Michigan Law Review

Volume 50 | Issue 8

1952

SIGNIFICANT DEVELOPMENTS IN LABOR LAW DURING THE LAST HALF-CENTURY

Russell A. Smith
University of Michigan Law School

SIGNIFICANT DEVELOPMENTS IN LABOR LAW DURING THE LAST HALF-CENTURY

*Russell A. Smith**

IT is common knowledge that dramatic and almost revolutionary developments have taken place in labor law since the turn of the century. Indeed, "labor law" has only during this period achieved the distinction of a recognized branch of the law. Concurrently, trade unions have experienced an amazing growth, as well as changes in basic structure, and it may fairly be stated that the enlargement of the pertinent body of law has both stimulated and been influenced by the augmentation of union power. This article is intended as a survey of significant developments in the law, not as a treatment of the minutiae.

As the twentieth century dawned, trade union membership in this country stood at approximately 790,000,[1] which compares with a peak membership of some 14,000,000 to 16,000,000 achieved by 1950.[2] The American Federation of Labor, and constituent craft unions, with a membership of about 625,000, were the dominant organizations in 1900. Other important unions, however, such as the railroad "Big Four," were also on the scene. These organizations had emerged out of a vortex of nineteenth century union movements of variegated pattern reaching back to the earliest stirrings of American industrial development following the War of 1812. The intervening period had witnessed the rise and decline of many types of labor organizations, some feeble, some fairly potent, including those with such intriguing names as the Order of the Knights of St. Crispin, the "Molly Maguires," and the Noble Order of the Knights of Labor.[3]

The worker organizations of the nineteenth century had not, on the whole, found a friendly legal climate. Political democracy, with its legal trappings, was accepted, though subjected to the severe strain of racism, but "industrial democracy" was quite another matter. The

* Professor of Law, University of Michigan.—Ed.

[1] BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS 139 (1950).

[2] Ibid.

[3] There are many excellent historical treatments of the American trade union movement, including DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY, 5th ed., cc. XI and XII (1948); DANKERT, CONTEMPORARY UNIONISM IN THE UNITED STATES, cc. 2 and 3 (1948); BLOOM AND NORTHRUP, ECONOMICS OF LABOR AND INDUSTRIAL RELATIONS, Part II (1950); FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES (1947); PERLMAN, HISTORY OF TRADE UNIONISM IN THE UNITED STATES (1937); PETERSON, AMERICAN LABOR UNIONS (1945); and PETERSON, SURVEY OF LABOR ECONOMICS, c. 17 (1947).

economic philosophy of laissez-faire, strongly influenced by classical wage theory, combined with an accommodating legal system to produce strong support for the managerial prerogative in its not unnatural resistance to the incursions of organized labor. The result was that the labor movement had to wage an uphill battle to attain acceptability and legal status. Labor's objective was to obtain a voice in the determination of working conditions; this was an invasion of management "rights" not lightly to be countenanced.

Thus the initial attempts at effective labor organization and collective action during the first several decades of the last century were so obnoxious according to the mores of the times that they were even regarded as common law criminal conspiracies.[4] Although the landmark opinion of Chief Judge Shaw of Massachusetts in *Commonwealth v. Hunt*[5] weakened this line of attack, the doctrine was applied as late as 1867.[6] It made possible a dual legal appraisal of trade unions and their activities. Both the means used or contemplated, and the objectives sought, passed under judicial scrutiny under standards so amorphous that the judges' own predilections could become the law of the case and of the land.

In the latter part of the century the courts turned from the criminal law to tort law as the principal means of controlling worker collective action, although local statutes and ordinances were commonly invoked, as today, to deal with disorderly conduct and kindred acts of violence. This transition reflected not so much an increased legal acceptance of labor organizations as the selection of a more effective remedy, for it was the equity courts which stepped into the arena and made available the speedy, flexible and potent weapon of the injunction, first used in a labor case in this country in 1877.[7] From this point on until the recent era of legislative intervention the development of the law concerning trade unionism was substantially the work of the equity judges, and they found themselves equipped with a considerable assortment of legal tools for the task.[8] Of these the most important by all odds was the doctrine of civil conspiracy which, like its earlier counterpart of the criminal law, permitted judgment to be passed both on ends sought and means used or contemplated. Even the government, in the famous

[4] The historically famous Cordwainer cases were the first in which the doctrine of criminal conspiracy was applied in this country, and began with Commonwealth v. Pullis (the Philadelphia Cordwainer's Case), Philadelphia Mayor's Court, 1806 (DOC. HIST. OF AM. IND. SOC., vol. 3, p. 60). See SMITH, CASES AND MATERIALS ON LABOR LAW, c. II (1950).

[5] 4 Metc. 111, 38 Am. Dec. 346 (Mass. Sup. Jud. Ct. 1842).

[6] State v. Donaldson, 32 N.J.L. 151 (1867).

[7] LANDIS AND MANOFF, CASES ON LABOR LAW, 2d ed., 38, 39 (1942).

[8] See SMITH, LABOR LAW 78 and 79 (1950) for a catalog of typically used legal doctrines.

Debs case,[9] invoked the strong arm of the chancellor to deal with the Pullman strike in 1894.

It is interesting to note that the courts had to grapple with the union "problem" during the nineteenth century unaided by legislative guidance. Perhaps this means that the legislatures on the whole were satisfied with the results of judicial intervention, but it also attests to a lack of political power or interest, or both, on the part of the unions. Traditionally, the unions of this country have not sought political solutions of their problems. Only in the limited areas of working hours, especially for women, and the employment of child labor, was there any substantial legislative action.

The Flowering of "Rule by Injunction"

The first three decades of the twentieth century witnessed the full realization of the potentialities of the labor injunction. The "right to strike" peacefully and for a proper purpose was increasingly conceded, but, on the ground of impropriety of purpose, injunctions frequently issued against strikes having organizational or union security objectives, or aimed at various kinds of "interference" with the management function, or to force changes in conditions established by a collective agreement. The "yellow dog contract" appeared on the scene as a means of obstructing the organizational efforts of unions, and in 1917 received the blessing of the Supreme Court in the famous *Hitchman* case.[10] Some courts declared against picketing in any form, considering it inherently coercive and therefore illegal; most courts came to regard it as lawful if primary and peaceful, but were astute to detect in it elements of coercion. The involvement of third parties in a labor dispute through the use of secondary picketing and strike action (commonly termed the "boycott") fared the least well.

