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THE National Labor Relations Act[1] was passed, as it declares in its first section, to encourage "the practice and procedure of collective bargaining" and to give workers freedom to designate "representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment"; and the last of the unfair labor practices named in section 8 is for an employer "to refuse to bargain collectively." Bargaining and negotiating, the National Labor Relations Board has repeatedly declared, must be done in good faith.[2] Discussion is not true negotiation or bargaining.[3] For the employer to bargain in good faith he must intend to reach agreement;[4] and be ready to have such agreement embodied in a writing signed by the parties.[5] A signed contract is then the end-all of the process, so far as the National Labor Relations Act is concerned; for regarding the *observance* of contracts the National Labor Relations Board, to which the act entrusts the application of its standards, has no responsibility.[6]

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[1] 49 Stat. L. 449 (1935), 29 U. S. C. (Supp. 1937), §§ 151-166 (hereafter cited as NLRA).

[2] NATIONAL LABOR RELATIONS BOARD, FIRST ANNUAL REPORT 86 (1936); SECOND ANNUAL REPORT 82 (1937).

[3] St. Joseph Stock Yards Co., 2 N. L. R. B. 39 at 48-55 (1936) (reviewing cases).

[4] The Railway Labor Act, 44 Stat. L. 577 (1926), 48 Stat. L. 1185 (1934), 45 U. S. C. (1934), §§ 151a, 152, with similar purpose, says the parties must "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions."

[5] Harnischfeger Corp., 9 N. L. R. B., No. 64 (1938); Inland Steel Co., 9 N. L. R. B., No. 73 (1938); H. J. Heinz Co., 10 N. L. R. B., No. 89 (1939).

[6] But see Brown Shoe Co., 1 N. L. R. B. 803 at 829 (1936); Shawsheen Dairy, Inc., (Mass. L. R. Com.) 3 L. R. R. 377 (1938) (breach of contract an unfair labor practice); M. & J. Tracey Co., 3 L. R. R. 356 (1938) (construction of preferential shop contract) (argument before board).

It is "the practice and procedure of collective bargaining" that is the board's concern. The formation of the contract is the culmination of collective bargaining.[7] At that point the legislative process in labor relations is over, and the executive process of application and interpretation begins.[8]

So the central aim of the NLRA is the facilitation of collective contracts.[9] Since the time that this aim first found general expression

[7] "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining." Consolidated Edison Co. v. National Labor Relations Board, (U. S. 1938) 59 S. Ct. 206 at 220.

[8] Collective contracts are enforced by the courts of most states. Witmer, "Collective Labor Agreements in the Courts," 48 YALE L. J. 195 at 202 (1938). But the labor anti-injunction statutes appear to present some serious obstacles. 51 HARV. L. REV. 520 at 531 (1938); 38 COL. L. REV. 1243 at 1263 (1938).

Perhaps a special board to see to the performance of labor contracts would be desirable. Such special agencies exist in many other countries. INTERNATIONAL LABOUR OFFICE, LABOUR COURTS (1938) [STUDIES AND REPORTS, Series A, No. 40]. Indeed we have in this country the Railroad Adjustment Board with precisely this function. Railway Labor Act, 45 U. S. C. (1934), § 153; Garrison, "The National Railroad Adjustment Board: A Unique Administrative Agency," 46 YALE L. J. 567 (1937); Spencer, "The National Railroad Adjustment Board," 11 J. BUS. (U. of Chi.) 1 (1938). William M. Leiserson, Chairman of the National Mediation Board, is for an amendment to the NLRA "requiring agreements arrived at by collective bargaining to be . . . subject to arbitration as they are under the Railway Labor Act." Leiserson, "Should the Wagner Act be Revised?" Address in America's Town Meeting of the Air, Jan. 5, 1939. The Wisconsin Labor Relations Act allows the Wisconsin Labor Relations Board to make findings of breach of contract. But these findings do not culminate in any order enforceable against the wrongdoer. Wis. Stat. (1937), § 111.15(4).

[9] By calling them contracts, I do not mean to endorse any legal theory, of which there are many. Fuchs, "Collective Labor Agreements in American Law," 10 ST. LOUIS L. REV. 1 (1924); 31 COL. L. REV. 1156 (1931); Rice, "Collective Labor Agreements in American Law," 44 HARV. L. REV. 572 (1931); 41 YALE L. J. 1221 (1932); Christenson, "Legally Enforceable Interests in American Labor Union Working Agreements," 9 IND. L. J. 69 (1933); Anderson, "Collective Bargaining Agreements," 15 ORE. L. REV. 229 (1936); 51 HARV. L. REV. 520 (1938); Hamilton, "Industrial Rights Arising from Collective Labor Contracts," 3 MO. L. REV. 253 (1938).

