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THE AUTHORITY OF THE NATIONAL WAR LABOR BOARD OVER LABOR DISPUTES

*Leonard B. Boudin**

THE National War Labor Board has reached the respectable age of two years. Supported originally only by the President's war powers, it has secured compliance with its orders, has weathered a minor congressional investigation, and has built up a body of decisions whose effect will continue after the war. These facts, as well as certain signs of the conservatism[1] which appears to strike all government agencies at one time or another, entitle the board to a short survey of certain aspects of its jurisdiction and authority.

The board's power is derived from a series of executive orders and statutes which start with Executive Order 9017 of January 12, 1942.[2] This order was a result of a joint conference between labor and management representatives on December 17, 1941, following the outbreak of war. The conference reached three basic conclusions:[3]

> "1. There shall be no strikes or lockouts
> "2. All disputes shall be settled by peaceful means.
> "3. The President shall set up a proper War Labor Board to handle these disputes."

The President in a letter sent to the conferees stated that he accepted their covenants "that there shall be no strikes or lockouts and all disputes shall be settled by peaceful means."[4] He concluded that "the three points agreed upon cover of necessity all disputes that may arise between labor and management."[5]

Executive Order 9017 which created the War Labor Board recites the existence of a state of war and asserts that "the national interest demands that there shall be no interruption of any work which contributes to the effective prosecution of the war." The limitations upon

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[1] See e.g., transcript of hearings on board changes in jurisdictional policy, California Packing Co., Simon J. Murphy Co., CONFERENCE OF NATIONAL WAR LABOR BOARD WITH REPRESENTATIVES OF AFL AND CIO (unpublished). These cases are cited infra at notes 76, 88, 98.

[2] 7 FED. REG. 237 (Jan. 1942); 1 War Lab. Rep. xvii.

[3] 1 War Lab. Rep. XIV.

[4] Ibid.

[5] Ibid.

the board's authority appear to be few: that the parties in dispute must exhaust all other remedies such as negotiation and conciliation; and that the board should not supersede or act in conflict with other agencies discussed below. The board was not given authority at this time over voluntary wage applications.[6]

Complete authority over voluntary wage applications, as well as over disputes of any nature whatsoever, was given to the board by Executive Order 9250.[7] This order was issued by the President under the authority of the Wage Stabilization Law of October 2, 1942.[8] The law prohibits increases or decreases in wages or salaries without the approval of the board. The executive order which followed created an Office of Economic Stabilization whose director was, with the President's approval, to "formulate and develop a comprehensive national economic policy." It set forth a basic wage and salary stabilization policy under the immediate control of the War Labor Board. Most significant, it stated that "the functions of said Board are hereby extended to cover all industries and all employees."

On April 8, 1943, the President issued Executive Order 9328[9] transferring his powers under Executive Order 9250 to the Office of Economic Stabilization and further limiting the power of the War Labor Board to grant wage increases. These restrictions were somewhat lessened by the issuance of the famous May 12th policy directive of the Director of Economic Stabilization.[10]

Finally, Congress in June of 1943 passed the Smith-Connally Law,[11] also known as the War Labor Disputes Act. This law grants the board certain "powers and duties" in addition to those previously held by it.[12] It also provides that whenever the United States Conciliation Service "certifies that a labor dispute exists which may lead to sub-

[6] Its one attempt to assert such jurisdiction was met with bitter opposition by the representatives of labor, Westinghouse Electric & Mfg. Co., NWLB No. 13, 2 War Lab. Rep. 281 (1942). Cf. this assumption of jurisdiction over the terms of an agreement with the board's refusal in another case to reopen the wage provisions upon the union's application, Postal Telegraph Cable Co., NWLB No. 86, 1 War Lab. Rep. 83 (1942).

[7] 7 FED. REG. 7871 (Oct. 1942); 4 War Lab. Rep. VIII (Oct. 3, 1942).

[8] Act of Oct. 2, 1942, Pub. L. 729, 77th Cong., 2d sess., 56 Stat. L. 765, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes."

[9] 8 FED. REG. 4681 (April 1943); 7 War Lab. Rep. VII.

[10] 8 War Lab. Rep. XIV.

[11] Act of June 25, 1943, Pub. L. 89, 78th Cong., 1st sess., 57 Stat. L. 163; 9 War Lab. Rep. VII.

[12] Id. at § 7.

stantial interference with the war effort and cannot be settled by collective bargaining or conciliation,"[13] the board is to hold a hearing upon the merits of the dispute.

CONSTITUTIONAL AUTHORITY OF THE BOARD

During the first year and a half of its existence, the constitutional basis of the board's authority was the President's war powers as Commander-in-Chief of the armed forces of the United States. The President has the duty to preserve the Constitution and to fulfill the federal guarantee to each state of the republican form of government and protection against invasion.[14] Translated into industrial terms, he has the duty to supply the armed forces with the weapons of war. To that end, the President entrusted the board with the duty to settle labor disputes which might interrupt war work.

The board met challenges to its authority with an assertion of this federal power.[15] When its decisions, and those of its predecessor, the National Defense Mediation Board, were disobeyed, the President acting under his constitutional war powers, in a number of instances took action against the recalcitrant employers or employees.[16]

On June 25, 1943, the board received legislative support in the form of the War Labor Disputes Act. This law, like the executive orders of the President, is grounded upon the war powers of the federal government. While it appears to have added to the board's prestige, the statute has added little to its legal authority. As a matter of fact,

[13] Id. at § 7 (a) (1).

[14] U.S. Const., Art. II, § 1, Art. IV, § 4, cited by the board in Bethlehem Steel Corp. (Little Steel Cas.), NWLB Nos. 30, 31, 34, 35, 1 War Lab Rep. 324 at 351 (1942).

[15] Bethlehem Steel Corp. (Little Steel Cas.), NWLB Nos. 30, 31, 34, 35, 1 War Lab. Rep. 324 (1942).

[16] Exec. Order 9108, March 21, 1942, seizing property in enforcement of, Toledo Peoria & Western R. R. Co., NWLB No. 48, 1 War Lab. Rep. 46 (1942), 3 id. 518 (1942), 4 id. 276 (1942); Exec. Order 9225, Aug. 19, 1942, enforcing S.A. Woods Machine Co., NWLB No. 160, 2 War Lab. Rep. 159 (1942); Exec. Order 8773, June 9, 1941, 6 FED. REG. 2777 (April-June 1941), enforcing North American Aviation, Inc., NDMB No. 36; Exec. Order 8868, Aug. 23, 1941, 6 FED. REG. 4349 (July-Sept. 1941), enforcing Federal Ship-building Co., NDMB No. 46; Exec. Order 8928, Oct. 30, 1941, 6 FED. REG. 5559 (Oct.-Dec. 1941), enforcing Air Associates Inc., NDMB No. 51. These cases are referred to in Report on the Work of National Defense Mediation Board (March 19, 1941-Jan. 12, 1942), U.S. Bureau of Labor Statistics, Bul. No. 714 (1942). See also warning of the President in securing enforcement of the NWLB order in Montgomery Ward & Co. Inc., NWLB 192, 1 War Lab. Rep. 280 (1942), 3 id. 99 (1942), 4 id. 277 (1942), 5 id. 80 (1942).

the law purports to limit rather than add to the President's power to seize war plants whose production is threatened by labor disputes.[17]

THE BOARD'S AUTHORITY IN DISPUTE CASES

At the time of the creation of the National War Labor Board, there existed a number of agencies, tribunals and forums for the settlement of certain types of labor disputes. The most important of these were the National Labor Relations Board and the National Mediation Board. The executive order took cognizance of these agencies by providing *inter alia* that "Nothing herein shall be construed as superseding or in conflict with the provisions of the Railway Labor Act . . . the National Labor Relations Act . . . the Fair Labor Standards Act . . . and the Act to provide conditions for the purchase of supplies, etc. . . . or the Act amending the Act of March 3, 1931, relating to the rate of wages for laborers and mechanics . . ."[18]

It will thus be seen that the authority of the National Labor Relations Board with respect to unfair labor practices affecting commerce, and the authority of the National Mediation Board and other agencies established under the Railway Labor Act with respect to disputes involving common carriers under the jurisdiction of the Interstate Commerce Commission, remained outside the scope of the board's jurisdiction. Subsequently on May 22, 1942, an executive order created a National Railway Labor Panel with the duty to appoint emergency boards in railway disputes.[19] The "exclusive and final jurisdiction" of such boards over wage disputes was made subject to the Director of Economic Stabilization under a later executive order.[20] Whether the latter transfer of final authority is in violation of the Stabilization Act of October 2, 1942, has for some time been the subject of dispute. The railway unions, urging this view, relied upon the provision of the act that the President "may not under the authority of this Act suspend any other law or part thereof."[21] The Director of Economic Stabilization relied upon the act's express authority to the President "to issue a general order stabilizing prices, wages and salaries. . . ."[22] The latter view, in our opinion, was correct notwithstanding congressional assertions to

[17] See "The Smith-Connally Act," 3 LAW. GUILD REV. 46 (1943).

[18] Exec. Order 9017, 1 War Lab. Rep. XVII at § 7, mentioned supra note 2.

[19] Exec. Order 9172, 7 FED. REG. 3913 (April-June 1942).

[20] Exec. Order 9299, issued Feb. 4, 1943, 8 FED. REG. 1669 (Feb. 1943).

[21] S. Hearings on S.J. Res. 91, 78th Cong., 1st sess., Nov. 8 and 9, 1943 (Committee on Interstate Commerce).

[22] 56 Stat. L. 765 (1942), enacting clause.

the contrary.[28] On June 30, 1944 the act of October 2 was amended so as to make conclusive a certification by an emergency board appointed from the National Railway Labor Panel in a dispute between employees and carriers "that the changes proposed by said settlement or recommended settlement are consistent with such standards as may be in effect, established by or pursuant to law, for the purpose of controlling inflationary tendencies."[28a]

To the board's jurisdiction over disputes in war plants and railways, jurisdiction over disputes involving states or municipalities and their employees has been added. In the two well-known cases involving the cities of Newark and New York, the board passed a unanimous resolution "that it has no power under Executive Order 9017 to issue any directive order or regulation in these disputes governing the conduct of the state or municipal agencies involved."[24] This decision of the board is based upon the doctrine that "state governments and their subdivisions within the sphere of their own jurisdiction are sovereign. This sovereignty cannot be interfered with or encroached upon by the United States Government."[25]

Although the board refused to follow the panel's recommendation that it assume jurisdiction, it issued a clear warning to the municipalities involved that they did not enjoy complete immunity from federal power. Dean Morse, writing the board's opinion, stated that "local governments in time of war, are [not] free under the doctrine of sovereignty, to follow any course of action they care to in regard to their relations with the employees irrespective of the effects of a particular policy upon the prosecution of the war."[26] Asserting that the doctrine of sovereignty "is not a suicidal doctrine," he pointed out that the President could take action to carry on a service or function, a threat to which might impede the successful prosecution of the war. The line of demarcation was indicated in the statement that in the present case, while the disputes "have reached serious proportions," the unions agreed not to strike and the local governments can handle the disputes.[27]

[28] S. Hearings on S.J. Res. 91, 78th Cong., 1st sess., Nov. 8 and 9, 1943 (Committee on Interstate Commerce).

[28a] Pub. L. 383, 78th Cong., 2d sess., approved and effective June 30, 1944, at § 202.

[24] Municipal Government, City of Newark, NWLB Nos. 47, 726, 5 War Lab. Rep. 286 at 286 (1942); 1 War Lab. Rep. 46 (1942).

[25] 5 id. at 286.

[26] Id. at 289.

[27] Id. at 292.

While recognizing the serious implications of an assumption of jurisdiction by the federal government of disputes between cities or states and their employees, the board's decision is not free from question. The working conditions of persons in private employment, like those of state employees, are normally under the jurisdiction of the state governments, not of the federal government.[28] The same wartime conditions which permit the federal government to exercise power over the employees of private employers justify the exercise of control over the working conditions of public employees.[29] There is common sense in the statement of the panel majority that "the activities of municipal employees, may be, and in this case are, just as intimately connected with the war effort as those of other employees."[30]

The board itself has delegated the exercise of its authority over labor disputes to its regional boards[31] and to a number of commissions with decisional authority over specific industries. Examples are the New York Metropolitan Milk Distributors Commission,[32] West Coast Lumber Commission,[33] Non-Ferrous Metals Commission,[34] Tool and Die Commission,[35] Trucking Commission,[36] and the Shipbuilding Commission.[37]

The authority of each of these bodies is final subject to review by the National War Labor Board upon its own motion or the petition of an aggrieved party.[38] Appeal under the board's rules is not a matter of right, and the grounds therefor are strictly circumscribed.[39]

[28] See e.g., Senn v. Tile Layers Protective Union, 301 U.S. 468, 57 S. Ct. 857 (1937).

[29] The Act of Oct. 2, 1942, 56 Stat. L. 765, applies to the employees of federal and state governments. See NWLB General Order No. 12-B, 8 War Lab. Rep. XVIII delegating authority to state, county and municipal governments to determine the wages of their respective employees, provided that the principles of the stabilization program were followed.

[30] Municipal Government, City of Newark, NWLB Nos. 47, 726, 5 War Lab. Rep. 286 at 304 (1942), mentioned supra note 24.

[31] See Regulations Governing Jurisdiction and Procedure of Regional War Labor Boards, § 802.51 et seq., C.C.H. IA LABOR LAW SERVICE, p. 11075 et seq.

[32] New York, New Jersey Metropolitan Milk Distributors War Conservation Committee, NWLB No. 197, 3 War Lab. Rep. VII (1943).

[33] Willamette Valley Lumber Operators, NWLB Nos. 69 et al, 5 War Lab. Rep. XVI (1942).

[34] 4 War Lab. Rep. LVII (1942), 5 id. XIV (1942).

[35] Order, Dec. 11, 1942, NWLB Release B-346, Dec. 14, 1942. Cited in C.C.H. IA LABOR LAW SERVICE, p. 13,155, ¶ 13,218.

[36] 5 War Lab. Rep. XV (1942), 6 id. XL (1943), 10 id. XXVII (1943).

[37] 6 War Lab. Rep. XXXIII (1943), 10 War Lab. Rep. XXIX (1943).

[38] C.C.H. IA LABOR LAW SERVICE, p. 11064, § 802.38.

[39] Ibid; Oregon-Washington Plywood Co., NWLB No. 256, 7 War Lab. Rep. 522 (1943); Coos Bay Logging Co., NWLB No. 379, 9 War Lab. Rep. 447 (1943).

The board has refused to exercise its authority in several cases, sometimes acting in reliance upon the procedural limitations set forth in Executive Order 9017. Thus, it has rejected disputes arising from attempts to change the terms of an existing collective labor agreement.[40] It has often referred parties to their grievance or arbitration machinery under collective labor agreements,[41] or it has returned disputes to them for further negotiation.[42] In addition, it has recently directed parties to arbitrate their disputes, notwithstanding the absence of a contract obligation to that effect.[43] It has frequently refused, in the course of its decisions, to pass upon certain matters which it regarded as an interference in the internal affairs of labor unions,[44] or with certain employer prerogatives such as choice of supervisory employees.[45] But the board, unlike the National Defense Mediation Board, has shown little fear of passing upon so-called jurisdictional disputes, as noted below.[46]

ARBITRATION

The board has assumed jurisdiction over the field of industrial arbitration.[47] While not superseding the courts, it exercises concurrent authority over this subject which was previously under the exclusive

[40] Postal Telegraph-Cable Co., NWLB No. 86, 1 War Lab. Rep. 83 (1942).