The impact of the injunction was severe, not only because the courts evolved a complex body of substantive dogma relating to the use of collective action, but also because injunction procedure lacked safeguards designed to insure a fair treatment of the union defendants. Equity jurisdiction, which on the basis of historical principle should have been invoked only sparingly and after a full exploration of its relative utility and propriety, was assumed almost without question, as if the labor dispute was the peculiar bailiwick of the chancellor. With the assumption of jurisdiction went the procedural techniques especially suit-

[9] In re Debs, 158 U.S. 564, 15 S.Ct. 900 (1895).
[10] Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 38 S.Ct. 65 (1917).

able and desirable, and indeed the peculiar virtue, of the equity courts in other contexts but ill adapted to the dynamics of the labor relations controversy. Thus, there was common use of the ex parte order issued on plaintiff's affidavit (or verified complaint) at the very moment when the timing of the collective action by the union was a paramount element in its strategy; supporting affidavits came to have a stereotyped form, were often made by espionage agents and other persons of dubious credibility, and counter-affidavits by the defendants frequently were of no avail; unions were commonly held accountable for the acts of individuals (as on the picket line) without inquiry into such matters as authorization, ratification or condonation; decrees were generally written broadly, verbosely, legalistically, and with little concern for the preservation of defendants' rights or for the problem of clear communication. These and other aspects of the labor injunction were the subject of sharp criticism by Judge Amidon of the federal bench in 1923,[11] but the instances of such judicial criticism were exceedingly rare.

The Gradual Achievement of Status by Labor Organizations

The liberal use of the injunction as a means of control of union action was at the same time accompanied by a gradual, though perhaps begrudging, recognition of the legal acceptability and even of the social desirability of labor organizations. The courts on the whole applied strict standards of appraisal of methods used and, to some degree, of particular objectives sought, but the nineteenth century skepticism of the basic needs, interests, and fundamental aims of worker organizations fell gradually before the onslaught of time.

Even before the turn of the century Judge Holmes, while sitting on the Massachusetts bench, had solicited his brethren to be wary of facile assumptions with respect to the propriety of worker organization. In *Vegelahn v. Guntner,* he said:[12]

> ". . . it is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms

[11] Great Northern Railway Co. v. Brosseau, (D.C. N.D. 1923) 286 F. 414.
[12] 167 Mass. 92 at 108, 44 N.E. 1077 (1896).

of society, and even the fundamental conditions of life, are to be changed.

"One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way."

In 1902 Holmes reiterated his faith in the social validity of worker collaboration when, again in dissent, he urged in *Plant v. Woods*[13] that collective action for organizational purposes should not be condemned. Rejecting the attempted differentiation between attempts immediately to improve working conditions and attempts to organize, he said: "I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest."[14] These views he asserted despite the fact that, as an economic classicist, he believed that unions could not achieve fundamental financial gains for the workers as a whole.[15]

It is interesting in this connection to note that even before these "liberal" expressions by Holmes, Judge Macomber of the New York Supreme Court in 1880 had expressed the view that the organization of workers was the necessary antidote to the growing power of capitalism.[16] He thought that the "wisest rule of political economy would demand that there should be no legislation upon this subject

[13] 176 Mass. 492, 57 N.E. 1011 (1900).

[14] Plant v. Woods, 176 Mass. 492 at 505, 57 N.E. 1011 (1900).

[15] "Although this is not the place for extended economic discussions, and although the law may not always reach ultimate economic conceptions, I think it well to add that I cherish no illusions as to the meaning and effect of strikes. While I think the strike a lawful instrument in the universal struggle of life, I think it pure phantasy to suppose that there is a body of capital of which labor as a whole secures a larger share by that means. The animal product, subject to an infinitesimal deduction for the luxuries of the few, is directed to consumption by the multitude, and is consumed by the multitude, always. Organization and strikes may get a larger share for the members of an organization, but, if they do, they get it at the expense of the less organized and less powerful portion of the laboring mass. They do not create something out of nothing. It is only by divesting our minds of questions of ownership and other machinery of distribution, and by looking solely at the question of consumption—asking ourselves what is the annual product, who consumes it, and what changes would or could we make—that we can keep in the world of realities. But, subject to the qualifications which I have expressed, I think it lawful for a body of workmen to try by combination to get more than they are now getting, although they do it at the expense of their fellows, and to that end to strengthen their union by the boycott and the strike." Holmes, J., in Plant v. Woods, 176 Mass. 492 at 505, 57 N.E. 1011 (1900).

[16] The Johnson Harvester Company v. Meinhart, 60 How. Pr. 168 (1880).

beyond preserving both employer and employed against violence and breaches of the peace, or acts in the nature of trespass, which have a tendency to bring about breaches of the peace," and by the same token he considered that courts should not go beyond preservation of the peace and the establishing of "responsibility for any acts which immediately and in a legal sense affect the rights of either [employers or employed]."[17] Had this view been taken by the courts as a whole, the shape of the law with respect to collective action would have been vastly different.

The views of Macomber did not prevail. The courts assumed the responsibility of passing on union objectives and conduct by the use of standards which they themselves in substantial part had to devise from whole cloth. Nevertheless, the basic notion that workers have a legitimate interest in organizing for the purpose of improving their lot by collective action came to be accepted, classical economics to the contrary notwithstanding. This principle was codified as part of the federal anti-trust legislation in 1914 with the statement, in section 6 of the Clayton Act, that "the labor of a human being is not a commodity or article of commerce,"[18] and Chief Justice Taft elaborated the point in his celebrated opinion in the *Tri-City Central Trades Council* case in 1921:[19]

> ". . . Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition

[17] Id. at 176, 178.

[18] 38 Stat. L. 731, 15 U.S.C. (1946) §17.

[19] American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184 at at 209, 42 S.Ct. 72 (1921).

between employer and employees as to the share or division between them of the joint product of labor and capital. . . ."

This affirmation of the rightful place of labor organizations in modern economic capitalist society amply attests to the resilience of the common law. Perhaps the judges moved too slowly in this direction; perhaps, as Professor Gregory argues, they should never have assumed the prerogative of basic policy-making in passing on the legality of union conduct;[20] no doubt many of them gave only lip service to the propositions announced by Chief Justice Taft, and earlier by Holmes, while finding ready pretexts for condemning specific union conduct. Nevertheless, the judicial record of the early decades of the present century is not wholly bad, even from the point of view of the protagonist of organized labor. "Rule by injunction" we had, but unions were finding their place even on the legal horizon.

Legislative Curbs on the Use of the Labor Injunction

As early as 1903 there began a legislative movement to curb the extensive use and correct the procedural defects of the labor injunction. This effort, which originated in the states and in 1914 spread to the Congress with the enactment of the Clayton Act, has been described vividly in the notable work of Frankfurter and Greene.[21] An understandable judicial animadversion to these intrusions perhaps accounts in part for the fact that the earlier statutes, particularly, suffered a substantial emasculation as well as constitutional obstacles at the hands of the courts. On both points the Supreme Court, itself, led the way, with its celebrated decisions in *Truax v. Corrigan*,[22] which held invalid the Arizona act of 1913, and the *Duplex Printing Press Co.*[23] and *Bedford Cut Stone* cases,[24] which placed a narrowly restrictive construction upon the anti-injunction provisions of the Clayton Act.