Contract is a term commonly used by the courts and the board, though these acts, if contracts at all, are of a separate type. Witmer, "Collective Labor Agreements in the Courts," 48 YALE L. J. 195 (1938). Consideration, for instance, is more or less fabricated in many cases. Anderson, supra, at 232; Hamilton, supra, at 264; Witmer, supra, at 204, note 33. In some ways collective agreements resemble international treaties. Anderson, supra, at 230. Treaties are not contracts except in a very loose sense. HUDSON, CASES ON INTERNATIONAL LAW, 2d ed., 877, note 14 (1936). Indeed the treaties which collective agreements most resemble are not even quasi-contractual (in the general sense of like contracts). They are rather quasi-statutory. McNair, "The Functions and Differing Legal Character of Treaties," 11 BRITISH YEARBOOK OF INTERNATIONAL

through section 7(a) of the National Industrial Recovery Act,[10] such contracts have become the rule, rather than the exception, and the number of workers in industrial, commercial, and maritime employment covered by such contracts has waxed many fold.[11]

These contracts present immensely interesting legal questions—for instance, whether legal rights are thereby created in individuals, and if so, how far these rights may be modified in the same way they were created, that is, by the action of the contracting parties and without the consent of the individuals;[12] and whether, in this respect and in others, the contract is something more than a contract, something like a statute, so that, for instance, if the union that has entered into it changes its allegiance or dissolves, the terms and conditions of employment nevertheless continue obligatory and unalterable until the expiration date of the contract or its supersession by a new and valid contract. These and many other problems antedated the duty of collective bargaining, but they come to new life in the sharper atmosphere created on the one hand by AFL-CIO rivalry and on the other by the growth of the collective contract system under the impetus of that rivalry and of national and state labor relations acts, and leaf out into new problems of harmonizing contracts with the "practice and procedure of collective bargaining," as now prescribed by law.[13]

It is to three of these new legal problems, especially as illustrated by decisions of the NLRB, that I address my attention: (1) To what extent and with what results do individual employment contracts conflict with collective contracts made by the representative of an employee

LAW 100 (1930). Collective contracts certainly have many traits of statutes. Duguit, "Collective Acts as Distinguished from Contracts," 27 YALE L. J. 753 (1918); Fuchs, "Collective Labor Agreements in German Law," 15 ST. LOUIS L. REV. 1 (1929); Fuchs, "The French Law of Collective Labor Agreements," 41 YALE L. J. 1005 (1932); Witmer, supra, at 209, 225, and 235. By statute these traits are accentuated. 43 MONTHLY LAB. REV. 398 (1936); Rice, "The Wisconsin Labor Relations Act in 1937," 1938 WIS. L. REV. 229, note 2.

[10] 48 Stat. L. 195, c. 90 (1933).

[11] Between 1,500,000 and 2,000,000 were probably covered in 1933; about 7,500,000 at the present time. (Estimate of Isador Lubin, U. S. Commissioner of Labor Statistics, in a letter to the author, Dec. 19, 1938.)

[12] Witmer, "Collective Labor Agreements in the Courts," 48 YALE L. J. 195, esp. at 229 (1938).

[13] Here is an acute "conflict in aims of contract law and of the labor relations acts." Witmer, supra, at 221. The fact that a contract antedates a conflicting statute gives it no absolute constitutional immunity. Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 S. Ct. 529 (1908); Louisville & Nashville Ry. v. Mottley, 219 U. S. 467, 31 S. Ct. 265 (1911); Norman v. Baltimore & Ohio R. R., 294 U. S. 240, 55 S. Ct. 407 (1935).

unit exercising the exclusive bargaining right conferred by NLRA section 9;[14] or, to restate the problem, what becomes of individual contracts when statutory collective contracts have been or may be made? (2) Does the existence of a collective contract made by a union not exercising the exclusive bargaining right conferred by section 9 hinder the exercise of that right and the making of a statutory contract? (3) Does a statutory contract remain in effect after a change of conditions? The underlying question in each case is whether the law, within the framework of the Constitution, will uphold or reject the challenged contract. The NLRA itself gives no express guidance; but its policy of encouraging collective bargaining makes the argument on the one hand, and the tradition of the common law of contract makes the argument on the other.