[41] Babcock & Wilcox Co., NWLB No. 68, 3 War Lab. Rep. 158 (1942); American Enka Corp., NWLB No. 182, 6 War Lab. Rep. 343 (1943); North American Aviation, Inc., NWLB No. 2435-D, 10 War Lab. Rep. 315 (1943).

[42] Chrysler Corp., NWLB No. 3950-D, 10 War Lab. Rep. 551 (1943).

[43] Electric-Vacuum Cleaning Co., NWLB No. 11-3659-HO, Region v, 12 War Lab. Rep. 183 (1943) (no contract); Aluminum Company of America, NWLB No. 64, 5 War Lab. Rep. 84 (1942), overruling contrary decision in Midland Steel Products Co., NWLB No. 85, 1 War Lab. Rep. 247 (1942).

[44] Darr School of Aeronautics, Inc., NWLB No. 111-2879-D, 14 War Lab. Rep. 535 (1944); R. K. Griffin Co., NWLB 111-3742-HO, Region III, 14 War Lab. Rep. 407 (1944); Humble Oil & Refining Co., NWLB No. 111-1819-D, 15 War Lab. Rep. 380 (1944).

[45] Winchester Repeating Arms Co., NWLB No. 443, 6 War Lab. Rep. 359 (1943).

The board's repeated failure in dispute cases to grant sick benefits and its expressed doubts as to *jurisdiction* over severance pay disputes is incomprehensible in view of its broad powers under the War Labor Disputes Act.

See e.g., Strand Baking Co., NWLB No. AR-5, 5 War Lab. Rep. 262 (1942) and Johns-Manville Co., NWLB No. 111-2526-D, 14 War Lab. Rep. 266 (1944) (sick leave); American Brake Shoe and Foundry Co., NWLB No. 111-1490-D, 17 War Lab. Rep. 23 (1944) (military severance pay).

[46] Fall River Textile Mills, NWLB No. 111-5334-D, 14 War Lab. Rep. 211 (1944); Electric Auto-Lite Co., NWLB No. 111-1894-D, 15 War Lab. Rep. 312 (1944).

[47] Statement of Policy Concerning Review of Arbitration Awards, WLB Press Release B-970, issued Sept. 10, 1943; Rules of Organization and Procedure, § 802.28 et seq., 11 War Lab. Rep. x et seq.

control of the judiciary. The board will not only compel labor and management to arbitrate their disputes, as hereinabove indicated. It will enforce, modify and vacate awards in labor cases whether the arbitration was had pursuant to board directive or to contract provisions.[48] However, it makes a distinction between wage awards and non-wage awards.

Non-wage awards, pursuant to agreement that they will be final or to board order making no provision for review, are not reviewable on the merits.[49] According to a recent statement of board policy,[50] they will be modified only to the extent that the arbitrator exceeds the terms of the submission agreement. Such awards which provide for board review will be given "the same weight accorded to the report and recommendations of a hearing officer."[51] If this award results from private arbitration, rather than from board order, it will not be reviewed by the board except as a dispute after certification in the usual manner.

Wage issues are treated differently because of the board's responsibility for the wage stabilization program. Awards resulting from private arbitration may, of course, come before the board in the form of voluntary agreements, where neither party contests its rendition or its conformance to the wage stabilization program. They are then treated like all other applications for approval.

The award may come to the board as a dispute after a party to it alleges it to be in violation of the national wage stabilization program. The board will then give weight to the award, and in particular to the findings of fact. It will, however, seek to determine "whether the arbitrator has correctly applied all criteria of the Board's wage policy to the facts of the case."[52] The board will examine into "what the arbitrator may have omitted to do as well as into the propriety of what he

[48] Instructions to Regional Boards in Cases of Non-Compliance with Arbitration Awards, Press Release 13-1365, March 14, 1944, 14 War. Lab. Rep. xxix; Winchester Repeating Arms Co., NWLB No. 2571-CS-D, 15 War Lab. Rep. 666 (1944).

[49] Rules of Organization and Procedure, § 802.28 et seq., 11 War Lab. Rep. x et seq., mentioned supra note 47; Sullivan Dry Dock and Repair Co., NWLB No. 565, 6 War Lab. Rep. 467 (Feb. 13, 1943), although the parties in their submission agreement provided that either might seek board review.

[50] Statement of Policy Concerning Review of Arbitration Awards, WLB Press Release B-970, issued Sept. 10, 1943, mentioned supra note 47; Smith and Wesson Co., NWLB No. 111-1262-D, 10 War Lab. Rep. 148 (1943).

[51] Statement of Policy Concerning Review of Arbitration Awards, WLB Press Release B-970, issued Sept. 10, 1943.

[52] Ibid; Rules of Organization and Procedure, § 802.31(a), 11 War Lab. Rep. x et seq.

has actually done."[53] It may then approve, modify or disapprove the award or refer the matter back to the arbitrator with advice as to board policy for reconsideration.[54]

Wage awards resulting from arbitration under board order are given the weight of a hearing officer's report. They are, however, very infrequent since, except in cases involving the establishment of job classifications, the board normally will prefer to dispose of the wage issues itself.[55]

THE NATURE OF THE DISPUTE

Not all disputes, of course, come within the jurisdiction of the National War Labor Board. Its authority is limited to "labor disputes." The board has very properly given this term the broad meaning to which it is entitled under the numerous decisions interpreting the Norris-LaGuardia Act[56] and the various state anti-injunction laws, viz., all disputes between unions or employees and employers relating to terms and conditions of employment.[57] Rarely has the board declined to act on the ground that something other than a labor dispute was involved. One such case involved the *Minneapolis and St. Paul Milk Distributors*[58] where the board refused to determine the extent and manner of curtailments of deliveries on the ground that the matter was subject to the jurisdiction of the Office of Defense Transportation. The board has also refused to render decisions on matters subject to the jurisdiction of the Office of Price Administration,[59] or the War Manpower Commission.[60] On the other hand, in a recent case involving certain music record producers, the board held that it was dealing with

[53] This phrase appears in the Statement of Policy Concerning Review of Arbitration Awards, WLB Press Release B-970 of Sept. 10, 1943, first mentioned supra note 47. The Rules of Organization and Procedure, 11 War Lab. Rep. x at § 802.31(a), first mentioned supra note 47, substituted this expression, "If it appears to the Board or its agent that the arbitrator has manifestly erred in applying or failing to apply any material aspect of the Board's wage stabilization policy. . . ."

[54] Ibid.

[55] Conestoga Transportation Co., NWLB No. 111-5159-D, Region III, 15 War Lab. Rep. 597 (1944).

[56] Act of March 23, 1932, Pub. L. 65, 72d Cong., 1st sess., 47 Stat. L. 70; 29 U.S.C.A. (1940) §§ 101-115.

[57] Id. at § 113.

[58] Minneapolis Milk Distributors, NWLB No. 850, 7 War Lab. Rep. 511 (1943); Saint Paul Milk Distributors, NWLB No. 881, 7 id. 514 (1943).

[59] Coal Truckers Assn., NWLB No. 139, 3 War Lab. Rep. 169 (1942).

[60] See e.g., Weyerhauser Timber Co., NWLB No. 111-3525-O, West Coast Lumber Commission, 13 War Lab. Rep. 424 (1943).

a labor dispute.[61] One might well inquire what position the board would have taken in a dispute such as that between the west coast fishermen and their employers. The Supreme Court recently held that the Norris-LaGuardia Act did not apply to this type of dispute since it was not a labor dispute, the fishermen being "independent business men," not employees.[62] In a case like this, it is possible that the board would have given greater breadth to the term "labor dispute." The board has disregarded the limitations of the Norris-La Guardia Act by passing upon jurisdictional and other inter-union controversies outside that statute's definition of a labor dispute.[63]

CONNECTION WITH THE WAR

In view of the fact that this is a wartime federal agency, the most frequent question that arises is this: what is the necessary relationship between the dispute and the prosecution of the war? An examination of the executive orders and statutes involved, a study of the board's decisions, and a realistic appraisal of the labor situation in wartime necessarily brings us to this conclusion: *every* labor dispute affects the war and *every* labor dispute is subject to the board's jurisdiction.

It is true that Executive Order 9017 describes "the procedure for adjusting and settling labor disputes which might interrupt work which contributes to the effective prosecution of the war."[64] However, this statement is procedural, rather than substantive. Also, the board did state in the *Little Steel* case that the "effect of the dispute upon the war effort . . . is the criterion which determines the Board's jurisdiction."[65] But neither statement answers the basic question, viz., what is the meaning of the expression "contributes to the effective prosecution of the war."

The intention of the President in framing this order must be interpreted in the light of the proceedings which led to its issuance. As noted above, the executive order was the result of an employer-labor conference held at the White House on December 17, 1941. That

[61] Electrical Transcription Manufacturers, NWLB No. 111-2499-D, 10 War Lab. Rep. 157 (1943). See also United States v. American Federation of Musicians, 318 U.S. 741, 63 S. Ct. 665 (1943).

[62] Columbia River Packers Assn. v. Hinton, 315 U.S. 143, 62 S. Ct. 520 (1942).

[63] See cases cited supra note 46; Young Women's Christian Assn., NWLB No. AR-641-D, Region XI, 8 War Lab. Rep. 454 (1943); Friun-Colnon Contracting Co., NWLB No. 111-1934-D, 10 War Lab. Rep. 145 (1943); Southwestern Bell Telephone Co., NWLB No. 660, 8 War Lab. Rep. 80 (1943).

[64] 1 War Lab. Rep. XVII at § 3, mentioned supra note 2.

[65] 1 War Lab. Rep. 324 at 351 (1942), mentioned supra note 15.

conference reached an agreement that "there should be no strikes or lockouts." There was no limitation of this pledge to disputes in war production or in industries directly related to the war, such as transportation and communication. In this respect, the statement of policy of the conference paralleled that of the 1918 employer-management conference which agreed likewise without limitation that "there should be no strikes or lockouts."[66] The President's letter to the conference in 1941 stated: "I accept without reservations your covenants that there should be no strikes or lockouts and that all disputes shall be settled by peaceful means." His executive order described the agreement thusly: "for the duration of the war there shall be no strikes or lockouts, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for the peaceful adjustment of such disputes."[67]

For a year and a half, the board has increasingly recognized the importance of carrying out this agreement and of determining *all* labor disputes. In one of the earliest cases involving a challenge to its jurisdiction, the *Montgomery Ward* case,[68] it found that a company engaged in the manufacture of civilian materials was subject to Executive Order 9017 and to its jurisdiction. The board pointed out that thousands of workers were directly or indirectly involved and that a strike in a particular plant might have serious effect upon civilian morale generally. It stated:[69]

> "But the most important question is not what effect a strike in Chicago would have on the company's business there and elsewhere, but what effect it would have on industrial relations generally and particularly on industrial relations in plants directly producing or distributing war materials. If 5500 workers of Montgomery Ward may properly strike in Chicago for higher wages and union security—the chief issues in this dispute—it seems to us almost certain that others workers in other establishments would feel that they should have the same right, and that once a

[66] The Proclamation of the President, April 8, 1918, creating the first National War Labor Board was somewhat more limited in its delegation of authority, and that board dismissed almost fifty complaints on the ground that war production was not involved. The National War Labor Board, Bulletin of the U.S. Bureau of Labor Statistics, No. 287, p. 13 (Dec. 1921).

[67] The President's letter, 1 War Lab. Rep. at xiv and Exec. Order 9017, I War Lab. Rep. xvii, mentioned supra note 2.

[68] Montgomery Ward & Co., NWLB No. 192, 1 War Lab. Rep. 280 (1942).

[69] Id. at 284. See Hotel Employees of San Francisco, NWLB No. 21, 1 War Lab. Rep. 91 (1942).

strike of the dimensions which are here threatened, against an employer as well-known as Montgomery Ward, and in an area as highly industrialized as Chicago, were allowed to take place on the theory that this Board lacked authority to deal with the dispute, a fire would be started which before very long might turn into a conflagration.

"We do not think that the workers, or the general public for that matter, would grasp clearly the distinction which the company seeks to make between concerns producing or distributing war materials and those producing or distributing non-war materials. We do not think that it would be possible as a practical matter, to have one part of industry free to indulge in strikes and lockouts, and another part bound to submit their disputes to this Board and to forego strikes and lockouts."

The board suggested in the same opinion, that "very good arguments can be made in support of the proposition that any labor dispute, no matter how minor in nature, is most certain, at least in some degree, to register a detrimental effect upon the war effort."[70] That was on June 29, 1942. Nine months later, the board finally accepted those arguments in the *Reuben H. Donnelly* case[71] and came to the conclusion that "any labor dispute of whatever nature which threatens to result in a strike or lockout does, in fact, affect the prosecution of the war on the home front."

The board's conclusion was grounded upon the unlimited scope of the no-strike pledge and the fact that "the maintenance of a sound domestic economy is essential to the war effort." As the board stated:[72]

"A threatened strike or lockout in any community in the land is bound to disturb and disrupt the economic life of the community. Thus, a strike in a so-called non-essential industry, such as any one of the service industries, is likely to have very serious consequences on industrial relations in the community."

The corollary of this jurisdictional principle was recently stated by the board in the *Allis-Chalmers* case in which Vice-Chairman Taylor wrote:[73]

". . . the moral obligation not to strike in war time remains. It might be argued that Section 8 of the [War Labor Disputes]

[70] Montgomery Ward & Co., NWLB No. 192, 1 War Lab. Rep. 280 at 285 (1942).

[71] NWLB No. 4207, 7 War Lab. Rep. 198 at 205 (1943).

[72] Ibid.

[73] NWLB No. 111-3511-D, 11 War Lab. Rep. 518 at 520 (1943).

Act is inconsistent with the concept of a no-strike agreement. But a careful consideration of Section 8 reveals the unsoundness of this argument.

"In the first place, the section is limited to the plants of 'war contractors.' The definition of this term in Section 2 (c) is such as to exclude from its coverage important segments of the economy in cases where no war contract is involved. Surely Congress must have intended that in these and other segments of the economy excluded from the operation of Section 8 the no-strike agreement should continue to be effective . . . Obviously, the no-strike agreement must cover the whole economy, as its terms provided, or else cease to be."

This decision resulted in part from the second important development in the history of the board, namely, its assumption of jurisdiction over virtually all voluntary wage increases, *irrespective of the nature of the work involved.* The act of October 2, 1942, authorizes the President to "provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities."[74] The President's order, No. 9250, was predicated upon the stated need "to control so far as possible the inflationary tendencies and the vast dislocations attendant thereon which threaten our military effort and our domestic economic structure, and for the more effective prosecution of the war."[75] Title II of that order provides *inter alia* that:

"No increases in wage rates, granted as a result of voluntary agreement, collective bargaining, conciliation, arbitration, or otherwise, and no decrease in wage rates, shall be authorized unless notice of such increases or decreases shall have been filed with the National War Labor Board, and unless the National War Labor Board has approved such increases or decreases."

In order to remove any question, the order further provides in Title III, section I, that:

"Except as modified by this Order, the National War Labor Board shall continue to perform the powers, functions, and duties conferred upon it by Executive Order No. 9017, and the functions of said Board are hereby extended to cover all industries and all employees. The National War Labor Board shall continue to follow the procedures specified in said Executive Order."

[74] 56 Stat. L. 756, enacting clause, first mentioned supra note 8.
[75] 4 War Lab. Rep. VIII, first mentioned supra note 7.

This section permits of two constructions (1) that the President expressly extended the power of the board over labor disputes, including those involving wages, to "all industries and all employees"; (2) that the phrase refers to control over wages alone.