A number of states followed the example of Congress and enacted legislation modeled more or less on section 20 of the Clayton Act, although the reform movement was dealt a severe blow by the cited decisions of the Supreme Court. Congress, itself, was not moved to take further action until 1932, when the Norris-LaGuardia Act[25] was

[20] GREGORY, LABOR AND THE LAW, rev. ed. (1949).

[21] THE LABOR INJUNCTION (1930). See also Smith and DeLancey, "The State Legislatures and Unionism," 38 MICH. L. REV. 987 at 1013 ff. (1940).

[22] 257 U.S. 312, 42 S.Ct. 124 (1921).

[23] Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S.Ct. 172 (1921).

[24] Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn., 274 U.S. 37, 47 S.Ct. 522 (1927).

[25] 47 Stat. L. 70, 29 U.S.C. (1946) §§101-115.

passed following the earnest prodding of able critics of the labor injunction led by Frankfurter and Greene. This statute was artfully written so as to obviate, if possible, a repetition of the earlier experience under the Clayton Act. The act imposed extensive restrictions on the federal judiciary in terms both of substance and procedure, and was in turn followed by a wave of similar state legislation.

The Norris Act is noteworthy not only for its specific limitations on the courts, but also for its broad declaration of public policy in favor of the free association of workers for purposes of collective bargaining. The helplessness of the individual employee in dealing with his employer "under prevailing economic conditions" was recognized, and there was affirmed the necessity of "full freedom of association, self-organization, and designation of representatives . . . free from the interference, restraint, or coercion of employers. . . ."[26] This policy was specifically implemented only by making "yellow-dog" contracts unenforceable in the federal courts, and by limiting the availability of the federal court injunction, but it was, nevertheless, in many respects an epochal and portentous pronouncement.

Federal Railway Labor Relations Legislation

The evolution of federal labor policy during the first three decades of the present century is shown not only by the anti-injunction statutes, but also by the history of federal railway labor legislation. This began even before 1900 with the Arbitration Act of 1888[27] and culminated with the Railway Labor Act of 1926 which, as amended, is the law today.[28] The Railway Labor Act, often referred to as a "model" labor relations law, was the product of a great deal of earlier legislative experimentation, and it is interesting to note that, as enacted in 1926, it represented the joint thinking of railway employers and unions themselves. Like the later Norris Act, it posited the desirability of free employee association, but for the first time in federal legislative history it wrote into law broad definitive proscriptions of employer interference with this "right" of self-organization as well as an obligation to bargain collectively. In addition, it recognized and gave attention to the problems of dispute settlement by creating special mediation machinery, encouraging resort to arbitration, and providing techniques for the handling of serious "emergency" strikes.

[26] Section 2.

[27] 25 Stat. L. 501.

[28] 45 U.S.C. (Supp. IV, 1951) c. 8. For an account of the various statutes see SMITH, CASES AND MATERIALS ON LABOR LAW 84-90 (1950).

This is not the occasion for a critical appraisal of the act, though it may be noted that there is considerably less enthusiasm for it now than formerly.[29] The statute does represent a significant chapter in the development of American labor law; the industries (which now include interstate air transport) to which it applies are obviously important; moreover experience under it adds measurably to the cumulative total and thus contributes toward an enlightened approach to the difficult problem of lawmaking in this area.

The National Labor Relations Act of 1935

The National Labor Relations Act of 1935 (the "Wagner Act")[30] probably ranks as the most important event of the past fifty years in the development of American labor relations law. It set national policy firmly and, I believe irretrievably, in favor of the right of self-organization. It interred, probably for good, the doctrine of criminal and civil conspiracy as applied to the organization of workers per se. It did not originate the notion that the right of self-organization should be implemented by legally enforceable duties upon employers, for this had already been accomplished for the railroads and airlines by the Railway Labor Act. But it did, for the first time, state these obligations in an orderly code of "unfair labor practices," and, for the first time, there was created a special governmental administrative agency charged with the enforcement of this code as a matter of public responsibility and not merely of private right.

The act of 1935 was designed to do more than declare the right of self-organization. Pre-enactment history, the language of the act, and the militancy shown in its administration, especially during the first several years of its life, all show that it was intended in fact to promote the rapid unionization of American industry. Section 1 ("Findings and Policy") reveals quite clearly the underlying philosophy. Framed for the immediate purpose of helping to sustain the legislation against the inevitable assault upon it on constitutional grounds, this section also reveals the determination of the Roosevelt administration to espouse the cause of unionism as a matter of considered social, economic, and perhaps political, policy. The stamping out of employer obstructionism was to remove one source of industrial strife which burdened interstate commerce, and on this point the framers cited prior supporting "experience," doubtless referring to

[29] See, for example, Northrup, "The Railway Labor Act and Railway Labor Disputes in Wartime," 36 AM. EC. REV. 324 (1946).

[30] 49 Stat. L. 449.

the Railway Labor Act. The "inequality of bargaining power" between employers and employees lacking full freedom of association was held to "aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions . . . ." The clear implication of this declaration was that workers should seize their freedom and organize, since only by means of unionization could this economic objective be realized, and there was clearly implicit a positive rejection of the theory that unionism and collective bargaining have little or no economic validity. Unionization was not merely to be countenanced and tolerated on the grounds earlier advanced by Holmes and Chief Justice Taft, in recognition of the natural desire of the individual worker to attempt to improve his bargaining position vis-a-vis his employer; this legitimate private interest of the worker was fortified by a new declaration of the existence of a broad public interest in the matter premised on a new economic faith.

The important objectives of the act could not have been realized if the constitutional issues which it raised had not been decided in favor of its validity, so the Supreme Court's decisions on these matters must be put down as a tremendously significant contribution of the last half-century to labor and constitutional law. The *Jones & Laughlin* and associated cases, decided in April 1937,[31] "overruled" a substantial segment of the American bar in upholding the statute.[32] The rationale of the earlier *Adair*[33] and *Coppage*[34] cases was clearly, although not expressly, repudiated with the Court's rejection of the "due process" attack upon the act, and these and later decisions gave almost unlimited jurisdiction to the National Labor Relations Board under the commerce power.

With the aid of the powerful policy pronouncement contained in the NLRA, given full legal effectiveness by the Supreme Court, and assisted by a zealous and almost crusading enforcement of the act by the NLRB, it is not surprising that the labor movement very shortly made the greatest membership gains in its history.[35] To this end the appearance on the scene of the CIO, with its preoccupation with the

[31] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615; NLRB v. Freuhauf Trailer Co., 301 U.S. 49, 57 S.Ct. 642; NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 57 S.Ct. 645; Associated Press v. NLRB, 301 U.S. 103, 57 S.Ct. 650; and Washington, Virginia & Maryland Coach Co. v. NLRB, 301 U.S. 142, 57 S.Ct. 648.

[32] I refer particularly to the "Report on the Constitutionality of the National Labor Relations Act" issued in September 1935, by the National Lawyers Committee of the "American Liberty League," signed by many eminent members of the bar.

[33] Adair v. United States, 208 U.S. 16, 28 S.Ct. 277 (1908).