In the exercise of its jurisdiction to end unfair labor practices the National Labor Relations Board affects contracts by ordering respondents "to cease and desist" from carrying out the contracts and "to take" the "affirmative action," in order to "effectuate the policies of this Act," of posting notices that it will so cease and desist.[15] In the exercise of its jurisdiction to certify representatives, the board affects contracts only indirectly—that is, by regarding them as a bar to, or more often by disregarding them in, making a decision.[16]

[14] The representative authorized under section 9 need not have been designated by the NLRB; this statutory representative of the employees is the union (or person) that has been so designated or would be so designated if a question concerning representation existed and were presented to the board. If the board, upon petition for certification of representative, presented normally, if not invariably, by a union that is a candidate for representative, finds upon investigation that there is a question concerning representation, it proceeds to determine the choice of the employees (incidentally holding an election if it deems it necessary for a correct determination) and certifies the representative chosen. But it dismisses petitions if it finds that no question concerning representation exists because there is no present desire of the petitioner to bargain collectively. J. & A. Young, Inc., 9 N. L. R. B., No. 102 (1938). Or because the employer does not refuse to bargain with the union which is the true representative, whether this be the petitioner—Mutual-Sunset Lamp Mfg. Co., 3 N. L. R. B. 450 (1937) (stipulation); Century Woven Label Co., 8 N. L. R. B., No. 69 (1938)—or another union—Todd Seattle Dry Docks, Inc., 2 N. L. R. B. 1070 (1937). Or because representation has recently been determined by a fair "consent" election. National Sugar Refining Co., 4 N. L. R. B. 276 (1937) (on the effect of a recent certification, see notes 92, 94 and 97 below). Or because the board, to redress the employer's unfair labor practice, has ordered the employer so to bargain. Harter Corp., 8 N. L. R. B., No. 43, p. 26 (1938). Usually the statutory representative of the employees has not been so designated by the board, and collective bargaining takes place without its intervention.

[15] N. L. R. A., § 10(c). See order summarized in note 46, below.

[16] If a question of each type concerning the same labor relationship arises at the same time, the board usually hears and decides the two together.

I

INDIVIDUAL EMPLOYMENT CONTRACTS AND STATUTORY COLLECTIVE CONTRACTS

The substance of collective bargaining, and so of the resulting contracts, relates to terms of employment that heretofore were settled by the employer with the tacit or occasionally active agreement of the individuals who work for him. In a sense every employment relation is contractual; that is, it is consensual. But ordinarily it is so freely terminable at the will of either party that it is not a contract in the usual sense.

Even the simplest employment contract does entail obligation, for either payment is made before the work is done—in which case the worker is under obligation to work (or pay damages)—or more commonly the service is performed before the wage is paid so that the employer is under obligation to pay. The existence of this sort of contract is of course no hindrance to collective bargaining; indeed its continuance is subsumed in collective bargaining, for a collective contract does not usually contain any promise that the employer shall offer jobs or any promise that employees shall work. Rather it declares the terms and conditions of hiring, working, and firing without reference to individuals; but it still remains for the employer and the individual workman to decide whether they will enter into an employment relationship.[17]

But more complex contracts are sometimes made between employer and workman. Two of the most usual types are those whereby the laborer promises to work at a definite wage or salary for a definite time or promises not to join a union or not to designate a representative for collective bargaining while he is employed. These contracts were entirely lawful[18] till the present decade, despite some statutory attempts to prohibit anti-union contracts,[19] and, if not in fact directly enforced

[17] The employer's freedom in selecting and in dismissing workmen is curtailed by the NLRA to the extent that he may no longer discriminate between persons on account of labor affiliation except according to the terms of a licit closed shop agreement. And it may be further curtailed by collective agreement, requiring the observance of seniority, for instance.

[18] The existence of consideration is doubtful but rarely important. Rice, "Collective Labor Agreements in American Law," 44 HARV. L. REV. 572 at 603, note 124 (1931); 35 COL. L. REV. 1090 at 1097 (1935). Compare note 9, above.

[19] Adair v. United States, 208 U. S. 161, 28 S. Ct. 277 (1907); Coppage v. Kansas, 236 U. S. 1, 35 S. Ct. 240 (1914).

by the courts, they were frequently protected against interference.[20] They began to give way to the collective agreement system with the enactment of the Norris-LaGuardia Act, restricting the federal courts,[21] and of state statutes with similar, but sometimes wider, effect.[22] These statutes (without expressly enjoining employers to bargain with their employees collectively) withdrew legal sanction from contracts contrary to the declared public policy that every worker have "full freedom of association, self-organization, and designation of representatives of his own choosing . . . for the purpose of collective bargaining."[23]

How far this general language, substantially repeated in the NLRA, will eventually lead the courts to results consonant with NLRB decisions it is too early to say. To be sure, the question before the courts and that before the NLRB are not precisely the same. The NLRA is not the concern of the courts (except as they are invoked to review unfair labor practice decisions of the NLRB); for the board's power

[20] Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 S. Ct. 65 (1917); La France Electrical Const. Co. v. International Brotherhood of Electrical Workers, 108 Ohio 61, 140 N. E. 899 (1923); International Organization, U. M. W. A. v. Red Jacket Consol. Coal Co., (C. C. A. 4th, 1927) 18 F. (2d) 839.