Whichever the intention of this section, it is clear that Executive Orders 9017 and 9250 must be read together and applied together. Wage disputes and wage negotiations are major items in employer-union relations. They cannot possibly be separated from non-wage issues. One cannot take away from unions and employers this aspect of their labor relations and leave them free to engage in strikes, lockouts and picketing with respect to the other aspects of their disputes. For one thing, wages are usually inextricably related to the other working conditions. This is the result, in part, of the give and take of negotiations. More fundamentally, there is a close connection among such matters as wages, hours, vacations, sick leave, the skill of fellow employees, the application of seniority provisions and the hundreds of other matters which are virtually inseparable in a collective bargaining agreement. Those being the facts of industrial life, knowledge of them may reasonably be imputed to the draftsmen of the two executive orders.

Notwithstanding the foregoing, the board in October 1943, rendered "a tentative opinion"[76] in which it came to certain extraordinary conclusions in respect either to its jurisdiction or to the exercise of its jurisdiction;—which, it is not entirely clear. Chairman William H. Davis, writing for the board's majority, referred to "the necessity of disposing by machinery other than certification to this Board of those issues and disputes which constitute a less important and substantial threat to war production." He said:[77]

> "In an effort to meet the problem, the Board has conferred with representatives of the United States Conciliation Service. We have discussed with them the necessity of disposing by machinery other than certification to this Board, of those issues and disputes which constitute a less important and substantial threat to war production. No inflexible rules were formulated; though administra-

[76] Simon J. Murphy Co., NWLB No. 111-1228-D, California Packing Corp., NWLB No. 111-549-D, WLB Press Release B-1066, issued Oct. 26, 1943, 11 War Lab. Rep., No. 8, xiv et seq. These cases were in the advance sheets, vol. 11, No. 8, and were not reprinted in the bound volume 11 because of the tentative character of the opinions. Criticized by this writer in "Administrative Abdication," 3 LAW. GUILD REV. 43 et seq. (Nov.-Dec. 1943. See note 1 supra in regard to hearings on these cases.

[77] WLB Press Release B-1066, Simon J. Murphy Co., California Packing Corp., 11 War Lab. Rep., No. 8, xiv (1943).

tive guides were discussed. It is hoped that by the gradual process of inclusion and exclusion in the handling of individual cases, principles will emerge which will indicate with some definitiveness the types of cases which the Board believes appropriate for certification and those which more appropriately lend themselves to settlement by some other means. It is for this reason that the Board has combined its opinions in the above-entitled cases. At the same time, emphasis should be placed upon the fact that this action has been taken primarily for administrative reasons rather than in definition of the limits of the Board's jurisdiction."

The theory of this waiver of jurisdiction was that the board's work was obstructed by its heavy case load. The chairman stated that this was the effect of the referral to the board "of the issues and disputes of minor nature," and that "it is more than ever necessary in war time that the peaceful processes of collective bargaining be preserved and utilized to the fullest extent."

While no one can differ with the board's view that collective bargaining constitutes a more satisfactory mode of determining disputes than decisions by the board itself, it is extremely difficult to appreciate the rationale of its decision or to contemplate without disturbance the untoward effects of that decision. One may question whether the board's work is impeded by the referral to it of disputes of a "minor nature." The board's heavy case load was and is due primarily to the fact that under Executive Order 9250 it has jurisdiction of voluntary wage applications.[78] It is these rather than the dispute cases that occupy most of the board's time and that have caused the complained-of backlog. Secondly, the board in using the term "disputes of a minor nature" was referring less to the nature of the dispute than to the industry or occupation in which it takes place. The board really meant that it might refuse to accept *non-war cases*, no matter how important or difficult the issues involved, and that it might continue to take those cases involving war production even though the dispute were of a minor nature more properly disposed of through collective bargaining.

No such demarcation between disputes involving war production and those which do not can be made by the board under the statutes or executive orders upon which its jurisdiction and powers are grounded. A board which has repeatedly taken disputes involving hotel and

[78] See e.g., Sixth Monthly Report of the National War Labor Board to the United States Senate of Oct. 2, 1943. WLB Press Release B-1030, § 3 (Oct. 10, 1943).

restaurant workers,[79] office workers,[80] and salesmen[81] cannot at this late date refuse jurisdiction to workers who do not engage in so-called war production.

To the extent that the board does have a heavy case load of disputes, the answer is obvious. As the labor members state in their dissenting opinion,[82] it is the board's duty to work out more efficient methods of administration, to request an increase in personnel from Congress if necessary, and otherwise to employ new administrative techniques, all of which would be preferable to a waiver of jurisdiction. The consequences of the board's action if unchanged, would have been these: *first*, a nullification of its previous decisions and particularly, that of the *Reuben H. Donnelly* case;[83] *second*, an incitement to employers of non-war workers to refuse to bargain collectively and to evade what the board refers to as a moral duty to settle labor disputes; *third*, either the presentation to workers in non-war industries of the right to strike, which would be contrary to public policy,[84] or an insistence that they continue to fulfill their no-strike pledge, without giving them any forum for the final determination of their labor disputes.

It will be noted that this opinion was described as "tentative." It was announced at a public hearing at which representatives of organized labor appeared in opposition to the contemplated proposals therein set forth.[85] Unfortunately, however, a number of regional boards immediately began to carry out the principles set forth in that opinion.[86] One board, by resolution, has vigorously expressed its objections to this waiver of jurisdiction. That was the Twelfth Regional Board which resolved that since labor had given up its strike weapon and since the

[79] Hotel Employers Association of San Francisco, NWLB No. 21, 1 War Lab. Rep. 91 (1942); Young Women's Christian Assn., NWLB No. AR-641-D, Region XI, 8 War Lab. Rep. 454 (1943).

[80] Security Title & Guarantee Co., NWLB No. 646, 4 War Lab. Rep. 344 (1942); J.S. Bache & Co., NWLB No. 612, 4 War Lab. Rep. 345 (1942).

[81] E.g., Reuben H. Donnelly Corp., NWLB No. 4207, 7 War Lab. Rep. 198 (1943), mentioned supra note 71.

[82] Simon J. Murphy Co., California Packing Corp., WLB Press Release B-1066a, Oct. 31, 1943, mentioned supra note 76.

[83] NWLB No. 4207, 7 War Lab. Rep. 198 (1943), mentioned supra note 71.

[84] See Montgomery-Ward decision, NWLB No. 192, 1 War Lab. Rep. 280 (1942), mentioned supra note 68.

[85] See note 1 supra.

[86] I.E. Illgenfritz' Sons, NWLB No. 111-2465-D, Region XI, 12 War Lab. Rep. 700 at 701 (1943) where a dispute involving nursery stock was rejected on the ground that "a nursery does not so vitally affect the war effort that further attention to this case is warranted." The same regional board recently refused to investigate a strike on the ground that it did not affect war production.

War Labor Board has jurisdiction over all disputes "we should be in a difficult and illogical position if we refuse to act in cases of this kind." [87]

The board has not explicitly withdrawn from the position taken in its "tentative opinion." It did, however, render a final opinion on the jurisdictional issue in which no reference is made to the necessity for the discriminatory acceptance of labor disputes. In the *Simon J. Murphy* [88] case it reasserted its jurisdiction over the cases in which "the employer is [not] directly occupied in the production or transportation of war goods." Special emphasis was placed upon the fact that "the practical achievement of the purpose to which the War Labor Disputes Act is directed requires that the Board should not disregard the possibility of a strike in one establishment spreading to other establishments." [89]

It is true that the board also emphasized the possibility "of damage to the war effort or to war production," [90] but the entire approach to the problem is radically different from that of its original "tentative opinion." We believe that the board has now come to a conclusion more in consonance with the no-strike agreement and the original intent of Executive Order 9017.

AGRICULTURAL WORKERS

Agricultural workers are notoriously in the greatest need of governmental assistance. For the most part they are unorganized. The statutory protection of the right to self-organization has not been extended to them. The social benefits of such legislation as the Fair Labor Standards Act,[91] and the Social Security Act [92] are withheld from them. Yet their importance to the community in time of peace and even more in time of war is manifest.

One might consequently have expected that the board, which has placed such emphasis upon the war character of the objects of its jurisdiction, would hasten to settle disputes among agricultural workers. The contrary is true. The board has hesitated to settle cases involving these workers. It has conceded "that agriculture is vitally necessary to

[87] Information received from that agency.

[88] Simon J. Murphy Co., NWLB No. 111-1228-D, 14 War Lab. Rep. 7 at 9 (Feb. 4, 1944). See same case supra note 76. See also Merchant Tailors Assn., NWLB No. 111-3816-HO, Region v, 14 War Lab. Rep. 302 (1944).

[89] Simon J. Murphy Co., NWLB No. 111-1228-D, 14 War Lab. Rep. 7 at 9 (1944).

[90] Ibid.

[91] 52 Stat. L. 1060 at § 213 (1938); 29 U.S.C.A. (1940) at § 213.

[92] 53 Stat. L. 174 (1939); 26 U.S.C.A. (1940) §§ 1400-1426.

the successful prosecution of the war."[93] But it came forward—at least temporarily—with a new exception to its rule that impact upon the war is the basic criterion. The board originally evolved what may be characterized as an isolationist theory for the purpose of placing agricultural workers outside its jurisdiction. In the test case on the subject, it said:

> "... this is not a situation in which a labor difficulty may spread to related or adjacent occupations or plants. The work of these employees is performed on farms in relatively isolated areas. The record before us does not reveal any present danger of this dispute spreading to adjacent war centers."[94]

This extraordinary conclusion was a complete turnabout of the board's original thinking on this subject. It will be recalled that originally many employers argued that only cases directly related to the war were within the board's jurisdiction. The board met this in the *Montgomery Ward* case[95] by pointing out that even if the war were *not* directly involved, an assumption of jurisdiction was justified by the danger that the dispute might spread to neighboring war plants. Now, in this agricultural case, the board was stating that in the absence of the second, and admittedly minor ground, it would not act, notwithstanding the existence of the first and primary ground of jurisdiction.

The benefits of the National Labor Relations Act have been denied agricultural workers in the past for reasons of administrative or political expediency.[96] The same reasons make it inadvisable in the view of many to have their disputes under the aegis of the National War Labor Board. There is no good reason, however, why these workers should not have the right even in peacetime to bargain collectively and to determine through their unions the conditions under which they will work. The right to self-organization and collective bargaining has been described by the Supreme Court as fundamental[97] and thus has

[93] California Packing Corp., WLB Press Release B-1066, 11 War Lab. Rep., No. 8, XIV at XVII (1943), mentioned supra note 76. The importance to the war effort of an adequate food supply has been expressly recognized by the board, Federated Fishing Boat of New England, NWLB Nos. 16, 16a, 1 War Lab. Rep. 1, 83, 86 (1942).

[94] California Packing Corp., WLB Press Release B-1066, 11 War Lab. Rep., No. 8, XIV at XVIII (1943).

[95] 1 War Lab. Rep. 280 (1942), mentioned supra note 68.

[96] Panel report, California Packing Corp., of June 11, 1943 (unreported); see board decision in same case, supra note 76 and infra note 98; S. Rep. No. 573 on S. 1958, 74th Cong., 1st sess., p. 7, May 1, 1935; H. Rep. No. 1147 on S. 1958, 74th Cong., 1st sess., June 10, 1935, minority report of Mr. Marcantonio at p. 26.

[97] Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 at 263, 60 S. Ct. 561 (1940).

necessarily antedated the passage of the National Labor Relations Act. In at least one state, the right has been constitutionally guaranteed to all workers, notwithstanding the absence of an administrative procedure for the enforcement by certain types of employees of these rights.[98]

In wartime however, the issues transcend those revolving about individual rights. It has been shown that the effective and uninterrupted prosecution of the war requires the settlement of labor disputes either through collective bargaining or the determination of a tribunal such as the National War Labor Board. The refusal of the board to enter the agricultural field can be supported today upon no reasonable ground.

On reconsideration, following the protests of organized labor, the board modified its position without changing its disposition of the dispute.[99] It refused to decide the representation issue for the reasons noted below. The issue of jurisdiction was met with the statement that "the board is not called upon in this case to determine its jurisdiction over other types of disputes that may arise between agricultural laborers and their employers. If and when an appropriate case is presented, the Board will make that determination, although it is pertinent to point out that the War Food Administrator, not the War Labor Board, has jurisdiction over voluntary or agree-upon adjustments in wages of agricultural employees not in excess of $5,000 per year."[100]

The reference to the jurisdiction of the War Food Administrator over voluntary adjustments has little meaning in a discussion of jurisdiction over disputes. However, this extraneous interjection may be disregarded in view of the board's explicit reservation of decision upon the jurisdictional issue. The precise meaning of its remarks is discussed below. Suffice it to say at this point, the board will probably take jurisdiction over disputes involving wages and conditions of employment affecting agricultural workers as well as any other workers even though it will continue to refuse a determination of the issue of exclusive representation.

INTERSTATE COMMERCE

Employers opposing the board's actions have frequently taken the position that the board's jurisdiction is limited to disputes affecting interstate commerce.[101] The board has, without exception, overruled

[98] N.Y. Const., Art 1, § 17.

[99] California Packing Corp., NWLB No. 111-549-D, 14 War Lab. Rep. 10 (Feb. 4, 1944).

[100] Ibid.

[101] Brooklyn Central Young Men's Christian Assn., NWLB No. 111-1286-D, 10 War Lab. Rep. 376 (1943); Colorado Spring Grocery & Meat Markets, NWLB No.

such objections and has consistently acted in intrastate disputes.[102] The reasons for this are clear and may be stated simply.

The board is not operating under the interstate commerce power given to Congress under the Constitution. Obviously, it could not have done so under the executive orders which were the sole foundation of its existence and powers until June of 1943. For it is Congress, not the President, which has been given the power to regulate interstate commerce.[103] The board was created under the war powers of the federal government and has acted under those powers since its creation. Executive Order 9017 is expressly predicated upon "the state of war declared to exist by joint resolution of Congress" and "the national interest (which) demands that there shall be no interruption of any work which contributes to the effective prosecution of the war."[104] The War Labor Disputes Act[105] which gives the board what is referred to as its statutory basis expressly makes its jurisdiction dependent upon the effect of the labor dispute on the war.

The war powers of the federal government have not hitherto been regarded as limited to matters affecting interstate commerce.[106] Their exercise by the President and by Congress in connection with war labor disputes does not impose any new limitation. The board seems to have taken the position that any labor dispute is subject to its jurisdiction because of the possible effect of a breach of the no-strike agreement upon community morale as well as upon our civilian economy. This being so, any distinction between intrastate and interstate commerce is completely immaterial and improperly disregards what has been referred to as "important segments of the economy in cases where no war contract is involved."[107]

THE NATIONAL LABOR RELATIONS ACT

It will be recalled that Executive Order 9017 provides that "nothing herein shall be construed as superseding or in conflict with . . . the

111-887-D, 13 War Lab. Rep. 113 (1943); Simon J. Murphy Co., NWLB No. 111-1228-D, WLB Press Release B-1066, 11 War Lab. Rep., No. 8, xiv, mentioned supra notes 76 and 88; Southern Service Co., Ltd., NWLB No. 111-358-C, Region x, 8 War Lab. Rep. 442 (1943).

[102] Ibid. See also NWLB Resolution of July 12, 1944, 17 War Lab. Rep., No. 1, xxvii.

[103] U.S. Const., Art. 1, § 8.

[104] 1 War Lab. Rep. xvii (1942).

[105] 57 Stat. L. 163 (1943).

[106] See Schenck v. United States, 249 U.S. 47, 39 S. Ct. 247 (1919); United States v. MacIntosh, 283 U.S. 605, 51 S. Ct. 570 (1931).