[34] Coppage v. Kansas, 236 U.S. 1, 35 S.Ct. 240 (1915).

[35] Total union membership rose from approximately 3,700,000 in 1935 to almost 9,000,000 in 1940. BLS, HANDBOOK OF LABOR STATISTICS 139 (1950).

organization of the unskilled workers, was particularly adventitious. After a few hectic years during which powerful employers in the steel, automotive, and other mass production industries made their last stand, the battle for organization and collective bargaining rights in the basic industries was substantially won by the unions, and labor-management relations entered upon a new phase.

Introduction of Legislative Employment Standards

During the 'thirties the new national labor policy was manifested in legislation dealing directly with employment standards, as well as in the promotion of unionization and collective bargaining. Most important were the Social Security Act of 1935[36] and the Fair Labor Standards Act of 1938.[37] These enactments were earnestly supported by the unions, a fact which shows that the unions would not thenceforth be content to rely exclusively on collective bargaining as a means of improving the worker's lot. The problems of unemployment and superannuation were to be solved or at least mitigated by direct legislative action.

The social security legislation, while "new deal" in origin, must now be regarded as expressing a fundamental and permanent national policy. The program is familiar to all and need not be detailed here, except to note that it provides unemployment insurance, old-age and survivors' insurance, old-age assistance, and various other welfare benefits. From the point of view of organized labor the most important of these are the unemployment and old-age insurance features. These, in recent years, have become the springboard from which the unions have launched a generally successful campaign for supplementation through collective bargaining.

The Fair Labor Standards Act of 1938 contained minimum wage, overtime premium pay, and child labor provisions, of which the first two were the most significant to the unions. Important judicial decisions under the act, such as those dealing with the "portal to portal" pay question,[38] and the meaning of the phrase "regular rate of pay" for overtime pay purposes,[39] had important repercussions on collective

[36] 49 Stat. L. 620, 42 U.S.C. (1946) §§301-302.

[37] 52 Stat. L. 1060.

[38] Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590, 64 S.Ct. 698 (1944); and Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 66 S.Ct. 1187 (1946).

[39] 149 Madison Ave. Corp. v. Asselta, 331 U.S. 199, 67 S.Ct. 1178 (1947); Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 65 S.Ct. 11 (1944); Overnight Motor Transportation Co., Inc. v. Missel, 316 U.S. 572, 62 S.Ct. 1216 (1942); Walling v. Belo Corp., 316 U.S. 624, 62 S.Ct. 1223 (1942); and Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 68 S.Ct. 1186 (1948).

bargaining as well as in the administration of the act, which led ultimately to the enactment of the Portal to Portal Act of 1947[40] and the Fair Labor Standards Amendments of 1949.[41] These statutes now constitute a complex part of the labor law structure of the country. The prime motivation for the original act was the depression of the early 'thirties. Purchasing power of the worker was to be maintained by means of the device of the minimum wage, and increased employment was to be induced by discouraging the use of the long workweek and by eliminating the employment of child labor. The continuance of the statutory standards, however, during the periods of full employment of World War II and thereafter clearly shows that by general consent the original rationale has been supplanted. The permanence of this legislation, in terms of general principle, laying aside details, is now unquestioned, without regard to the economic state of the nation.

The Supreme Court and Collective Action

Returning now to the subject of labor law as it concerns union-management relations, note must be taken of certain significant contributions made by the Supreme Court during the past two decades in relation to the legal status of union collective action. The rapid growth of the unions, under the beneficent influence of the Norris Act of 1932 and the National Labor Relations Act of 1935, was bound to enlarge the area and increase the incidence of union strike, picketing, and boycott action, and, indeed, the act of 1935 purported to assure to employees the right "to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."[42] It was inevitable that the Court should ultimately face questions relating to the extent of the union privilege to employ these coercive measures.

Naturally enough, the question first posed concerned the extent of the rights granted by the NLRA. In the *MacKay Radio* case,[43] decided in 1938, it was made clear that the peaceful economic strike was a protected form of concerted action, but in the *Fansteel* case,[44] decided a year later, the Court, in one of its few basic disagreements with the policies of the NLRB, held that workers who engaged in a "sit-down" strike forfeited their right to be protected against employer retaliation. In the same year it was held in the *Sands* case[45] that a

[40] 61 Stat. L. 84, 29 U.S.C. (Supp. IV, 1951) §§251-262.
[41] 63 Stat. L. 910, 29 U.S.C. (Supp. IV, 1951) §§201-261.
[42] Section 7 of the act.
[43] NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 333, 58 S.Ct. 904 (1938).
[44] NLRB v. Fansteel Metallurgical Corporation, 306 U.S. 240, 59 S.Ct. 490 (1939).
[45] NLRB v. Sands Mfg. Co., 306 U.S. 332, 59 S.Ct. 508 (1939).

strike in repudiation of a collective agreement similarly removed the strikers from the protection of the act. The latter two cases forced the adoption of the broad principle that when serious misconduct attended the use of concerted action, the workers involved could be dealt with by the employer without regard to his normal obligations under the statute. Thus, the statutory protection of concerted action was not to be given full literal effect. The interesting result was that a law which on its face was not at all concerned with the regulation of union and employee conduct became the basis for indirect sanctions against misconduct. It became necessary for the NLRB and the courts to grope for appropriate standards of misconduct, which they, like the common law and equity courts, had to supply out of their own experience and precepts, unaided by legislative guidance. History appears to have repeated itself.

This incursion into the field of union collective action was accompanied by judicial action on two additional fronts, but with very different implications for organized labor. In 1940 the Court held in the *Thornhill*[46] and *Carlson*[47] cases that peaceful picketing was a constitutionally protected form of "free speech," and in the *Hutcheson* case[48] that union action which was non-enjoinable under section 20 of the Clayton Act, read in conjunction with the Norris Act, could not be made the basis for prosecution under the Sherman Act. These were momentous decisions. The first two gave the Court a broad supervisory control over the injunctive activities, insofar as picketing was concerned, of all the courts in the land. The third substantially ended the use of the federal anti-trust laws as an instrument of union regulation, for it became apparent a few years later in the *Allen Bradley* case[49] that only where there is union-employer collaboration to protect labor and product markets against outside competition will there still be union liability under the Sherman Act.

The ink was hardly dry on the picketing cases before the Court began a series of qualifying decisions which, as of today, have robbed *Thornhill* and *Carlson* of most of their vitality.[50] To the student of

[46] Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736 (1940).

[47] Carlson v. California, 310 U.S. 106, 60 S.Ct. 746 (1940).

[48] United States v. Hutcheson, 312 U.S. 219, 61 S.Ct. 463 (1941).

[49] Allen Bradley Co. v. Local Union No. 3, Intl. Brotherhood of Electrical Workers, 325 U.S. 797, 65 S.Ct. 1533 (1945).

