed which will substantially injure the general public. There will be a tendency on the part of those who are opposed to labor to construe this very

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1. Metz and Jacobstein, A National Labor Policy, Brookings Institute, Washington, 1947

2. Ibid. Chapter IV

broadly; they will try to show that almost every strike is in effect against the general public. This danger will have to be prevented by an exact expression by Congress of what constitutes a substantial injury. When there is a complete or near complete stoppage of the production of a basic or necessary commodity, the strike is in reality a strike against the general public.

Any strike that is for the purpose of correcting what Congress deems an unfair labor practice is completely unnecessary since there already exists machinery for correcting this practice--the labor court.

It is axiomatic that under our form of government no person can be forced to work; he may be prevented from working, but there is no way of making him work so long as he is a private citizen. How can we keep people from striking even for an illegal object? By depriving them of the various rights that have been given them by congressional action, such as the right to reinstatement after a strike, the right to appeal cases to the labor courts, etc. The Supreme Court did just this in the Fansteel Case.[1] A group of employees who went on a sit-down strike were refused re-instatement. The court refused to uphold an NLRB order for their return to work;[1] however, the Board has interpreted this to mean that

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1. NLRB v Fansteel Metallurgical Corp. 306 U.S. 240 "Here the strike was illegal in its inception and prosecution".

the only crimianl acts which will prevent an employee from being reinstated are felonies.

The anti-trust laws should be used to prevent the consolidated use of the strike against two employers for the purpose of limiting interstate commerce. Strikers should lose all protection of law when engaged in strikes to compel the employer to break the law, or vitiate his bargaining agreements; they should not be allowed to strike contrary to the terms of a collective bargaining agreement.

Boycotts

This is a form of the sympathetic strike; both will be dealt with here. It envolves the pressure upon a person who, though linked by commerce with some party to the dispute, has no dispute with the union. This is an entirely unjustified action; it harms many innocent third parties. The boycott and the sympathetic strike should be wiped from the present picture for all time. The best way to do this would be to allow an employer to discharge employees who engage in this sort of activity.

Picketing

Either because of fear or custom or sometimes both employees generally refuse to cross picket lines; this makes picketing one of the major elements in industrial warfare campaigns. The Supreme Court has held that there is an absolute right to picket [1] on the basis that picketing was a form of free speech.

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1. Thornhill v Alabama 310 U.S. 88

However, if the object of picketing is illegal, or if the placards carried by pickets present untruths or misleading statements, or if the picketing results in violence it should be controlled to correct the abuse. People can be definitely stopped from picketing whereas they could not be forced back to work. To allow an employer to fire picketers is sometimes of no avail; quite often the picketers are not employees. The logical method to be used is the injunction. But, the improper use of the injunction is still fresh in the minds of organized labor and the very word to them is anathema. Still, there is no danger involved in proper use of the injunction. It should issue from the labor court after the facts of the case have been speedily ascertained.

Collective Bargaining

The collective bargaining agreement is a most important instrument; however, at the present time it is in a weak position because it is unforceable.[1] There should be means of enforcing it, or providing damages if either side fails to live up to its provisions. Both the unions and employers must be given the responsibilities inherent in forming a contract; the collective bargaining agreement must be looked upon as a contract.

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1. Employees are not held by the NLRB to the conditions set forth by such an agreement.

In order to help this along Congress should do the following; define the subject matter of a collective bargaining agreement that will be enforceable under law, provide that unions, whether or not incorporated, are suable at law for breach of contract, impose upon employees as well upon employers the obligation to bargain collectively. The obligation to bargain collectively must be adquately defined.

The means of enforcing the collective contract is the same employed elsewhere when dealing with unions--suspension of the bargaining rights of the unions in question. These rights are not what may be called "absolute rights"; they have been announced by Congress as public policy, but the public policy can change if the welfare is threatened.

The bargaining agreement should be between employers and their employees; not between industries and the entire trade union. The smaller a bargaining unit, the less chance there is for crippling strikes. It has been argued that only through large industry-wide units are unions able to obtain their objectives. This is no longer so; the government has and should continue to delineate the rights and legitimate aims of employees. These aims should be protected by law, not by fear of large-scale concerted action.

Summary

A number of recommendations for Congressional action have been made. These aims should be furthered under whatever system the Congress decrees for the handling of labor disputes, whether it be the present NLRB, the system of labor courts suggested, or some third alternative. These recommendations have been made with the object of protecting the general public by removing the causes and effects of strikes and the like. The means used have not been violent; violence cannot breed peace. Unions which are acting contrary to the public policy are penalized by losing all the rights that Congress and the courts have given to labor.

All rights that belong to labor should be described from time to time by the Congress in order that there be no confusion as to what they are.

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