[107] Allis-Chalmers Co., NWLB No. 111-3511-D, 11 War Lab. Rep. 518 at 520 (1943), mentioned supra note 73.

National Labor Relations Act." This passage has its parallel in the War Labor Disputes Act passed a year and a half later which provides that the board in making its decisions in dispute cases "shall conform to the provisions of . . . the National Labor Relations Act . . . and all other applicable provisions of law."[108] Presumably these provisions mean, *first*, that the National War Labor Board will not occupy the field of the National Labor Relations Board either by conducting elections or by directing the cessation of unfair labor practices where the National Labor Relations Board has power to perform either act; *second*, that the National War Labor Board will not direct parties litigant to act in violation of the National Labor Relations Act; and *third*, that weight, possibly finality, must be given to the decisions of the National Labor Relations Board.[109]

An examination of the cases shows that each of the foregoing principles has been followed by the National War Labor Board. The board has invariably referred demands for collective bargaining to the National Labor Relations Board.[110] The National War Labor Board's refusal to act seems proper in all such cases except where the only issue is that of successorship to certification rights and obligations.[111] There one may accuse it of excessive delicacy since successorship is not necessarily a matter within the exclusive jurisdiction of the National Labor Relations Board. The NWLB has refused to consider the propriety of the discharge of union members under a union shop agreement with a rival union where the claim was made that the contract was in violation

[108] 57 Stat. L. 163 at § 7(a) (2) (1943), mentioned supra note 11.

[109] Also, more literally, that the NWLB will not act in *conflict* with the NLRB. Thus in the recent Allis-Chalmers Mfg. Co. case, NWLB No. 111-35111-D, 11 War Lab. Rep. 518 (1943), the NWLB refused to conduct an election at the instance of one union where the NLRB had previously denied a similar request and upheld the certification of a rival union.

[110] Virginia Electric and Power Co., NWLB No. 41, 1 War Lab. Rep. 74 (1942), where the NLRB issued a company-union disestablishment order later enforced by the Supreme Court, and where the NWLB requested expeditious action by the NLRB.

Tennessee Schuylkill Corp., NWLB No. 585, 6 War Lab. Rep. 290 (1943), where the union's NLRB petition for certification was pending, the NWLB directed recognition of the union "for the purpose of handling the grievances of its members" with unsettled grievances to go to arbitration. The board also stated that "the National Labor Relations Board is requested to expedite the election in this case."

[111] In Easy Washing Machine Corp., NWLB No. 703, 6 War Lab. Rep. 10 (1943), the board rejected a mediator's recommendations that the company bargain with a union which, since its certification by the NLRB, had become affiliated with a CIO national union. The board "recommends that the union petition the National Labor Relations Board for an election . . . and that the company consent to the holding of such an election." The decision of the board should at least have directed the company to execute a stipulation of consent to the election.

of the Wagner Act.[112] It has in other types of cases refused to direct the reinstatement of employees allegedly discharged for union activity.[113]

Finality has been given the NLRB decisions with respect, particularly, to one important matter: the appropriateness of the collective bargaining unit.[114] In several cases, the National War Labor Board has been confronted with a request of one or the other party for the extension or limitation of a collective bargaining unit previously found appropriate by the National Labor Relations Board. In almost every such case, the NWLB has held that the determination of the NLRB is conclusive and that the unit for which the union has been certified is the unit to be set forth in the contract without expansion or contraction.[115] On the other hand, the board has directed in certain cases that the same contract cover several separate units for which the same union (or its affiliates) was separately certified by the National Labor Relations Board.[116] Obviously, particularly in wartime, there is mutual and public advantage in the limitation of negotiations and in the determination of as many related disputes as possible. It is even more important to achieve thereby that uniformity of working conditions upon which stabilization is predicated.

While the National War Labor Board has not been given the power to supersede the National Labor Relations Board, it has not been forbidden to assist that agency. Litigation under the National Labor

[112] Pearson Candy Co., Ltd., NWLB No. 11-156-C, Region x, 9 War Lab. Rep. 679 (1943).

[113] Industrial Rubber Goods Co., NWLB No. 111-3402-HO, Region xi, 13 War Lab. Rep. 119 (1943).

[114] Gerber Products Co., NWLB No. 111-2134-D, Region xi, 12 War Lab. Rep. 74 (1943); Remington-Rand, Inc., NWLB No. 424, 7 War Lab. Rep. 183 (1943); Wilson-Jones Co., NWLB No. 161, 3 War Lab. Rep. 312 (1942); Federal Shipbuilding and Dry Dock Co., NWLB No. 25-390-D, 12 War Lab. Rep. 39 (1943), affirming order of Shipbuilding Commission, reported at 11 id. 226 (1943). See, however, Bethlehem Steel Co., NWLB No. 117, 6 War Lab. Rep. 513 (1943).

[115] Ibid. However, the NWLB has not infrequently interpreted NLRB certifications by defining supervisors and by making specific exceptions to control coverage. See Illinois Powder Co., NWLB No. 3025-D, 10 War Lab. Rep. 79 (1943); Borg-Warner Corp., NWLB No. 4246-D, 10 War Lab. Rep. 631 (1943); Federal Shipbuilding & Dry Dock Co., NWLB No. 25-390-D, 11 War Lab. Rep. 226 (1943); Phelps Dodge Corp., NWLB No. 111-1529-D, 11 War Lab. Rep. 71 (1943).

[116] Wilson & Company, Inc., NWLB No. 188, 2 War Lab. Rep. 122 (1942), relying upon the opinion of the chairman of the NLRB. Woodward Iron Co., NWLB No. 111-1205-D, Region iv, 10 War Lab. Rep. 473 (1943). Conversely, the board has directed the execution of agreements for plant guards separate from production workers. Brewster Aeronautical Corp., NWLB No. 111-3372-D, 11 War Lab. Rep. 286 (1943); Great American Industries, NWLB No. 111-467-R, 11 War Lab. Rep. 287 (1943).

Relations Act lacks many of the advantages normally attributed to the administrative process. The investigatory proceedings, the trials before board examiners, the enforcement proceedings of the board, are time-consuming operations. This is not a satisfactory situation even in peacetime. It has resulted in the virtual nullification of many of the National Labor Relations Board's decisions and in the destruction of many unions which were unable, during the long period of litigation, to withstand the pressure of unfair labor practices.[117]

In some cases, the unions were able to enforce the board's decisions by engaging in strikes and other types of economic warfare. Today, however, these pressure activities have been renounced by the unions. The country cannot permit violation of national labor policy, injury to employee morale, or interference with war production. A labor dispute must be decided quickly if the fundamental principles underlying Executive Order 9017 are to be carried out.

Accordingly, the National War Labor Board early in its career instituted the laudable practice not of supplanting the National Labor Relations Board but of supporting and enforcing its orders. Thus, the National War Labor Board has frequently directed employers to bargain with unions certified as the collective bargaining representative of their employees.[118] In one recent case, *Shell Oil Co. Inc.*[119] the board's

[117] See e.g., Leonard B. Boudin, "How to Amend the Wagner Act," 100 NEW REP. 7 (1939).

[118] Electro Chemicals, Inc., NWLB No. 111-379-C, Region x, 12 War Lab. Rep. 80 (1943), directing a shut-down firm and its "successors or agents" to bargain upon resumption of negotiations. In Zion's Cooperative Mercantile, Inst., NWLB No. 111-110-D, 13 War Lab. Rep. 6 (1943), the board directed collective bargaining pursuant to an NLRB certification despite the employer's claim of doubt as to majority representation.

In Utah Copper Co., NWLB Nos. 111-4944-D and 111-4945-D, 14 War Lab. Rep. 80 (1944), the NWLB modified an order of its Non-Ferrous Metals Commission, 13 War Lab. Rep. 284 (1943) by recommending, rather than directing, that the employer bargain collectively with the NLRB certified unions, the commission thereafter to fix the terms and conditions of employment upon which agreement was not reached between the parties. The parties were also directed to execute a collective agreement embodying the terms previously fixed by the commission. Accordingly, the recommendation appears to be as mandatory as a so-called directive.

See United States Gypsum Co., NWLB No. 111-115-D, Region x, 14 War Lab. Rep. 388 (1944). See also Idaho Potato Growers Assn., NWLB No. 111-5051-D, 14 War Lab. Rep. 131 (1944) where the Eighth Regional Board directed collective bargaining in accordance with an NLRB certification and order to bargain collectively based upon a finding that the employees were not agricultural workers. The NWLB regarded itself as bound by the NLRB's finding that the persons involved were employees within the meaning of the National Labor Relations Act. The decision in this case was rendered during the pendency of a petition for review of the NLRB order filed by the company with the circuit court of appeals.

[119] NWLB No. 92, 3 War Lab. Rep. 296 at 298 (1942).

order significantly provides that "the Board, recognizing the findings and conclusions of the National Labor Relations Board as controlling, directs as follows: 'the Company shall recognize the union as the exclusive bargaining representative in the unit defined by the National Labor Relations Board in Case No. R-626 . . .'"

The suggestion has occasionally been made that employees faced with an employer refusal to bargain collectively with their certified representative should file unfair labor practice charges with the National Labor Relations Board.[120] Aside from the inefficacy of such procedure in wartime, it is clear that a union is not required to file such a charge. As a War Labor Board panel recently stated:[121]

> ". . . it may, in seeking to exercise the exclusive bargaining rights awarded it by the N.L.R.B., either file such a charge or, at its discretion, strike. The union has accepted the award of the N.L.R.B. and thinks it unnecessary to submit the question of the unit to that Board for re-determination. . . . Out of this situation, there has, however, arisen a dispute which threatens to interrupt work contributing to the effective prosecution of the war and for which all remedies available through other governmental agencies have been exhausted. It is the opinion of the undersigned, therefore, that it is altogether proper for the National War Labor Board to assume jurisdiction of the dispute."

So much for the simple refusal to recognize the weight of an NLRB certification. There is, however, a variety of situations involving the collective bargaining issue which may be noted briefly.

The War Labor Board will not take jurisdiction over disputes involving representation where there has been neither prior collective bargaining nor NLRB certification.[122] These clearly are controversies concerning representation within the meaning of section 9c of the National Labor Relations Act.

Certifications are given much the same weight accorded them by the NLRB. The War Labor Board thus regards an NLRB certification less than a year old as binding upon the parties.[123] Where the certifica-

[120] See e.g., id. at 308, dissenting report of industry panel member.

[121] Id. at 301-302.

[122] NWLB-NLRB Agreement on Cases Involving Wagner Act Questions, issued March 16, 1944, 14 War Lab. Rep. VIII.

[123] See Ace Foundry Co., NWLB No. 899, 14 War Lab. Rep. 755 (1943). In the J.S. Bache Co. case, NWLB No. 111-2707-D, 15 War Lab. Rep. 581 (1944) the Second Regional Board directed collective bargaining pursuant to a two-year-old NLRB certification.

tion is more than a year old, the NWLB should and usually does rely upon the presumption of continuance of majority representation.[124] Presumably the same result would follow the expiration of an exclusive collective bargaining agreement even in the absence of certification.[125] The exception occurs where the facts cast doubt upon the force of the presumption.[126] If in this type of case there is a competing union the board will not consider its claims to representation unless it or the company has filed a petition for certification with the NLRB prior to certification of the dispute to the War Labor Board.[127] The rationale of this is clear: the board in the absence of a petition for certification may properly assume that "there was no bona fide doubt as to . . . [the first union's] majority status."[128] If the petition was filed, its outcome by way of its dismissal or the election results will be awaited before the NWLB takes further action.

The National War Labor Board has also directed the reinstatement of employees in two types of cases: *first*, where the matter is still pending before the National Labor Relations Board;[129] *second*,

[124] See Montgomery-Ward & Co., NWLB No. 111-5353-HO, 13 War Lab. Rep. 454 (1944); National Carbon Co., NWLB No. 13-353-D, 14 War Lab. Rep. 21 (1944); in Commercial Iron Works, NWLB No. 111-676, 14 War Lab. Rep. 166, the 10th Regional Board on February 4, 1944, directed the execution of a contract, provided that the union secure a ruling from the NLRB within sixty days to the effect that it was entitled to recognition. The union had won an NLRB election on September 26, 1941, and the long delay was due to the NWLB and the United States Conciliation Service. Accordingly, the conditions seem unfair. Cf. Title Guarantee and Trust Co., New York State Labor Relations Board, Case No. SE-9592, 12 Lab. Rel. Rep. (1943).

[125] Ibid; Los Angeles Candy Companies, NWLB No. 111-3362-D, 17 War Lab. Rep. 186 (1944).

[126] See dictum in National Carbon Co., NWLB No. 13-353-D, 14 War Lab. Rep. 21 (1944), mentioned supra note 124.

[127] NWLB-NLRB Agreement on Cases Involving Wagner Act Questions, 14 War Lab. Rep. VIII.

[128] Id. at IX.

[129] Western Cartridge Co., NWLB No. 491, 4 War Lab. Rep. 427 (1942), involving nineteen discharges; Montag Brothers, Inc., NWLB No. 799, 6 War Lab. Rep. 355 (1943), ordering the reinstatement of strikers. An excellent panel report points out the distinction between NLRB and NWLB powers and recommends "that the Board make it clear in its order that it is not exercising the powers of the NLRB to reinstate employees but that it is merely recreating a status in the plant of the company as a measure of insuring industrial stability as a war measure, pursuant to its duly granted powers" (p. 359); Carter Carburetor Corp., NWLB No. 148, 6 War Lab. Rep. 565 (1943), where the NLRB's trial examiner had recommended the reinstatement of employees discharged on account of their participation in a strike; cf. Winchester Repeating Arms Co., NWLB No. 443, 6 War Lab. Rep. 359 (1943), mentioned infra note 130, where the board had directed that three discharges upon which

where the National Labor Relations Board has directed the reinstatement of these employees and enforcement proceedings are pending before the circuit court of appeals.[130] In both cases, the National War Labor Board decision is made without prejudice to the rights of the employer in the event that the National Labor Relations Board or the courts should render a contrary decision. The National War Labor Board has acted similarly in cases involving the disestablishment of or directions to cease recognizing labor organizations. Thus, in the *Virginia Electric and Power Company* case[131] where the National War Labor Board had previously refused[132] to direct an employer to bargain with one union while the validity of a contract with another was the subject of the National Labor Relations Board enforcement proceedings, it nevertheless directed that the employer cease bargaining with the company-union (involved in the unfair labor practice case) until an election was held and a collective bargaining agent certified by the National Labor Relations Board. In another case,[133] in which the National Labor Relations Board had disestablished a company-union, the National War Labor Board directed that:

> "The company shall comply with the order of the National Labor Relations Board disestablishing the independent union and shall not recognize or deal with said independent union unless and until such time as a superior court modifies or reverses the order of the National Labor Relations Board."

The foregoing illustrates not merely admirable cooperation between government agencies, but the more effective enforcement of a statute such as the Wagner Act by interlocutory orders. However, the National War Labor Board has more recently indicated somewhat of

the NLRB had not yet acted be handled through the grievance machinery it set up for a minority union. Recently the National Board reversed a regional board order reinstating employees whose cases were pending before the NLRB. McGough Bakeries, Inc., NWLB No. 111-2275-D, 16 War Lab. Rep. 624 (1944).

[130] Winchester Repeating Arms Co., NWLB No. 443, 6 War Lab. Rep. 359 (1943); Western Cartridge Co., NWLB No. 491, 4 War Lab. Rep. 427 (1942); Borg-Warner Corp., NWLB No. 517, 7 War Lab. Rep. 119 (1943), directing the continuance of employment of one reinstated in accordance with an NLRB order.