[50] Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 61 S.Ct. 552 (1941); Carpenter and Joiners Union of America, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 62 S.Ct. 807 (1942); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684 (1949); Building Service Employees International Union v. Gazzam, 339 U.S. 532, 70 S.Ct. 784 (1950); Intl. Brotherhood of Teamsters, etc. v. Hanke, 339 U.S. 470, 70 S.Ct. 773 (1950); and Hughes v. Superior Court of California,

labor law the most interesting aspect of these cases is that the Court felt constrained, as it had in respect to the problem of defining protected concerted action under the NLRA, to permit legislative and judicial appraisal of the kind of picketing employed and of the object for which it was employed. The decision in the *Meadowmoor* case[51] opened the door to the sweeping injunction in any case in which the trial court could with reason conclude, in the language of Justice Frankfurter, ". . . that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful." In *Ritter*,[52] then in *Giboney*,[53] and finally in relation to the "secondary boycott" provisions of the Taft-Hartley Act,[54] the use of picketing as a means of assisting or setting in motion secondary economic pressure was released from constitutional immunity. In the *Gazzam, Hanke* and *Hughes* decisions[55] of 1950 state authority to proscribe picketing for ends reasonably deemed improper was upheld. It is thus apparent that something like the much maligned "ends-means" test of the common law became the rationale for a strategic retreat by the Court from its original constitutional position with respect to picketing. Meanwhile, the Court had steadfastly refused to extend the shelter of the Constitution to strike action, although the trade unionist would certainly consider the "right to strike" even more basic than the "right to picket."[56]

The Court's high-level supervention with respect to picketing no doubt served the desirable end of forcing a greater degree of state court restraint in the use of the labor injunction, and of inducing a closer analysis generally of the legitimate interests of the unions in their resort to collective action. Even the exposition of constitutional doctrine in the sanctum of the Supreme Court building does not wholly

339 U.S. 460, 70 S.Ct. 718 (1950). Cf. Bakery and Pastry Drivers and Helpers Local 802 v. Wohl, 315 U.S. 769, 62 S.Ct. 816 (1942); AFL v. Swing, 312 U.S. 321, 61 S.Ct. 568 (1941); and Cafeteria Employees Union v. Angelos, 320 U.S. 293, 64 S.Ct. 126 (1943).

[51] Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 at 294, 61 S.Ct. 552 (1941).

[52] Carpenter and Joiners Union of America, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 62 S.Ct. 807 (1942).

[53] Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684 (1949).

[54] International Brotherhood of Electrical Workers, Local 501, AFL v. NLRB, 341 U.S. 694, 71 S.Ct. 954 (1951).

[55] Building Service Employees International Union v. Gazzam, International Brotherhood of Teamsters, etc v. Hanke, and Hughes v. Superior Court of California, 339 U.S. 532, 70 S.Ct. 784 (1950).

[56] See Dorchy v. Kansas, 272 U.S. 306, 47 S.Ct. 86 (1926); Lincoln Federal Labor Union No. 19129, AFL v. Northwestern Iron and Metal Company, 335 U.S. 525, 69 S.Ct. 251 (1949); and International Union, UAWA-AFL v. Wisconsin Employment Relations Board, 336 U.S. 245, 69 S.Ct. 516 (1949).

escape the influence of current opinion, and it is to be recalled that by 1940, when the first picketing cases were considered, the proclaiming of the "bill of rights" of labor, as declared in the Wagner Act, was at its zenith. However, the Court's present position, which permits the regulation of picketing within fairly wide limits, was inevitable unless the Court was prepared to place all forms of peaceful union collective action beyond legislative and judicial control, a situation which, as the history of the post-war "national emergency" strike problem amply shows, would be intolerable. Even the best friends of the labor movement must surely agree that, in the long, run, it is wise policy to equate the strike, boycott and picketing with other forms of collective economic pressure insofar as constitutional issues are concerned.

The War Labor Policy: Tri-Partitism

Organized labor played a role during World War II consonant with its newly attained stature. President Roosevelt won a no-strike pledge from the national unions, and assured them that the statutory gains represented by the Fair Labor Standards Act and the National Labor Relations Act would be safeguarded. Labor leaders occupied prominent positions in important war agencies, such as the Advisory Commission to the Council of National Defense, the Office of Production Management, the War Production Board, the War Manpower Commission, and the Defense Advisory Commission. Of greater pertinence to our present theme, however, was the emergency War Labor Board machinery designed to prevent runaway inflation and to assure that labor disputes should not interrupt production of essential goods. In this mechanism tri-partitism was a feature of paramount importance. The principle of equal representation of public, labor and management was not novel—indeed, it had been used in World War I—but the responsibilities and powers of War Labor Board II were much greater than those of War Labor Board I.[57]

The Board had to function for a time without benefit of statutory sanction or guidance, under powers conferred upon it by executive order, and, as to its dispute function, relying principally on the original "no strike" pledge resulting from the labor and industry conference convened by the President in December 1941. Even after the enact-

[57] For a full and authoritative documentation of the work of War Labor Board II see the three volume publication by the U.S. Department of Labor entitled THE TERMINATION REPORT OF THE NATIONAL WAR LABOR BOARD (1945).

ment of the Stabilization Act of 1942[58] and the War Labor Disputes Act of 1943,[59] the Board continued to be the chief policy-maker in the determination of principles of wage stabilization and dispute settlement. The effectiveness of its program rested primarily on the cooperation of management and labor and this cooperation was due in large part to the fact that there was joint participation in making policy.

The forging of decisions in the tough crucible of tri-partitism meant some degree of compromise with abstract principle, some inconsistency, and a good deal of uncertainty, and it meant that the term "wage stabilization" signified something other than "wage freeze." All of this was probably necessary, in view of the powerful bargaining position of the labor unions in industry and, without any intention of being invidious, their political influence with the administration. The product was an amalgam compounded from the elements of two policies, one opposing wage increases, as part of the economics of counter-inflation, and the other favoring a preservation of the principles of collective bargaining. The resulting alloy naturally would not have met the most rigid specifications for a solid anti-inflationary structure, but it was on the whole adequate to support the requirements of the total job which had to be done.

The procedures used and principles developed during this emergency period deserve mention in a chronicle of the significant labor law developments of the past fifty years in view of their obvious importance in relation to the crucial issues of the war, and also because of their enduring effects. Recent events have forced us once again to resort to "emergency" economic controls, and once again we have adopted a tri-partite procedure for handling the problems of wage stabilization, and, in critical cases, of dispute settlement. The present Wage Stabilization Board naturally, to some extent, looks to the policies developed by the wartime Board as an important body of instructive experience in developing its own program, although its problems in many respects are different and require different solutions. The "hold the line" cost of living formula ("Little Steel") of the War Labor Board has evolved into a firm policy of the present Board approving cost of living wage adjustments,[60] and the "inequality" doctrines of the earlier Board have their counter-parts in the inter-plant and intra-plant inequity regulations of the present board.[61]

[58] 56 Stat. L. 765.
[59] 57 Stat. L. 163.
[60] Wage Stabilization Board General Wage Regulation 8.
[61] Wage Stabilization Board General Wage Regulations 17 and 18.