[131] Virginia Electric & Power Co., NWLB No. 41, 4 War Lab. Rep. 272 (1942), directing that the company refrain from entering into a contract either with the AFL union or the one found by the NLRB to be company-dominated and that it recognize the AFL union for the adjustment of its members' grievances.

[132] Virginia Electric & Power Co., 1 War Lab. Rep. 74 (1942), where the NWLB denied an AFL union's request for recognition as bargaining agent. See note 131 supra.

[133] Western Cartridge Co., NWLB No. 491, 4 War Lab. Rep. 427 (1942).

a change of mind. It came to an agreement[184] with the National Labor Relations Board that "in all cases of complaints about discharges the War Labor Board ought not to act unless the number of men discharged was so large a group that their remaining out would interfere with the war effort." It also agreed "that the mere filing of the National Labor Relations Board Trial Examiner's report finding an unfair labor practice ought not to afford a ground for action by us since the Trial Examiner's report may be reversed." Peculiarly enough this agreement was not limited to cases of discharges allegedly in violation of the National Labor Relations Act. At the NLRB's request, it applied to discharges not allegedly due to union activity but allegedly arbitrary or without just cause. These discharges, of course, are not subject to the jurisdiction of the NLRB.

The theory of the National Labor Relations Board, which vigorously sought the agreement, appears to be this: It is true that the National Labor Relations Act prescribes discharges for union activity and not discharges for any other reason however unreasonable or improper. However, in deciding whether or not a discharge is for union activity, the National Labor Relations Board and the courts have often given consideration to the absence of a proper reason for discharge. Accordingly, since both the National Labor Relations Board and the National War Labor Board will inquire into the propriety of a discharge, the National War Labor Board will be infringing upon the jurisdiction of the National Labor Relations Board if it takes any cases of discharge.

The desire of the National Labor Relations Board to retain its jurisdiction is very understandable. However, that must not blind us to the fallacy in the above argument. That government agency seems to have overlooked the distinction between evidence and substantive rights. It is true that absence of a proper reason *may* be evidentiary of discriminatory intention, if it is coupled with other matters such as union activity and employer knowledge of it, etc. But that does not mean that we are not discussing two very different things; one, a discharge without justification, and the other, a discharge for union activity. The National Labor Relations Board itself has argued for many years that a discharge without cause is not the same as a discharge in violation of the National Labor Relations Act. Today apparently, it is adopting the thinking of its anti-labor opponents in this, as in some other aspects. In doing so, it is not merely being illogical, but it is injuring the entire scheme of labor relations for it is attempting to take away from the

[184] Reported in dissenting opinion of Regional Board Eleven's Industry Members, Centrifugal Fusing Co., NWLB No. 2480-D, 11 War Lab. Rep. 577 at 579 (1943).

National War Labor Board a dispute over which the NLRB is neither willing nor able to assume jurisdiction. Under the National Labor Relations Board's contemplated scheme, an employee discharged without cause would have no recourse to an impartial tribunal for the settlement of his grievance. Fortunately, up to now, the National War Labor Board and its regional boards have taken jurisdiction over disputes involving discharges which could not possibly come within the jurisdiction of the National Labor Relations Board. One such case involved a discharge for alleged sabotage;[135] another because the employee was an alien whose loyalty was allegedly in question.[136] It is to be hoped that this general agreement will give way to the necessities of industrial relations.

The tenor of the agency agreement suggests a narrow conception of labor relations which is completely inconsistent with the previous policies of the National War Labor Board. Possibly because of a fear of infringing upon another agency's jurisdiction, the board disregards the fact that the discharge of a small number of men may reasonably lead to a strike by a large number, and that, even if no strike results, the effect upon employee morale may be almost as disastrous. This theory of NLRB "jurisdiction" was carried to a bizarre extreme by one of the regional boards. In a recent case, it denied checkoff and a leave of absence for union activity on the ground that "such issue is not properly before the . . . Board inasmuch as such issue requires determination by the National Labor Relations Board rather than the National War Labor Board."[137]

One may ask, as have industry NWLB members, why the board should act at all. Our answer is that the board must act in such a case because a wrongful discharge gives rise to a bona fide grievance. Like all other grievances, it must be settled by the government if the dis-

[135] Id.

[136] Motor Wheel Corp., NWLB No. 111-221-C, Region XI, 10 War Lab. Rep. 714 (1943); see also Frank-Foundries Corp., NWLB No. 95, 3 War Lab. Rep. 223 (1942), where the board assumed jurisdiction over a dispute arising from the discharge of ten employees and held that the union could file NLRB charges or submit the cases to contract grievance and arbitration procedures.

Muskegon Piston Ring Co., NWLB No. 111-1197-HO, Region XI, 10 War Lab. Rep. 339 (1943), reinstating with back pay an employee discharged for alleged misconduct.

[137] Arkansas Fuel Oil Co., NWLB No. 8-D-120, Region VIII, 13 War Lab. Rep. 341 at 342 (1943). The NWLB has also granted certain relief usually found in NLRB orders. One such instance is the direction that the employer grant union representatives access to company property. General Petroleum and Richfield Oil Corps., NWLB No. 111-316-C, 12 War Lab. Rep. 7 (1943).

putants themselves fail to settle the matter amicably.[138] It is true that it has long been an employer's prerogative to determine cause for discharge. But that (like certain trade union "rights") is passing into abeyance as collective bargaining contracts provide for the arbitration of all disputes. It is only one of a large number of employer "rights" which must be yielded today when the requirements of industrial peace stand above all private considerations.

Our discussion of the agency agreement has been limited to its disposal of charges *not* based upon union activity. However, there is considerable strength to the more bitterly contested conclusion that the NWLB has the right to reinstate employees allegedly discharged for union activity. In doing this, it is by no means conflicting with the NLRB by engaging in the cessation of unfair labor practices. Instead it is engaging in work beyond the confines of NLRB jurisdiction: the settlement of a labor dispute which might affect the prosecution of the war. In wartime, restoration of the status quo ante is of preeminent importance regardless of whether it takes the form of the cessation of a strike, the restoration of seniority rights or the reinstatement of a discharged employee. The fact that the immediate *effect* of the NWLB's directive order is similar to an NLRB reinstatement order cannot obscure the different legal character of the two governmental actions.

Conformance to the National Labor Relations Act may have a more literal meaning, i.e., whether a board order is in *violation* of the National Labor Relations Act. This question has been raised most often by companies objecting to the board's maintenance of membership clause. It was originally made in September 1941, at a time when the National Defense Mediation Board had jurisdiction over labor disputes affecting the war.[139] Then, the general counsel of the National Labor Relations Board stated that the proviso in section 8 (3) of the National Relations Act "is not confined to the closed shop variety of contracts," but that it included "a maintenance of membership clause."[140]

When the issue was raised before the National War Labor Board in the *Little Steel* cases, the board pointed out that "Section 7 of the Executive Order does not place a limitation upon the power of the

[138] The War Labor Disputes Act, supra note 11, imposes upon the board the duty to settle *all* labor disputes. See also Norge Machine Products Division of Borg-Warner Corp., NWLB No. 111-5665-D, 14 War Lab. Rep. 367 (1944), where the Eleventh Regional Board reinstated strikers "discharged" by the employer, reversed on other grounds, 15 War Lab. Rep. 650 (1944).

[139] Discussed in the opinion in the Little Steel cases, NWLB Nos. 30, 31, 34, 35, 1 War Lab. Rep. 324 (1942), mentioned supra note 15.

[140] Id. at 355.

Board finally to determine on their merits whatever issues may arise in a labor dispute, but rather when read in conjunction with Section 2 of the order, it places a procedural limitation upon the War Labor Board in that the procedures of other existing agencies for the settlement of labor disputes shall be exhausted before the War Labor Board takes jurisdiction."[141]

However, the board has met flatly the substantive arguments relating to the National Labor Relations Act, conceding *arguendo* that section 7 "relates to matters of substantive law rather than to procedural rights only."[142] It has repeatedly reaffirmed the conclusion originally reached by the National Defense Mediation Board and by the general counsel of the National Labor Relations Board that its union security provisions are in strict conformance with the proviso to section 8 (3) of the Wagner Act.[143]

So-Called Unfair Labor Practices Outside the Scope of NLRB and SLRB Jurisdiction

There are of course, many so-called unfair labor practices which are outside the scope of the National Labor Relations Act and of the various state labor relations laws. This is the result of the exclusion of certain types of workers from the benefits of the National Labor Relations Act.[144] It also results from the small number of state laws patterned after the National Labor Relations Act.[145] That federal law excludes from the category of employer the United States, the states, and their political divisions.[146] It excludes from its protection, workers

[141] Id. at 354.

[142] Ibid.

[143] Id.; Montgomery Ward & Co., Inc., NWLB No. 3930-D, 10 War Lab. Rep. 415 (1943); Fairbanks, Morse & Co., NWLB No. 4327-D, 11 War Lab. Rep. 217 (1943); Vilter Mfg. Co., NWLB No. 3928-D, 11 War Lab. Rep. 332 (1943).

[144] 49 Stat. L. 449 (1935).

[145] New York State Labor Relations Act, N.Y. Labor Law (McKinney, 1939) art. 20, §§ 700-715, (Supp. 1944) §§ 705, 707; Massachusetts State Labor Relations Law, 1938 Acts, c. 345 as amended by 1939 Acts, c. 318 and 1941 Acts, c. 251, Mass. Ann. Laws (Michie, 1942) c. 150A; Pennsylvania Labor Relations Act, 1937 Acts, No. 294, P. L. 1168 as amended, Pa. Stat. Ann. (Purdon, 1941) tit. 43, §§ 211.1-211.13, (Supp. 1943) §§ 211.3, 211.4, 211.7, 211.9; Minnesota Labor Relations Act, 1939 Laws, c. 440 as amended by 1941 Laws, c. 469 and 1943 Laws, cs. 624 and 658, Minn. Stat. (Mason, 1927) (Supp. 1944) c. 23, §§ 4254-21 through 4254-47; Utah Labor Relations Act, 1937 Laws, c. 55, Utah Code Ann. (1943) §§ 49-1-8 through 49-1-25; Rhode Island State Labor Relations Act, 1941 Laws, c. 1066 as amended by 1942 Laws, c. 1247; Wisconsin Employment Peace Act, 1939 Laws, c. 57, Wis. Stat. (1941) §§ 111.01-111.19; Kan. Laws, 1943, c. 191; Colo. Laws, 1943, c. 131.

[146] 49 Stat. L. 449 at § 2(2) (1935).

employed in agricultural work, in domestic service or by their parents or spouses.[147] It expressly excludes those workers who are subject to the operation of the Railway Labor Act,[148] i.e., the more than a million employees of railroads subject to the jurisdiction of the Interstate Commerce Commission. In addition, the recent NLRB policy of refusing to ascertain the collective bargaining representatives of foremen[149] has resulted in an important addition to this list of exceptions.

There are today only nine states which have state labor relations laws of the administrative character of the Wagner Act.[150] Consequently, most of the so-called intrastate employees are deprived of the benefits of this type of protective labor legislation. In the few states which do have such laws, certain employee categories are expressly deprived of protection. The most prominent of these are those excluded from the NLRA.[151] Others are the employees of charitable, educational and religious institutions.[152] In addition, some states will not accept jurisdiction over representation disputes involving union jurisdictional problems.[153]

The absence of legislative provision has not prevented the occurrence of disputes involving intrastate employees. These disputes have arisen by reason of discharge of employees, the existence of company unionism, the refusal to bargain collectively, and other interference with self-organization. The outbreak of war has not reduced the number of such disputes; and it has increased their seriousness. Those involving foremen from whom the NLRB has arbitrarily withdrawn the

[147] Id. at § 2(3).

[148] Id. at § 2(2).

[149] Maryland Drydock Co., 49 NLRB, No. 105, p. 733 (1943), 50 id. No. 53, p. 363 (1943); see 23 id. No. 95, p. 917 (1940), 24 id. No. 83, p. 803 (1940). For the history of unionization of foremen which casts substantial doubt upon the propriety of the NLRB's order, see UNION MEMBERSHIP COLLECTIVE BARGAINING BY FOREMEN, Bulletin No. 745, U.S. Dept. of Labor, Bureau of Labor Statistics (1943), and see also H. Hearings on H.R. 2239, H.R. 1742, H.R. 1728, H.R. 992, 78th Cong., 1st sess., March-May 1943 (Committee on Military Affairs). These bills relate to the full utilization of manpower.

[150] See note 145 supra.

[151] See note 145 supra, i.e., Colorado, Minnesota, New York, Pennsylvania, Rhode Island, Utah, Wisconsin and Massachusetts, although the last cited state law makes no specific mention of the Railway Labor Act. Kansas defines neither employer nor employee. Colorado also excludes executives and supervisory employees. Both Wisconsin and Colorado exclude strikers and employees discharged on account of union activities if they too were guilty of unfair labor practices.

[152] N.Y. Labor Law (McKinney, 1939) art. 20, § 715; R.I. Acts, 1941, c. 1066, § 16.

[153] N.Y. Labor Law (McKinney, 1939) art. 20, § 705 (3); R.I. Acts, 1941, c. 1066, § 6 (3).

protection of the Wagner Act have led to very dangerous strikes. As a result, the National War Labor Board has been and will be repeatedly asked to intervene in disputes of this nature involving employees who have no recourse to federal or state agencies.[154]

Discharges

The most obvious type of dispute arises from the discharge of employees who are represented by a labor organization. The discharge may take two forms: First, where the employee claims to have been discharged for union activity and second, where it is alleged that the discharge is without just cause. If the first contention is made, and there is a state or federal tribunal with the duty to protect the employee's right to self-organization, the NWLB should not normally act except as indicated above. However, assuming that the employee is engaged in intrastate work in a state without a state labor relations law, it seems clear that this type of dispute must be decided by the NWLB.[155] The same is true of course of a discharge, regardless of the commerce aspect, where the claim is made not that it was for union activity, but simply that it was captious, otherwise improperly motivated or simply unreasonable.[156] Here clearly for the reasons stated above the board must necessarily act because there is no other tribunal with jurisdiction.

Company Unions

One of the old-time methods of preventing labor organization has been the creation of company unions, i.e., labor organizations dominated, formed or assisted by employers. Such unions have been of great value to employers in interfering with the self-organization of their employees. A large part of the litigation of the last eight years before the National Labor Relations Board has involved this issue of com-

[154] The NWLB has recently taken jurisdiction over a dispute affecting foremen, exclusive of issues concerning bargaining rights and alleged discriminatory discharges under the NLRA. It also ordered the reinstatement of the striking foremen. Aeronautical Products, Inc., 15 War Lab. Rep. 688 (1944).

[155] Southern Service Ltd., NWLB No. 111-358-C, Region x, 8 War Lab. Rep. 442 (1943) where the reinstatement of discharged strikers was ordered.