Even without the intervention of another controlled economy, the wage adjustment and dispute settlement policies of the War Labor Board would have had enduring effects, for they profoundly influenced and affected the content of collective bargaining agreements and management and union thinking. Witness, for example, the lasting effects of the Board's "maintenance of membership" policy on the issue of union security, its vacation and holiday pay edicts, and its position favoring the inclusion of arbitration as the terminal step in contract grievance procedure. In the light of post-war experience, it is evident that on the whole the gains in contract terms achieved by the unions during the war pursuant to Board order were not lost with the return of free collective bargaining. Instead, they have been absorbed and have tended, like other contract terms, to become the base for further bargaining demands. This natural evolution from directive to contract norm to further bargaining pressure means that governmental intervention in dispute settlement has most important implications.

Post-War Reaction: The Taft-Hartley Act

The decade from 1935 to 1945 saw a tremendous expansion of trade union power under the stimulus, first, of the pro-union NLRA of 1935, and, second, of the favorable labor climate of World War II.[62] The strategic position of the unions was such, especially in the basic industries, that, but for their commendable and patriotic exercise of self-restraint, they could have forced upon the employers of the country much greater bargaining gains than were actually realized through the processes of the War Labor Board. With the coming of V-J Day, however, the need for self-restraint was reduced, while the areas of labor-management disagreement increased sharply with the movement toward reconversion to a peacetime economy. The result was a record number of work stoppages of serious magnitude during 1946,[63] and a succession of bargaining crises while the nation groped toward a post-war wage policy.

Even before the war there had been substantial pressure for a revision of the national labor laws so as to make them less partisan, and the post-war strike wave heightened public interest in the matter of

[62] Expressed in terms of membership figures alone, which do not by any means accurately measure the actual increase in power and position, total membership rose from approximately 3,700,000 in 1935 to approximately 15,000,000 in 1945. BLS, HANDBOOK OF LABOR STATISTICS 139 (1950).

[63] Man days lost through strikes rose to 38,025,000 in 1945 and 116,000,000 in 1946. See 66 MONTHLY LAB. REV. 62 (1948).

statutory changes, especially to take account of the growing problem of basic collective bargaining disputes. Scores of proposals of every conceivable variety for new federal legislation were made in and out of Congress. At length, in the Eightieth Congress, after a Republican political resurgency had re-established conservative strength, the Labor-Management Relations Act of 1947 (the "Taft-Hartley Act")[64] was enacted over Presidential veto. Union leaders denounced the act as viciously anti-union, and vowed that it would have a short and ignoble life. Their maledictions have continued, though at a notably reduced volume, but to date their prophecies of the early demise of the act have remained unfulfilled. It may well be that the act of 1947, with some amendments and supplementation, will survive as a permanent part of our structure of labor law. In any case, it has already marked a new phase in the legal approach to labor relations problems.

The major features of the law are familiar and need not be recounted here. Its basic premise is that management-union-employee relations, like other areas of human relations, can and should be subjected to legal rules, and it more closely approaches in character an overall labor relations code than any other American statute to date. Like the act of 1935, it deals with employer anti-unionism, and provides principles and procedures for the settlement of representation questions, but with these matters the resemblance ends. Problems of collective bargaining received attention in the act of 1935 only by imposing upon employers the obligation to bargain with properly qualified unions, whereas the act of 1947 imposes a reciprocal obligation upon unions, stipulates minimum procedural requirements which bargainers must meet in negotiating contract changes, creates special mediation machinery, provides for special treatment of the emergency strike problem (using the techniques of fact-finding and injunction), and even, to a limited degree, imposes limitations on the content of collective agreements with its prohibition of the closed shop, its qualifications on the union shop privilege, and its regulations of the check-off and employer contributions to union welfare funds. The act of 1935 was silent as to the problem of union and employee misconduct, while the act of 1947 includes, as its most important single addition, a code of union unfair labor practices. The act of 1935 omitted entirely any reference to the institutional problems of unionism (membership regulations, powers and duties of officers, relations between parent and local unions, control of union funds, etc.), while the act of 1947 pays at

[64] 61 Stat. L. 136, 29 U.S.C. (Supp. IV, 1951) §§141-197.

least limited attention to some of these. The one major category of problems neglected by both laws, but, oddly enough, given extensive treatment by the Railway Labor Act through the Adjustment Board procedure, is the interpretation and application of collective agreements.

One very interesting, and perhaps unexpected, legal consequence of the act of 1947 has been its devastating impact on state labor relations laws. In a series of cases resting on the postulates of the pre-LMRA decisions in *Hill v. Florida*[65] and *Bethlehem Steel Company v. New York State LRB*,[66] the Supreme Court has held in effect that the statute suspends most of the labor relations law of the states, at least where legislatively declared, insofar as it may be applicable to employers and unions subject to the federal act, and this is most of them. The Court has specifically held that, as to such parties, (1) state labor relations law proscriptions of employer unfair labor practices, of the same tenor as those contained in the NLRA, may not be enforced,[67] (2) representation questions may not be decided under state law,[68] (3) strike notice and referendum provisions of state law may not be applied,[69] and (4) even state statutes providing for compulsory arbitration of public utility labor disputes, and suspending the right to strike in respect thereto, are superseded.[70] Only two decisions of the Court look in the other direction. In one of these the right of Wisconsin to regulate and limit irregular strike action (in this instance, the unannounced "quickie" strike) was upheld,[71] but the authority of this decision is subject to some question in the light of the decisions just noted, all of which came later. In the other, it was held that the states are free to impose more severe limitations on the union shop privilege than are prescribed by the NLRA,[72] but on this point the act, itself, is quite clear. In the light of these cases an increasingly common state court reaction to employer as well as to state labor board petitions to enjoin union collective action is dismissal based upon the doctrine of supersedure of state authority. Whether the doctrine has or has not been correctly applied, and whether or not it represents sound policy,

[65] 325 U.S. 538, 65 S.Ct. 1373 (1945).
[66] 330 U.S. 767, 67 S.Ct. 1026 (1947).
[67] Plankinton Packing Co. v. Wisconsin ERB, 338 U.S. 953, 70 S.Ct. 491 (1950).
[68] LaCrosse Telephone Corp. v. Wisconsin ERB, 336 U.S. 18, 69 S.Ct. 379 (1949).
[69] Intl. Union, UAW-CIO v. O'Brien, 339 U.S. 454, 70 S.Ct. 781 (1950).
[70] Amalgamated Assn. of Street, Electric Ry. & Motor Coach Employees of Amer., Div. 998 v. Wisconsin ERB, 340 U.S. 383, 71 S.Ct. 359 (1951); and United Gas, Coke & Chemical Workers of Amer., CIO et al. v. Wisconsin ERB, 340 U.S. 383, 71 S.Ct. 359 (1951).
[71] Intl. Union, UAW-AFL v. Wisconsin ERB, 336 U.S. 245, 69 S.Ct. 516 (1949).
[72] Algoma Plywood & Veneer Co. v. Wisconsin ERB, 336 U.S. 301, 69 S.Ct. 584 (1949).

are matters of serious discussion.[73] In any case, if it is to be applied as broadly as is indicated by the current trend, the states will be substantially eliminated from the policy-making function in labor relations matters, and the NLRB, on the other hand, will have a mountainous burden of work, probably beyond its capacities, as the sole arbiter in areas of regulation covered by the LMRA.

Whatever else may be said about the Taft-Hartley Act, it is an interesting adventure in the area of pervasive regulation, which cannot, as yet, be fully evaluated. One might suppose that it would tend to decelerate the pace of union organization by emphasizing the right of workers to abstain and encouraging freer use by employers of counter propaganda; yet the statistical record to date seems to be otherwise.[74] Doubtless it has to some extent added strength to the bargaining position of employers, for every change in legal rules relating to the use of collective action necessarily affects the relative bargaining positions of the parties. On the other hand, there is little evidence to date that the act can or will be used to destroy the union movement. In terms of specific content there is reason for criticism or question as to some provisions and approbation as to others. Even the sponsors of the act have conceded that some amendments are in order,[75] and an initial step in this direction was taken with the enactment of the amendments to the union shop provisions in 1951.[76] A detailed examination of the provisions of the act is beyond the scope of our present discussion.

The Maturation of Collective Bargaining: Arbitration

To the practicing labor relations lawyer it is evident that the "law" with which he must work consists not only of the legal principles

[73] See, for example, Petro, "Federal-State Relations in Labor Law," 1 LAB. L.J. 419 (1950); Petro, "State Jurisdiction to Control Recognition Picketing," 2 LAB. L.J. 3 (1951); Petro, "State Jurisdiction to Regulate Violent Picketing," 3 LAB. L.J. 3 (1952); Cox and Seidman, "Federalism and Labor Relations," 64 HARV. L. REV. 211 (1950); Smith, "The Taft-Hartley Act and State Jurisdiction over Labor Relations," 46 MICH. L. REV. 593 (1948); and Benetar, "Jurisdiction of the National Labor Relations Board under the Taft-Hartley Act," PROC. OF N. Y. UNIV. THIRD ANNUAL CONF. ON LABOR 277 (1950).

[74] The right to refrain from self-organization and concerted action is declared in section 7 of the amended NLRA. Section 8(c) of the amended NLRA is the so-called "free speech" provision, pursuant to which employers (and unions) are free to resort to exhortation and propaganda so long as language of coercion is not used. The NLRB's Annual Reports show, however, that more representation petitions have been filed per year since the Taft-Hartley Act was passed than theretofore, on the average, and a continuing upward trend is evident. Moreover, the post-LMRA percentages of union victory in representation elections has remained in the neighborhood of 80%, which is about the pre-LMRA percentage.

[75] See the so-called "Taft substitute" for the Thomas-Lesinski bill (S. 249 and H.R. 2032), introduced in the 81st Congress.

[76] P.L. 189, 82d Cong., 1st sess.

declared by statute and judicial decision, but also of the rules incorporated in collective bargaining agreements. These agreements, although framed as though they were ordinary private contracts, actually operate in the plant as general standards or norms, much in the manner of legislative acts. The individual employment agreement or arrangement imports the terms of these contract standards very much in the same way that negotiable instrument obligations take on content from the N.I.L. There are now some 75,000 of these collective agreements, covering some 15,000,000 workers employed in American industry,[77] including most of the basic or key industries. The terms of employment laid down in these contracts have the most significant implications not only to the parties immediately involved but to the economy as a whole, and must be accorded a high, if not the highest, position in the total body of legally enforceable labor relations rules. Since the last two decades have seen the fullest flowering of collective bargaining to date, it is proper to record this fact as a significant labor law development of the past half-century.

In the administration of these agreements a collateral development, of particular interest to the labor relations lawyer, has been the increasing use of voluntary arbitration as a means of amicable dispute settlement. Governmental policy has been solidly behind this movement, as shown by the creation of a statutory arbitration tribunal (the National Railroad Adjustment Board) by the Railway Labor Act, the sponsorship of grievance arbitration by the National War Labor Board of World War II, the favorable though less specific pronouncements written into the Taft-Hartley Act, and the encouragement and assistance given by the Federal Mediation and Conciliation Service. Umpireships are now common under the basic collective agreements in the steel, textile, aluminum, automotive, and other industries, and thoustands of arbitration decisions are handed down yearly by permanent and ad hoc arbitrators. This body of decisions constitutes a rich source of information concerning labor relations problems and principles, and, while incompletely reported, is likely to develop into one of the most important sources of practical labor relations law.[78] The widespread use of arbitration is persuasive evidence of the increased sense of responsibility of labor and management and of the maturing of their bargaining relationships.

[77] DUNLOP, COLLECTIVE BARGAINING 14 (1949).

[78] For an interesting and instructive account of arbitration see ELKOURI, HOW ARBITRATION WORKS (1952).

Resumé

What has been recited above shows clearly that the statement with which this paper opened is accurate. Dramatic and almost revolutionary developments have, indeed, occurred during the past fifty years in the body of labor law, using that term in the technical and traditional sense. In the area of regulation of union-management-employee relations the most significant development has been the substitution of legislative for judicial policy determination; as we have seen, we are proceeding on the premise that suitable minimum standards of conduct can and should be evolved by law. In the area of terms of employment the most significant developments have been the decision to fix certain minimums by fiat, through wage-hour, child labor, and social security legislation, and the widespread use of collective bargaining, through which standards are determined by negotiation; bargaining is the great experiment in industrial democracy.

The standards of employment of today, in part legislative, in part bargained, in part still unilaterally determined by employers, are vastly different in industry generally from those obtaining at or near the turn of the century. The average earnings rate for factory workers advanced from $0.19 per hour in 1909 to $1.086 per hour in 1946.[79] From 1900 to 1946, while the cost of living index (1914=100) advanced from 75 to 194, the index of average hourly earnings increased from 76 to 486, which means that the increase in the real earnings rate was 151 per cent.[80] There was some collective bargaining even before 1900,[81] but the bulk of present day contract standards, including seniority protection, premium pay, vacation and holiday provisions, pension and insurance plans, and grievance machinery, are the product of the efforts of the past fifty years.

There is a question, of course, to what extent this progress in the earnings rate can be attributed to the trade union movement. Reputable economic authority may be cited in support of the proposition that, for the worker population as a whole, increases in real income would have been forthcoming to substantially the same degree with or without unionism, in view of technological progress in this country. Be that as it may, there can be no doubt that other important work standards of

[79] BLS, HANDBOOK OF LABOR STATISTICS 59 (1950).

[80] BLOOM AND NORTHRUP, ECONOMICS OF LABOR AND INDUSTRIAL RELATIONS 67 (1950).