[156] Muskegon Piston Ring Co., NWLB No. 111-1197-HO, Region xi, 10 War Lab. Rep. 339 (1943) (unanimous order to reinstate with back pay an employee discharged for allegedly improper conduct). Motor Wheel Corp., NWLB No. 111-221-C, Region xi, 10 War Lab. Rep. 714 (1943), cited supra note 136 (order to reinstate without back pay but with full seniority rights an employee discharged because he was an alien under governmental investigation, who was subsequently "cleared"). Centrifugal Fusing Co., NWLB No. 2480-D, 11 War Lab. Rep. 577 (1943), cited supra note 134 (discharge on account of alleged sabotage).

pany unionism. The board, as well as Congress and the courts, has made frequent findings that company-unionism interferes with the rights of collective bargaining and self-organization.[157]

It is, however, true that the issue of company unionism is not one normally within the scope of the War Labor Board. While it can be argued that employees have a fundamental right not to be discharged without cause, it is somewhat more difficult to show that, in the absence of statute, they have a fundamental right not to be subjected to the burden of a company union. That "right" was first given to employees generally through the passage of the National Labor Relations Act.[158] It would seem proper, therefore, to require that any claims of company unionism be dealt with only by national or state labor relations boards. There is one exception to this conclusion. If the existence of a company union imperils the collective bargaining rights of a labor organization with a substantial representation among the employees involved, the NWLB should disestablish the company union during the preelection period.[159]

Refusal to Bargain Collectively

The United States Supreme Court has said that the right to argue collectively through a union of one's own choosing, is a fundamental one antedating the passage of the National Labor Relations Act.[160] Whether or not one is wholly in agreement with this statement, it is common knowledge that the refusal to deal with labor unions has historically been the prime cause of labor disputes.[161] This type of dispute,

[157] S. Rep. No. 573 on S. 1958, 74th Cong., 1st sess., p. 10, May 1, 1935; H. Rep. No. 1147, 74th Cong., 1st sess., p. 18, June 10, 1935; Report of (old) NLRB to President, for period July 9, 1934 to Jan. 9, 1935; National Labor Relations Board v. Pacific Greyhound Lines, Inc., 303 U.S. 272, 58 S. Ct. 577 (1938); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S. Ct. 615 (1937).

[158] See, however, the Railway Labor Act of 1934, 48 Stat. L. 1185, 45 U.S.C. (1940) §§ 151, 152; the Bankruptcy Act, 30 Stat. L. 544 (1898) as amended 1933-1934, 11 U.S.C. (1940) § 672; and the Emergency Railroad Transportation Act of 1933, 48 Stat. L. 211 at § 7E which protected special employee groups against the menace of company unions.

[159] One suggested alternative is to grant a minority union exclusive bargaining rights if "it can establish that the company has engaged in unfair labor practices in an attempt to defeat the union or to prevent its becoming the recognized collective bargaining agent for the employees." Resolution of Twelfth Regional War Labor Board, November 9, 1943 (unreported).

[160] Amalgamated Utility Works v. Consolidated Edison Co., 309 U.S. 261, 60 S. Ct. 561 (1940).

[161] See e.g., JOSEPH ROSENFARB, THE NATIONAL LABOR POLICY AND HOW IT WORKS, c. 8 (1940).

too, did not end with the outbreak of war, nor has it been limited to those cases in which the NLRB or a similar state agency could direct an employer to bargain collectively. It has occurred in many cases where the employer is protected by reason of the intrastate character of the business or because its employees come within one of the exceptions to the application of the state law.

Disputes involving collective bargaining have arisen mainly in two types of cases. One type is where the employer denies that the union represents his employees,[162] the other, where he admits it.[163] In both cases, it has been argued that he has no legal obligation to bargain and that a directive order of the board, requiring such bargaining, establishes a little Wagner Act for the state in which the employees work.[164]

The answer to this claim is, of course, somewhat different in wartime than in peacetime. Some of our states recognize the fundamental right of self-organization and of collective bargaining in their constitutions or legislation.[165] That they have not implemented this right with legal machinery for its enforcement does not derogate from its existence. In peacetime, the absence of machinery for the enforcement of this right is compensated by such economic weapons as the strike and boycott. In wartime, these weapons must be put aside. As the Twelfth Regional WLR recently stated:

> "It does not follow, however, that employees have foregone all opportunity to gain by peaceful measures during time of war that which may be available to them in time of peace by use of force. The War Labor Board was created so that both labor and management could settle such issues peacefully for the duration of the emergency without freezing either side to pre-war conditions."[166]

Investigation of Representatives

The situation presents no distinction in principle where the employer denies that the union has been designated by its employees as their exclusive collective bargaining agent. The board would merely

[162] Southern Service Ltd., NWLB 111-358-C, Region x, 8 War Lab. Rep. 442 (1943).

[163] Champion Steam Laundry, NWLB No. 111-312-C, Region vi, 9 War Lab. Rep. 336 (1943); The Austin Co., NWLB No. 4264-D, 8 War Lab. Rep. 189 (1943) (sustaining prior order of RWLB vi); New Service Laundries, Inc., NWLB No. 111-1536-D, Region xii, 10 War Lab. Rep. 626 (1943).

[164] See particularly the dissenting opinion in New Service Laundries, Inc., NWLB No. 111-1536-D, Region xii, 10 War Lab. Rep. 626 (1943).

[165] E.g., Cal. Labor Code (Deering, 1943) § 923.

[166] See New Service Laundries, Inc., NWLB No. 111-1536-D, Region xii, 10 War Lab. Rep. 626 at 628 (1943), cited supra note 163.

have to engage in the administrative process of ascertaining the desires of the employees. For this task it has the benefit of the precedents established by the National Labor Relations Board in eight rich years of operation. Accordingly, since March of 1943, the national and regional boards have made this type of investigation of representatives in the few cases requiring this technique.[167] In some cases, the board has employed the old and now discarded card-check method of the NLRB.[168] In others, it has conducted elections by secret ballot.[169] Following the practice of the National Labor Relations Board, it has made findings, first as to the appropriateness of the bargaining unit and then as to the choice of the employees. This practice had continued without interruption until October 26, 1943 when the board issued its tentative opinion on jurisdiction and on the certification of disputes.[170] It announced therein that it would not enter the representation field "save under the most compelling circumstances where the war effort clearly requires a particular course of action."[171] The board did not explain the nature or extent of the compulsion which would lead to such action. Suffice it to say that the cases in which this decision was reached involved the following:

1. Three laundry and dry cleaning establishments where according to the board "the record does not show that the dispute has become so serious as to threaten substantial interference with war production."[172]

2. The *California Packing Corp.* case, referred to above, involving agricultural workers, in which the board found that "agriculture is vitally necessary to the successful prosecution of the war."[173]

3. The *Simon J. Murphy Co.*[174] case where the board directed the reinstatement of discharged employees because of "the potential effect on the war" and "the risk to the war effort that would be involved in refusing to take jurisdiction of the dispute." If the last two examples lack these "compelling circumstances" it is safe to assume that they do not exist.

[167] California Packing Corp., NWLB No. 111-549-D, WLB Press Release B-1066a, issued Oct. 31, 1943, 11 War Lab. Rep. No. 8, XIV at XX in dissenting opinion, cited supra note 76.

[168] Information received from the board.

[169] Union National Bank Building Operating Co., NWLB No. 4326-D, Region VII, 11 War Lab. Rep. 366 (1943); Colorado Springs Grocery & Meat Markets, NWLB No. 111-887-D, 13 War Lab. Rep. 113 (1943).

[170] Simon J. Murphy Co., NWLB No. 111-1228-D, California Packing Corp., NWLB No. 111-549-D, WLB Press Release B-1066, 11 War Lab. Rep. No. 8, XIV, mentioned supra note 76.

[171] Id. at XVII.

[172] Id. at XVIII.

[173] Id. at XVII.

[174] Id. at XIX.

Why did the board refuse to deal with this type of case? The tentative opinion stated that it involved a problem "with which this Board is not equipped to deal." To that, a complete answer appears to have been given in the dissenting opinion of the labor members. *First,* if administrative changes are necessary, make them. "We must adapt our administrative machinery to the problem that must be solved. We cannot shirk our responsibility by seeking to check the problem to fit the machinery we have established at the present time."[175] *Second,* there had been no material increase in administrative difficulties arising from the handling of these representation cases during the period under discussion. Less than two per cent of the certifications of labor disputes to the board from the time of the first representation case had involved this problem.[176]

The second argument made by the board was that "such determinations are for the period preceding collective bargaining; the work of this Board is, in the main, tied in with the period subsequent to negotiations, when collective bargaining has broken down."[177] The artificiality of this distinction will be obvious to every student of labor relations. For many years representation disputes have been recognized as labor disputes by courts and legislatures.[178] It is rather late to write a new definition.

The third argument of the board is that "action by the War Labor Board taken in the period when a union is unrecognized or uncertified has not generally avoided recurring difficulties between the parties."[179] This is a rather surprising statement since there had been an insignificant number of elections conducted by regional boards[180] and there has been no evidence of so-called "recurring difficulties."

The solution of the board—that the dispute be referred back to the Conciliation Service,—is no solution at all if the board is not willing to *compel* the settlement of representation cases. In its tentative opinion, the board did indicate that it regarded management as obligated "to accept a determination by democratic election of questions concerning representation even though, in the particular situation, there may be no statutory obligation to do so."[181] But this obligation is meaningless

[175] Ibid.

[176] Id. at xx.

[177] Id. at xvii.

[178] See Norris-LaGuardia Act, supra note 56, N.Y. Anti-Injunction Law, Civil Practice Act, § 1876a.

[179] Simon J. Murphy Co., NWLB No. 111-1228-D, California Packing Corp., NWLB No. 111-549-D, WLB Release B-1066, 11 War Lab. Rep., No. 8, xiv at xvii, cited supra note 76.

[180] Id. at xx.

[181] Id. at xv.

unless the board is prepared to conduct elections in the face of management opposition. The board did say that the failure on the part of management "to conform to these obligations will impose upon the Board the necessity of specifying definite rules concerning certification of cases, and the formulation of appropriate regulations in order that collective bargaining may continue to perform its healthy function and that the Board may continue to be an effective instrument for preserving industrial peace."[182] But nowhere in the opinion does the board indicate that it will conduct such elections. Its contrary intentions may be inferred from the vigorous dissenting opinion in which it was stated that: "To expect exhortation and prayer to replace the threat of compulsion is to betray a naiveté of which, we are certain, none of the Board members is guilty."[183]

The War Labor Board issued new and presumably final opinions in these representation cases on February 4, 1944.[184] While these reaffirmed its original refusal to accept jurisdiction, the reasons offered were somewhat different and the effect upon the original no-strike agreement far less serious.

Agricultural workers were excluded because "the exclusion of agricultural labor from the provisions of the National Labor Relations Act was based upon a deliberate policy judgment of Congress that the Federal Government ought not to deal with questions of collective organization and representation affecting such employees."[185] The representation disputes of the building and laundry workers were rejected because "the Board would be assuming the virtual role of a statutory labor relations board in states where local legislatures had not seen fit to act."[186] These rejections appear to be absolute in character. The board has finally eliminated the possibility suggested in the "tenta-

[182] Ibid.

[183] Id. at xx.

[184] Simon J. Murphy Co., NWLB No. 111-1228-D, 14 War Lab. Rep. 7 (1944); California Packing Corp., NWLB No. 111-549-D, 14 id. 10 (1944), cited supra notes 88, 99.

[185] 14 id. 10.

[186] Atlanta & Savannah Laundries, NWLB Nos. 111-1840-D, 111-2638-D, 111-2712-D, 14 War Lab. Rep. 11 (1944). Subsequently, the board adjudicated the Atlantic Laundry dispute in Atlantic Laundries, Inc., NWLB No. 111-5126-D, 17 War Lab. Rep. 150 (1944); similar action was taken in Young Men's Christian Assn., NWLB No. 111-1774-D, 15 War Lab. Rep. 236 (1944) and Universal Furniture Mfg. Co., NWLB No. 111-3315-D, Region x, 15 War Lab. Rep. 619 (1944). But see Polk Sanitary Milk Co., NWLB No. 111-1826-D, Sixth Region, 15 War Lab. Rep. 487, refusing jurisdiction over a dispute arising from an intra-state employer's refusal to bargain collectively.

tive opinion" that it might enter the representation field "under the most compelling circumstances where the war effort clearly requires a particular course of action."

The board's reasons are persuasive in neither case. So far as agricultural workers are concerned, the views of Congress with respect to a peacetime statute like the National Labor Relations Act can have little bearing upon the jurisdiction and powers of the wartime NWLB. The board's statement that "the word employee as used in the War Labor Disputes Act is defined in Section 2 (d) as having the same meaning as in the National Labor Relations Act"[187] is equally irrelevant. Agricultural workers are employees, regardless of what definition was inadvertently written into this sprawling, badly-written Smith-Connally Law. Certainly Executive Orders 9017 and 9250 are subject to no such arbitrary limitations. It is doubtful whether Congress could have curtailed by statute the board's power vested in it by the President, even if this result were intended.

As for nonagricultural workers, the board's arguments are equally weak. It may be true that a board conducting intrastate elections "would be assuming the virtual role of a statutory labor relations board."[188] But this is a statement of fact rather than of legitimate objection. If states have not acted to settle wartime labor disputes, the board must of necessity do so. The argument that "this is a role for which the Board is not equipped"[189] repeats the one discussed and disposed of above.

What is there which makes the board's decision, if somewhat unreasonable, at least palatable? The answer lies in the board's decision in the *Anacortes Veneer Company*[190] case rendered during the period between the two sets of decisions herein discussed. There the board held that a union representing a substantial minority of employees had a right to litigate terms and conditions of employment of its own members. The rationale as stated in the opinion of Public Member Morse[191] was as follows:

> "The National War Labor Board has concluded that, during the existence of the present war emergency, in cases wherein no

[187] California Packing Corp., NWLB No. 111-549-D, 14 War Lab. Rep. 10 (1944), mentioned supra note 99.

[188] Atlanta & Savannah Laundries, NWLB Nos. 111-1840-D, 111-2638-D, 111-2712-D, 14 War Lab. Rep. 10 (1944), mentioned supra note 186.

[189] Ibid.

[190] NWLB No. 111-368-C, 13 War Lab. Rep. 150 (1943).

[191] Id. at 152.

collective-bargaining agent has been certified for the employees involved, any group of employees who have exhausted all the normal procedures for obtaining wage increases are entitled to have their wage claims passed upon by the War Labor Board. If the Board were to adopt the opposite point of view by ruling that wage demands could be presented only through the duly certified or recognized collective-bargaining agent of the employees in question, it would be a party to a procedure which would effectively prevent small groups of employees, such as those involved in the instant case, from securing deserved wage increases. The National War Labor Board does not propose to become a party to such a procedure."

Accordingly, in the second significant *California Packing Corporation* case opinion,[192] the board deferred consideration of its jurisdiction over nonrepresentation disputes that might arise between agricultural laborers and their employers. And in the related laundry cases it said that "where a dispute exists between an intrastate employer and his employees on questions other than the right of exclusive representation, such as wages and conditions of employment, and the dispute threatens substantial interference with the war effort, the board has a duty, under the War Labor Disputes Act, to decide the dispute by prescribing appropriate terms and conditions of employment."[193]

THE BASIC MAGNESIUM DOCTRINE

The passage of the Frey Amendment to the Labor-Federal Security 1944 Appropriation Act[194] raised a particularly interesting legal problem. That amendment provided that the NLRB might not use the funds provided by the bill to set aside a labor agreement, including one executed in violation of section 8 (3) of the National Labor Relations Act, unless its validity were attacked within three months after its execution. The *Basic Magnesium*[195] case arose when that company entered into a contract with an AFL union, following notification of a CIO union's claims to representation. The latter then filed a petition for certification and, after an employee election, was certified by the National Labor Relations Board. When the company refused to bar-

[192] California Packing Corp., NWLB No. 111-549-D, 14 War Lab. Rep. 10 (1944), also cited supra note 99.

[193] Atlanta & Savannah Laundries, NWLB Nos. 111-1840-D, 111-2638-D, 111-2712-D, 14 War Lab. Rep. 11 at 12 (1944), mentioned supra note 186.

[194] 57 Stat. L. 494 (1943).