[81] See CHAMBERLAIN, COLLECTIVE BARGAINING, c. 2 (1951).

today, not the least of which are the very important intangible values to the worker accruing in the very process of collective bargaining, including grievance handling, owe their existence to unionism.

What of the Future?

American labor law during the past fifty years has accommodated itself to the trade union movement, then protected and fostered it, and finally taken account of and sought to control and regulate the use of its vast economic power. "Labor relations" experts who look at union-management-employee problems in terms of "human relations" are inclined to doubt both the wisdom and the necessity of this "approach through law." Certainly this point of view must receive serious consideration, especially by those who administer the collective bargaining relationship, for the existence of legal standards even in their present complex form is designed to mark the outer boundaries of conduct rather than to provide the guide-posts for good relations between the parties. But the student of American law is likely, with justification, to believe that, barring a consolidation of union political power such as to make legal restrictions upon unions untenable, there will be no substantial recession from the currently held view that the relations growing out of unionism should be subjected to minimum legal standards.

This is not to suggest the absence of very serious problems in the field of labor law. Assuming the desirability, or at least the inevitability, of a continuance of the policy of legal controls, the shape of the law remains a matter of vital concern. Certain questions of paramount importance may be noted. The first relates to the fundamental problem of union, or union-employer, economic power. Both the Taft-Hartley Act and the Railway Labor Act leave the parties to collective bargaining substantially free to make such bargains as they will, and, in pursuit of their respective positions, to use their economic power freely except when a "national emergency" strike or lockout situation develops, and except, in the case of the Taft-Hartley Act, that unions are forbidden to use the secondary boycott.

The underlying premise is that "free" collective bargaining produces results compatible on the whole with the public interest, or at least that the risks involved are less than those that would attend any effort on the part of the state to interfere with the bargaining process beyond insistence upon "good faith." If, as must be assumed, it was intended on the whole to preserve freedom to make bargains in terms of the resultant of relative economic strength, one may wonder a little whether the complete prohibition of the use of the secondary boycott

is sound, for this tactic would seem to be less potent in the aggregate than the primary strike (e.g., in the basic industries) as a means of union coercion. Our economy is no longer, if it ever was, characterized by the kind of atomistic enterprise and organization in which the forces of free competition can, in the name of Adam Smith, be relied upon to maximize production at minimum prices. We have instead massive concentrations of capital under single ownership, now matched by corresponding union power. We have "monopolistic competition" among and within industries along with monopolistic control by unions of the labor force. We have "pattern" and in some important instances industry-wide bargaining. Economists are struggling to determine whether this type of economic organization can be relied upon to produce results consistent with the public interest, and, if not, what to do about it.[82] The problem presented is exceedingly complex and difficult. It seems quite clear, at least to this observer, that we shall not in any case attempt to solve the problem by atomizing either industrial or labor organizations; but the question remains whether any move should be made in the direction of supplying and applying economic standards against which to test the conduct of big business and big labor. I venture no opinion on this point, for I think economic analysis has not as yet reached the point where a considered judgment can be rendered. I do suggest, however, that the shape of our labor law must necessarily be involved in the solution which is ultimately sought.

A second problem, somewhat collateral to the first, concerns the official policy to be applied with respect to the "national emergency" strike or lockout. Present statutory policy, laying aside the special treatment provided through the Wage Stabilization Board, calls for the use of the "cooling off" technique backed up by injunction and implemented by public fact finding under the Taft-Hartley Act or public recommendations under the Railway Labor Act. These procedures have not been notably successful in recent years, and we shall continue to face the question whether alternative solutions should be attempted.

82 For general examinations of the problem see BURNS, THE DECLINE OF COMPETITION (1936); CHAMBERLIN, THEORY OF MONOPOLISTIC COMPETITION, 6th ed., (1950); CLARK, ALTERNATIVE TO SERFDOM (1948); SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY, 3rd ed., (1950); GRIFFIN, ENTERPRISE IN A FREE SOCIETY (1949); and STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE (1951). For discussions of the union problem see Simons, "Some Reflections on Syndicalism," 52 J. POL. ECON. 1 (1944); ROSS, TRADE UNION WAGE POLICY (1948); LINDBLOM, UNIONS AND CAPITALISM (1949); REYNOLDS, LABOR ECONOMICS AND LABOR RELATIONS, Part Two (1949); SLICHTER, MODERN ECONOMIC SOCIETY, cc. XXIII-XXV (1936); BLOOM AND NORTHRUP, ECONOMICS OF LABOR AND INDUSTRIAL RELATIONS, Part IV (1950); and CHAMBERLAIN, COLLECTIVE BARGAINING, cc. 15-17 (1951).

There is a growing feeling, for example, that compulsory arbitration should be tried, at least in the case of railroads. Many observers hold that Taft-Hartley emergency boards of inquiry should have power to make recommendations on the issues in dispute in the particular case in order better to crystallize and focus public pressure on the parties. There is even support among some neutral critics for the view that the emergency problem has been magnified out of all proportion to the facts and that a general policy of non-intervention should be adopted. The importance of this question lies not simply in the point that a given dispute may involve, if carried to the point of strike or lockout, serious and even catastrophic immediate repercussions. Of at least equal importance is the fact that the terms ultimately agreed upon usually have the most serious general economic effects. If the state is to intervene on any basis which tends to affect these terms, the responsibility is great. Here also, then, we have a continuing problem of absorbing interest, magnified by the recent decision in the Steel seizure cases.

Finally, as an item for the future, note may be taken of the perplexities arising in the matter of determining legal relations within the union structure. These relations are both intra and inter union, and include such matters as the standards, if any, to be met by union membership rules as well as the machinery for their internal enforcement, the question whether, and if so by what means, "democracy" shall be required within unions, what legal relationships shall exist between parent and local unions, and how to resolve inter-union representation and jurisdictional disputes. Thus far, for the most part, the development of legal policy with respect to intra-union matters has been left to the law of unincorporated associations, which means that judicial intervention on the whole has been limited to the enforcement of the basic "contracts" (constitutions and by-laws) of the unions. A slight deviation from this pattern is observable in the attention paid to union membership regulations by the enactment in a few states of FEPC legislation, in Taft-Hartley's oblique attack on the problem by the method of laying down certain prerequisites for the validation of the union shop, and in the work of the courts in holding unions to the standards of fiduciaries in exercising their bargaining responsibilities. The most forthright legislative action has been in relation to inter-union conflicts and consists of the labor relations act provisions for the resolution of representation and jurisdictional disputes. Especially in regard to the problem of internal union relations, however, the law is still embryonic,

and yet it is increasingly apparent that the manner in which unions operate with respect to their existing and potential membership is a matter of tremendous importance in view of the position now held by the unions as the representatives of workers. Most progressive union leaders are fully cognizant of this fact and are seeking the development of fair operating standards. Much progress along this line is to be noted, especially among the CIO unions. The question facing lawmakers is whether and to what degree there should be evolved with respect to these problems a code of law.