[195] Basic Magnesium Inc., NWLB No. 11-2980-D, 14 War Lab. Rep. 209 (1944).

gain with the certified union, it filed unfair labor practice charges with the NLRB. However, that agency refused to issue a complaint on the ground that the rider precluded action in a complaint case arising over an agreement entered into three months or more prior to the filing of charges. This did not, however, still the dispute between the employer and the CIO union. The latter asked the NWLB to intervene and order collective bargaining in line with the NLRB certification. For, while the unlawful AFL contract was not subject to attack by the NLRB, the NWLB was under no limitation, by appropriations rider or otherwise, in the settlement of labor disputes. It could have directed collective bargaining to which the CIO union was entitled under the NLRB certification. Instead, it stated that "it declines to take jurisdiction." The board's press release states as a reason: "It was felt by the majority that the War Labor Board could not properly undertake to do what Congress had directed the National Labor Relations Board not to do."[196] Recent hearings before the House Appropriations Committee illuminate the NWLB's error in failing to settle the dispute.[197]

GRIEVANCES

For many years, labor relations and personnel experts have recognized the necessity of procedures for the swift and fair settlement of employee grievances. The failure to employ such procedures has not only caused obvious inequities, but has adversely affected employee morale and work. As a result, progressive employers, including various governmental departments and agencies, have set up grievance procedures even in the absence of a collective bargaining relationship with a labor organization.[198]

The War Labor Board has been faced with two separate problems in connection with grievance machinery: first, where only a minority of the employees are organized, but request the adoption of a means of settling grievances; second, where an employer, in the course of a dispute with the exclusive bargaining representative of its employees, insists upon the establishment of a separate grievance machinery for the non-union employees. These problems being distinct, they must be considered separately.

The National Labor Relations Act, as interpreted by the NLRB,

[196] NWLB Press Release B-1316 (Feb. 20, 1944).

[197] H. Hearings on the Department of Labor-Federal Security Agency Appropriation Bill for 1945, 78th Cong., 2d sess., March 14 through May 2, 1944 (Committee on Appropriations).

[198] See e.g., Employee Grievance Procedure, approved for NWLB employees by the Civil Service Commission, Personnel Branch, on Aug. 24, 1943, (unreported).

gives no collective bargaining rights to minority unions.[199] The act is predicated upon the theory of majority representation. Only a majority union whose representation has been proven by certification or otherwise has the right to demand collective bargaining. If it does not represent a majority of the employees, it may not demand lesser rights such as, e.g., the establishment of a grievance procedure in a contract or otherwise. These views of the NLRB are by no means universally accepted by students of labor law.[200] A very strong argument can be made for the proposition that in the absence of an exclusive bargaining representative designated by a majority of the employees in the appropriate collective bargaining unit, minority groups have a right to engage through their representatives in collective bargaining. The basic section of the NLRA provides without limitation that "employees shall have the right to self-organization . . . to bargain collectively through representatives of their own choosing."[201] The next section of the act[202] makes it an unfair labor practice to refuse to bargain collectively with the representatives of employees. It would be in consonance with the spirit of the statute to give literal application to those sections by requiring collective bargaining with the representatives of organized minorities until the establishment, by designation of the majority, of an exclusive bargaining agent. However, the NLRB, carrying the theory of majority representation to an extreme length, has taken a contrary position and this is unlikely to be modified or reversed by it or the courts.[203]

This interpretation of the NLRA does not of course prevent the NWLB from granting certain benefits to employees only a minority of whom are organized in a union. The board, as appears below, has a far broader standard of operation—the successful prosecution of the war—than the statutory unfair labor practices to which the NLRB is limited.

[199] Huch Leather Co., 11 NLRB, No. 37, p. 394 (1939); Todd Shipyards Corp., 5 NLRB, p. 20 (1938).

[200] See ROSENFARB, THE NATIONAL LABOR POLICY AND HOW IT WORKS 238 et seq. (1940), mentioned supra note 161; a book review by Boudin, 55 HARV. L. REV. 555 (1942).

[201] 49 Stat. L. 449 at § 7 (1935).

[202] Id. at § 8(5). The unfair labor practice is stated thus: "To refuse to bargain collectively with representatives of his employees, subject to the provisions of section 9(a)." The last named section merely provides that the representatives designated by the majority "shall be the exclusive representatives."

[203] This view has been carried so far that the NWLB has refused to direct recognition for a minority union's own members, where another minority union had a contract to the same effect for its members. Pacific Mills Worsted Division, NWLB No. 111-705-D, 11 War Lab. Rep. 551 (1943), mentioned infra note 207.

With this understanding, the NWLB discovered soon after the war began that many plants which had operated either without unions or with company unions lacked an adequate method of settling the grievances of their employees. The board found that these grievances were not receiving adequate attention and that in the words of one panel, "the resultant unrest may constitute a threat to maintenance of full production."[204] Accordingly, beginning in April 1942, with the well-known *Sperry Gyroscope Company* case[205] the board ordered recognition of a minority union "as the representative of its members on grievances" with the further provision that "all unsettled grievances shall be submitted to arbitration for final and binding determination." The *Sperry* case was one in which the company had previously been ordered by the National Labor Relations Board to disestablish a company union.[206] This has not, however, been regarded as a condition precedent to the establishment of grievance procedures. The board has ordered the institution of this machinery in other types of cases. In one case, where one of several organizing unions had petitioned the NLRB for an election, the WLB directed the institution of this type of machinery for the benefit of the several unions involved.[207] It is probable that the NWLB will act more conservatively in the future wherever the other board is involved. It has agreed not to institute grievance machinery without consultation with the NLRB, where another union's petition for certification is pending, because of the possibility of interference with the election. Likewise, where one union has been ordered disestablished by the National Labor Relations Board, the National War Labor Board will only in an exceptional case grant another the benefits of a grievance procedure because of the alleged possibility of damage to the disestablished union—in the event that the disestablishment

[204] Sperry Gyroscope Co., NWLB No. 70, 1 War Lab. Rep. 167 at 172 (1942).

[205] Id.

[206] Sperry Gyroscope Co., 36 NLRB, No. 264, p. 1349 (1941).

[207] Acme Evans Milling Co., NWLB No. 584, 6 War Lab. Rep. 163 (1943). See also Tennessee Schuylkill Corp., NWLB No. 585, 6 War Lab. Rep. 290 (1943) where the sole union involved was granted limited recognition for the handling of grievances for its own members pending NLRB action upon its petition for certification. See also Pacific Mills, Worsted Division, NWLB No. 111-705-D, 11 War Lab. Rep. 551 (1943), where the NWLB directed that one minority union use the grievance machinery set up under the company's contract with another union. This amended a directive of the First Regional Board creating a separate machinery. Pacific Mills, Worsted Division, NWLB No. 111-705-D, 11 War Lab. Rep. 239 (1943). However, the NWLB has denied even the limited recognition for grievance purposes to a union which *lost* an NLRB election. Harry Davies Moulding Co., NWLB No. 4305-D, 11 War Lab. Rep. 188 (1943). The unanimous decision here reversing the hearing officer's report is very questionable.

order should be set aside by a circuit court of appeals.[208] One may very well question this hesitancy on the part of the NWLB since the NLRB's decisions are usually enforced in the courts, and in any event a grievance procedure with a bona fide union is normally helpful to everyone concerned, rather than injurious.

The second problem relating to the National Labor Relations Act arises in the course of a dispute between an employer and a majority union. Certain employers in the course of a labor dispute have requested that the board grant individual employees the right to settle grievances through a grievance procedure other than that inserted in the contract between the company and the majority union. Other employers have merely demanded a contract clause reserving to individual employees the right to present grievances directly to their employer. The NWLB and its regional boards have usually refused to grant the first clause on the ground that it is in violation of the NLRA, and the second because it is an unnecessary and obviously provocative statement of a statutory right.[209] A short reference to the provisions of the Wagner Act will explain these decisions. The law provides that: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment."[210] It also contains a proviso that "any individual employee or a group of employees shall have the right at any time to present grievances to their employer."[211] This has been interpreted by counsel for

[208] Grievance machinery for two national unions had been ordered by the board in Sun Shipbuilding & Drydock Co., NWLB No. 427, 3 War Lab. Rep. 404 (1942), after the NLRB had ordered the disestablishment of a union with which the company had a contract. Following an order of the circuit court setting aside the NLRB order, the NWLB revoked its prior order. Sun Shipbuilding & Drydock Co., 7 War Lab. Rep. 472 (1943).

[209] Electric Boat Co., NWLB No. 111-1238-D, Region II, 12 War Lab. Rep. 164 (1943); Foote Bros. Gear & Machine Corp., NWLB No. 2905-D, 10 War Lab. Rep. 96 (1943); Bell Aircraft Corp., NWLB No. 111-131-C, 10 War Lab. Rep. 126 (1943); Borg-Warner Corp., NWLB No. 4246-D, 10 War Lab. Rep. 631 (1943); Lucas Machine Tool Co., NWLB No. 111-204-R, 11 War Lab. Rep. 26 (1943); Zion's Cooperative Mercantile Inst., NWLB No. 111-110-D, 13 War Lab. Rep. 6 (1943); Armour Fertilizer Works, NWLB No. 111-879-D, 12 War Lab. Rep. 128 (1943); Aluminum Co. of America, NWLB No. 111-18, 12 War Lab. Rep. 446 (1943).

[210] 49 Stat. L. 449 at § 9(a) (1935).

[211] Ibid.

the National Labor Relations Board, as follows:[212] These individuals or groups may "present" grievances to their employer by appearing on behalf of themselves "at every stage of the grievance procedure set up in the collective agreement (regardless of whether it so specifies) but leaving the exclusive representative entitled to be present and negotiate at each such stage concerning its views as to the subject of the grievance."

The board's counsel concludes with these clarifying remarks:[213]

> "If at any level in the established grievance procedure, there is agreement between the employer, the exclusive representative, and the individual or group, disposition of the grievance is thereby achieved. Failing agreement of all three parties, any dissatisfied party may carry the grievance through subsequent machinery until the established grievance procedure is exhausted."

This excludes the possibility of a separate grievance procedure for the unorganized or organized minority. As a WLB panel recently stated:[214]

> "'Presenting' a grievance means talking about it. 'Settling' a grievance means doing something about it. Surely grievances of a general nature, the settlement of which may affect other workers or may serve as a precedent affecting others, should not be left to the whim or weakness of the individual worker."

These practical views have the support of authority. In *Atlantic Coast Line R. Co. v. Pope*.[215] the Circuit Court of Appeals, Fourth Circuit, held that a non-union employee was subject to a grievance procedure established by a carrier and a union under the Railway Labor Act. The court stated that "the duty of the minority to recognize the authority of representatives selected by the majority was as binding in this respect as the duty of the carrier to treat with the representatives so selected with respect to pay, rules, working conditions of employees, etc."[216]

A year later the Attorney General of the United States gave clear expression[217] to the rationale of the decision, stating:

> ". . . Furthermore, it is as important that there be collective

[212] Opinion of the general counsel (NLRB) interpreting the proviso to § 9(a) of the National Labor Relations Act, 13 Lab. Rel. Rep. 142 at 143 (1943).

[213] Ibid.

[214] Electric Boat Co., NWLB No. 111-1238-D, Region 11, 12 War Lab. Rep. 164 at 170 (1943).

[215] (C.C.A. 4th, 1941) 119 F. (2d) 39.

[216] Id. at 43.

[217] 40 Op. Atty. Gen., No. 59, pp. 4-5 (Dec. 29, 1942).

action on the part of employees in the negotiation of settlements of grievances as it is that there be collective bargaining agreement which relate to wages, hours, and other conditions of employment. Disputes about grievances normally require interpretations of these latter provisions. Even where this is not the case, all members of the class or craft to which an aggrieved employee belongs have a real and legitimate interest in the dispute. Each of them, at some later time, may be involved in a similar dispute."[218]

While adopting these principles, the NWLB does not regard itself as able to enforce them in all cases. Recently, it unanimously overruled an order of its Eighth Regional Board which, at the request of a certified union, directed a company to cease meeting with a minority union to settle grievances.[219] The National Board took the position that exclusive jurisdiction rested with the NLRB. Since the regional board's order was made as an incident to its determination of contract terms between the employer and the certified union, we believe its decision was proper and should not have been reversed.

COMPLIANCE AND SANCTIONS

The effective enforcement of its orders is one of the most troublesome problems of the administrative agency. This is particularly true of those agencies created by executive orders, as witness the recent difficulties of the President's Fair Employment Practice Committee.[220]

[218] According to the attorney general, the individual employee's right to "present" grievances was derived from § 2 (Fourth) of the Railway Labor Act, 44 Stat. L. 577 (1926) as amended by 48 Stat. L. 1185 (1934), which states that "nothing in this act shall be construed to prohibit a carrier from permitting an employee, *individually*, or local representatives of employees from conferring with management during working hours without loss of time." (Italics ours). He also relied upon "the fundamental nature of the right involved" which justified its exercise until abrogation by unambiguous congressional action.

It should be emphasized that the individual employee engaging in the presentation of grievances may not substitute another union for the majority one. See, however, General Committee of Adjustment of the Brotherhood of Locomotive Engineers v. Southern Pacific Co., (C.C.A. 9th, 1942) 132 F. (2d) 194 which came to the rather peculiar conclusion that the Railway Labor Act conferred upon an individual employee the right to select even a minority union as his representative in grievance proceedings in disregard of the existence of a majority organization. The decision was set aside on other grounds by the United States Supreme Court, 320 U.S. 338, 64 S. Ct. 142 (1943).

[219] Hughes Tool Co., NWLB No. 111-2083-D, 14 War Lab. Rep. 81 (1944) affirming and amending NWLB No. VIII, D-78, Region VIII, 11 War Lab. Rep. 477 (1943).

[220] On the FEPC and the railroads, see N. Y. TIMES, p. 1 (Dec. 27, 1943); id. at p. 1 (Dec. 14, 1943); PM (Oct. 30, 1943). See also H. R. Hearings before the

It is true, too, to a lesser extent of those agencies created by statute. Thus, for example, enforcement of the National Labor Relations Act has been frequently obstructed because of the mild character of its sanctions.[221] Compliance with a purely remedial statute is rarely achieved without considerable difficulty.

The situation with respect to the War Labor Board is extremely complex. The board began its existence as the creation of an executive order but it has been given certain powers under two statutes. The Act of October 2, 1942, does make substantial provision for its enforcement. Thus it states that:[222]

> "No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act. The President shall also prescribe the extent to which any wage or salary payment made in contravention of such regulations shall be disregarded by the executive departments and other governmental agencies in determining the costs and expenses of any employer for the purposes of any other law or regulation."

The act also provides that:

> "Any individual, corporation, partnership, or association willfully violating any provision of this Act, or of any regulation promulgated thereunder, shall, upon conviction thereof, be subject to a fine of no more than $1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment."[223]

Executive Order 9250 contains provisions substantially similar, delegating to the board the authority to determine that a payment is in contravention of the act, or any rulings, orders or regulations promulgated thereunder.[224]

However, these provisions relate only to the wage stabilization program and to wage regulations of the board made pursuant to the Act of October 2, 1942, and Executive Order 9250. *They do not fortify the board's powers and decisions in dispute cases.*

Special Committee to Investigate Executive Agencies, Part 2, June 30, 1943 through March 16, 1944.

[221] Boudin, "How to Amend the Wagner Act," 100 NEW REP. 7 (1939), mentioned supra note 117.

[222] 56 Stat. L. 765 at § 5(a) (1942).

[223] Id. at § 11.

[224] 7 FED. REG. 7871 (Oct. 1942); 4 War Lab. Rep. viii (Oct. 3, 1942). Title III, § 2 of the order is the authority for the statement. See also Regulations of the Economic Stabilization Director, § 4001.15, C.C.H. 1A LABOR LAW SERVICE, p. 10,410, ¶ 10,417.

There, the situation is very different. The board is essentially an advisory tribunal, representative of the public, industry and labor. Despite the fact that it speaks with the voice of authority in the form of directive orders, it is still nothing more than an advisory tribunal recommending the disposition of disputes to the parties and, where necessary, to the President or to the Director of Economic Stabilization.[225] Until recently, the board lacked even the power to compel the attendance of parties, to subpoena witnesses or to punish for contumacious behavior at formal hearings. Today, under the War Labor Disputes Act, it has been given subpoena power, the enforcement of which is in the hands of the federal district courts.[226] While it has also been given the power "to decide the dispute,"[227] the statute fails to provide any new mechanism for the enforcement of any such decision. The statute does, of course, provide for the seizure by the President of plants, mines, or other facilities, where there is a threat to war production. Presumably this threat exists in every case in which a directive order is disobeyed. However, the power to seize a war plant existed prior to the statute and was exercised by the President pursuant to his constitutional war powers.

Additional sanctions for the purpose of effectuating compliance with the directive orders of the board are now set forth in Executive Order 9370 issued by the President on August 16, 1943.[228] These sanctions may only be applied to enforce those orders of the board issued under the War Labor Disputes Act. It has taken the position that orders issued before the effective date of the act, i.e., June 25, 1943, are not enforceable under this executive order.[229]

This limitation seems entirely unreasonable. Most of the remedies provided in Executive Order 9370 are less drastic than that of the seizure of a war plant. It could not have been the intention of the President to limit the enforcement of orders issued prior to June 25

[225] See Exec. Order 9370, 10 War Lab. Rep. VII (1943).

Since the foregoing was written the board's claim that it is merely an advisory tribunal has been judicially upheld. In re Employers' Group of Motor Freight Carriers v. National War Labor Board, No. 8680, U. S. Court of Appeals, District of Columbia, June 2, 1944, 16 War Lab. Rep. 147; In re Montgomery Ward & Co. v. National War Labor Board, No 8732, U. S. Court of Appeals, District of Columbia, July 19, 1941, 17 War Lab. Rep. 345.

[226] War Labor Disputes Act, 57 Stat. L. 163 at § 7 (1943).

[227] Id. at § 7(a)(2).

[228] 10 War Lab. Rep. VII (1943), mentioned supra note 225.

[229] United States Gypsum Co. v. National War Labor Board (D. Ct. D. C. Civil No. 21363), Memorandum of Department of Justice, Affidavit of Lloyd K. Garrison, Executive Director of National War Labor Board (unreported).

to this one measure of taking possession of a plant or factory while remaining free to use less severe methods of enforcing later orders.

The executive order authorizes the Director of Economic Stabilization to issue these directive orders in non-compliance cases to government departments or agencies: (a) to withhold from a non-complying employer "any priorities, benefits or privileges extended, or contracts entered into, by executive action of the government" (b) in the case of a plant seized under the War Labor Disputes Act, to withhold from a non-complying labor union the checkoff and other benefits accruing to it at the time of seizure; (c) "in the case of non-complying individuals, directing the entry [by the War Manpower Commission] of appropriate orders relating to the modification or cancellation of draft deferments or employment privileges, or both."

Reliance upon these sanctions will, in all likelihood, be infrequent. The prestige of the board, enhanced by its tripartite character, together with the public notoriety given to offenders, has proven very effective in the past. Of the more than a thousand labor disputes decided by the board in the first year and a half of its existence, only seven had to be referred to the President for what he termed, "persistent non-compliance."[230] However, as the war takes on a more satisfactory aspect, as the board's operations become more technical and its wage stabilization program more rigid and as strikes receive impetus through the War Labor Disputes Act,[231] the need for sanctions other than those upon which the board has hitherto replied, is obvious. Executive Order 9370 was born of this need.

The executive order does not, of course, take care of every possible situation. For practical reasons, small employers, particularly those in non-defense work, may remain untouched by the sanctions provided for in the executive order. It is very unlikely that the President would seize a business not falling under the definition of a war facility set forth in section 3 of the War Labor Disputes Act.[232] While in some cases, the less drastic sanctions referred to by the President in a letter accompanying his executive order, i.e., "including control of war contracts, of essential materials, and transportation and fuel"[233] can be applied, board members have questioned their applicability to small

[230] Exec. Order 9370, 10 War Lab. Rep. VII at VIII, mentioned supra note 225.

[231] The act, by providing a procedure for strike notices, proved in practice, as the President had warned in his veto message, to be an incitement to strike; hundreds of strike notices were thereafter filed.

[232] 57 Stat. L. 163 (1943), mentioned supra note 11.

[233] 10 War Lab. Rep. VII.

non-defense industries. The situation will be particularly acute in the case of hospitals and other non-profit and charitable agencies which have hitherto resisted the jurisdiction of the board. It is inconceivable that the "less drastic sanctions" referred to by the President could be applied to this type of enterprise. What is not unlikely, however, is its seizure by the President as Commander-in-Chief of the armed forces rather than pursuant to his authority under the War Labor Disputes Act. The fact that these enterprises are not war facilities does not render unimportant the economic disturbances and the effect upon community morale arising from their disregard of board decisions in dispute cases. While some such enterprises are permitted certain procedural privileges with respect to voluntary wage adjustments,[234] they are nevertheless subject to national wage policies and susceptible to civil and criminal penalties for violation of those policies. There is no reason why greater latitude should be shown them in dispute cases where the violations, if they occur, are far more likely to be wilful. The argument has occasionally been made that it is impractical to seize control of a charitable or non-profit institution.[235] These difficulties are highly exaggerated. Our governments, state and federal, have had more experience in the non-profit, philanthropic and charitable than in the business fields. If they can move into the latter, under the spur of a national emergency, they can do the same for the former.

It is, of course, to be hoped that the prestige and authority of the board, particularly as supplemented by Executive Order 9370, will secure by their mere existence compliance with directive orders of the National War Labor Board. The possibility that sanctions may occasionally have to be used should, however, not be forgotten.

SUPERSEDURE

One final constitutional concept relating both to jurisdiction and enforcement, may be noted here: that of supersedure. In view of the fact that the board's powers are predicated upon the wide base of constitutional war powers and that the War Labor Disputes Act gives it absolute power to determine labor disputes and to "provide by order the

[234] E.g., see Board Resolution of Oct. 16, 1943, reported at 11 War Lab. Rep. XLI (Oct. 20, 1943) on non-profit agencies; see also board order on non-profit hospitals issued Jan. 25, 1943, 6 War Lab. Rep. VIII; and order on three non-profit agencies conducted for the benefit of the blind, WLB Press Release B-477, issued March 11, 1943, 7 War Lab. Rep. XXV.

[235] Transcript of Public Hearing, Security Title and Guarantee Co., Dec. 3, 1943, Case No. 646, and particularly Public Member Wayne Morse's remarks at p. 25 et seq. (unreported).

wages and hours and all other terms and conditions (customarily included in collective bargaining agreements) governing the relations between the parties,"[236] it is natural that problems of conflict with state power should arise.

Every such problem of conflict must be met in the same manner: The familiar principles of supersedure are applicable. Where the federal government steps in, the power of the states is ousted.[237] This is not to mean that the mere *existence* of Executive Orders 9017 and 9250 and the War Labor Disputes Act nullifies this state legislation.[238] The emergency character of the board and the procedural conditions precedent to its action preclude any claim of congressional intention to automatically supersede all state labor legislation. But when the board does act, it is not bound by and may disregard existing state or municipal law or regulations.

Thus, in the *Greenebaum Tanning Company* case,[239] the board was faced with the employer's contention that the Wisconsin Employment Peace Act[240] prevented it from directing the parties to a labor dispute to adopt the standard maintenance of membership clause. The board answered this contention in two ways: *first*, it declared that the Wisconsin statute which required a three-quarters vote of the employees before the employer could execute an all-union shop agreement was unlawful because it was in violation of the National Labor Relations Act; *second*, it held that quite aside from this conflict with a federal statute, the state law was superseded by the powers of the War Labor Board under the above mentioned executive orders and statute. Said the board:[241]

> "The war powers of the President and Congress, under which the Board derives its authority to order the Greenebaum Company and its employees to abide by the maintenance-of-membership clause of the Board's directive order, are superior to and supplant any legislation of the State of Wisconsin which would place restrictions or conditions upon the maintenance-of-membership provision which the Board has seen fit to apply. The Board has arrived at this conclusion upon the premise that the absolute neces-

[236] 57 Stat. L. 163 at § 7(a)(2) (1943).

[237] Napier v. Atlantic Coast Line Ry. Co., 272 U.S. 605, 47 S. Ct. 207 (1926).

[238] Cf. Mintz v. Baldwin, 289 U.S. 346, 53 S. Ct. 611 (1933); see also Allen Bradley, Local No. 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740, 62 S. Ct. 820 (1942).

[239] NWLB No. 879, 10 War Lab. Rep. 527 (1943).

[240] Wis. Stat. (1941) §§ 111.01-111.19.

[241] Greenebaum Tanning Co., NWLB No. 879, 10 War Lab. Rep. 527 at 539 (1943), mentioned supra note 239.

sity for peaceful and prompt settlement of wartime labor dispute calls for full use of those broad and extensive powers of the President and Congress heretofore designated as the war powers.

"No law of a state which is aimed at inserting conditions in a collective bargaining contract between an employer and the bargaining agent of the employees can be said to supersede any order of the War Labor Board regulating relations between employer and employee in time of war when the power to issue that regulation flows from the war powers of the United States. There can be no 'concurrent jurisdiction' between state legislation and War Labor Board rulings concerning employer-employee relations when their provisions conflict. The War Labor Board's rulings in the instant case are proper under the War Labor Disputes Act and under the terms of Executive Order 9017; therefore, they must prevail. Any other interpretation could unduly limit the war powers of the United States and would seriously interfere with the successful prosecution of the war."

Of course, similar state laws in Colorado and Kansas can prove no greater obstacles to the granting of union security in those states.[242] The same principles must render ineffective those laws of Colorado and Pennsylvania which place limitations upon the deduction of dues through check-off. In the one state these dues deductions are made unlawful in the absence of an individual authorization terminable upon thirty days notice;[243] in the other, in the absence of an individual authorization and a majority vote of the employees in the unit.[244] Check-off has often been granted by the board for the purpose of rendering convenient the collection of dues. In some cases, the aim primarily has been to facilitate the union's efforts to collect the dues; in others, to insure against any interference with production. In addition, the board has granted a check-off of dues as a form of union security, often in conjunction with the maintenance of membership provisions. In any of these cases, the direction that parties adopt a compulsory check-off must supersede any inconsistent state regulations. The board and its regional agencies have accordingly granted check-off in disputes involving employees in these states.[245] However, one line of decisions, that issued by the Eleventh Regional Board in Detroit, came to an obviously

[242] Colo. Laws, 1943, c. 131 at § 6(1)(c); Kan. Laws, 1943, c. 191 at § 8(4).

[243] Colo. Laws, 1943, c. 131 at § 6(1)(i).

[244] Pa. Stat. Ann. (Purdon, 1941) tit. 43, § 211.6(1)(f).

[245] United States Vanadium Co., NWLB No. 111-1021-D, 13 War Lab. Rep. 527 (1944), mentioned infra note 249.

erroneous conclusion.[246] That local board denied a compulsory check-off on the ground that Michigan law[247] made it a criminal offense for an employer to "require any employee . . . [to] agree to contribute . . . to any fund for charitable, social or beneficial . . . purposes." This Michigan law could not have been intended to apply to the check-off of union dues. The National Board has in several cases given a properly limited application to other state laws which were claimed by employers to constitute a bar to the board's compulsory check-off orders.[248]

Very recently in the *United States Vanadium Company* case,[249] the board decided not to rely upon this proper method of by-passing a state law. It flatly met the issue of conflict. In one of Dean Morse's last opinions before his regrettable resignation, it granted the standard maintenance of membership and the irrevocable check-off in the face of the prohibitions of the Colorado Peace Act. Said Dean Morse:[250]

> " . . . The efforts of the United States in the present world conflict are being conducted by the nation as a unit not by the several states as separate entities. It is therefore reasonable to insist that the settlement of wartime labor disputes be carried on under the uniform procedures established by the United States Government as a central authority."

CONCLUSION

The work of the board has not ended. The board may be expected to continue in existence through the reconstruction period after the war unless the rigidity of its wage stabilization program results in its premature destruction. Some observers believe that the value of the board is so substantial that we must establish some such institution on a permanent basis after the war. Notwithstanding the uncertainty of the board's future, its rich past suggests these comments:

The magnitude of the board's task has been unprecedented in the field of labor relations. A parallel elsewhere is found only in the work of the Office of Price Administration. The National War Labor Board

[246] Universal Products Co., NWLB No. 111-3236-D, Region XI, 12 War Lab. Rep. 297 (1943).

[247] Mich. Stat. Ann. (1937) § 28.585.

[248] Washburn Wire Co., NWLB No. 111-298-C, 12 War Lab. Rep. 124 (1943). See also Denver Fire Clay Co., NWLB No. 111-2000-D, Region IX, 10 War Lab. Rep. 585 (1943), holding that check-off is not inconsistent with Colorado assignment of wage law.

[249] NWLB No. 111-1021-D, 13 War Lab. Rep. 527 (1944).

[250] Id. at 535.

has borne the double burden of wage stabilization and of settling labor disputes. Its predecessor in the first World War, of course, was not concerned with wage stabilization and hence had fewer and less serious problems. But even in the field of labor disputes, the two boards show little similarity. Those disputes involving wages must be determined today on the basis of involved economic criteria which troubled no one in 1918. The present board's jurisdiction over labor disputes generally is much greater than its predecessor's because of the comprehensive nature of a total war and today's war economy. The number of disputes handled, even in the industries over which the first War Labor Board took jurisdiction, are infinitely greater. This is the result of the differences in the country's war production between 1918 and 1941–44, the longer period of the second board's operations and the fact that the higher extent of union organization has made working conditions dependent in larger part upon bilateral rather than unilateral action.

The most vigorous critics of the board must pause in admiration for its accomplishments. Let us pass over its wage stabilization policies, its recent attempts to limit its own jurisdiction, and the administrative inadequacies which have led to intolerable delays in the rendition of decisions. Some of these matters are not germane to this discussion and will be dealt with elsewhere; others have been sufficiently discussed above. In neither case can they detract from the board's magnificent work.

These are the accomplishments of the present board: This is the first time that the tripartite method of handling labor disputes has been successfully attempted on a national scale. Our experiences in the first World War are not comparable for many reasons, including those suggested above. The board, through the tripartite appointment of panels, and the similar composition of itself and its subordinate agencies has actually engaged in a modified form of national and industry-wide collective bargaining approaching forms hitherto found only in Sweden and England. The reasonableness of this type of bargaining is so generally recognized that we may expect a continuance of it in many industries even if we fail to set up for the postwar period an agency similar to the present National War Labor Board. The extraordinary degree of voluntary compliance with the board's decisions bears testament to the soundness of its tripartite character, to the reasonableness of its decisions and to the fairness and patriotism of industry and labor. Finally, the board has assisted this by cracking down without hesitancy upon employer or union violation of its decisions or of the no-strike-no-lockout agreement, and by expeditiously certifying such violations

to the President. This success must be regarded in the light of the fact that the board was without statutory support until a year and a half after starting operations, that it possessed no sanctions of its own, and that its decisions, though phrased in the form of directive orders, were merely recommendations. It is very doubtful whether any other agency, resting upon so perilous a foundation, entrusted with jurisdiction over so delicate a subject matter, itself possessing only moral sanctions, has ever in the history of this country had so successful and productive an existence.