In New York, at least, the rule is not applied to labor disputes. Exchange Bakery & Restaurant v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927); Interborough Rapid Transit Co. v. Lavin, 247 N. Y. 65, 159 N. E. 863 (1928); Interborough Rapid Transit Co. v. Green, 131 Misc. 682, 227 N. Y. S. 258 (1928). Even collective contracts have been denied protection. Stilwell Theater, Inc. v. Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932); Witmer, "Collective Labor Agreements in the Courts," 48 YALE L. J. 195 at 218 (1938). But would such a contract be denied protection if made by a statutory representative? Compare note 97, below.

[21] 47 Stat. L. 70, c. 90 (1932), 29 U. S. C. (1934), § 101.

[22] Riddlesbarger, "State Anti-injunction Legislation," 14 ORE. L. REV. 501 (1935); 5 INT. JUR. ASSN. MO. BULL. 59 at 68 (1936).

[23] 47 Stat. L. 70, c. 90, § 2 (1932), 29 U. S. C. (1934), § 102. A similar declaration in Wis. Stat. (1937), § 103.51 (enacted in 1931), led the state supreme court early in 1934 to hold that employers were bound to negotiate with the collective representative of their employees—the first court to announce such a duty. Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Mfg. Co., 215 Wis. 623, 256 N. W. 56 (1934). Though Lauf v. E. G. Shinner & Co., 303 U. S. 323, 58 S. Ct. 578 (1938), where a collective contract existed between the employer and the plant union, later held to be employer dominated, E. G. Shinner & Co., (Wis. L. R. B.) 3 L. R. R. 656 (1938), cleared up certain doubts, the effect of the NLRA on the Norris-La Guardia Act is still a matter that puzzles everyone. 6 INT. JUR. ASSN. MO. BULL. 25 (1937); 6 id. 111 (1938); 7 id. 7 (1938); Rice, "The Wisconsin Labor Relations Act in 1937," 1938 WIS. L. REV. 229 at 273, note 179(1); Larson, "The Labor Relations Acts—Their Effect on Industrial Warfare," 36 MICH. L. REV. 1237 at 1255, 1270 (1938); 52 HARV. L. REV. 327 (1938). See also unreported cases summarized 3 LEAGUE FOR INDUSTRIAL RIGHTS MO. BULL. 188-191 (1938).

to prevent unfair labor practices is exclusive[24] and its power to determine representation is both exclusive and unreviewable[25] except as incidental to unfair labor practice orders[26] On the other hand, the NLRB is not the agency for enforcing or protecting individual contracts; the question that it has to decide is whether the existence of such contracts requires it to alter its usual course in administering the NLRA, whether it must temper its administration so as to avoid incidental impairment of them. Nevertheless, there is incongruity between the energy of the NLRB and the reluctance of the courts, for the public policy of the Norris-LaGuardia Act is the same public policy that inspires the NLRA and there takes body in its definitions of unfair labor practices. Hence the NLRB has in several instances rejected the view of courts in dealing with contracts which in its opinion cannot stand against the implications of the NLRA.[27]

The contract problem may be presented to the NLRB in either of the two types of proceedings that it entertains—(1) for the veto of unfair labor practices, (2) for the certification of employee representatives. In proceedings of the former type, the board has frequently found individual "yellow dog" contracts to be coercively unfair and has accordingly ordered their express repudiation individually by the coercing employer.[28] And so of other individual contracts used by the employer to avoid making a statutory collective contract; [29] or subsidiary

[24] N. L. R. A., § 10(a); Wisconsin Labor Relations Board v. Fred Rueping Leather Co., (Wis. 1938) 279 N. W. 673 at 677; Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 58 S. Ct. 459 (1938); Rice, "The Wisconsin Labor Relations Act in 1937," 1938 WIS. L. REV. 229 at 273.

[25] But the courts themselves enforce (partially) equivalent labor standards of the Bankruptcy Act, § 272, as added by 52 Stat. L. 904 (1938), 11 U. S. C. A. (Supp. 1938), § 672 [superseding § 207(l) and (m)], and of the Railway Labor Act, note 4, above.

[26] N. L. R. A., § 9(d). See note 69, below.

[27] Williams Mfg. Co., 6 N. L. R. B. 135 (1938); Hill Bus Co., 2 N. L. R. B. 781 (1937); National Electric Products Corp., 3 N. L. R. B. 475 (1937).

[28] Atlas Bag & Burlap Co., Inc., 1 N. L. R. B. 292 (1936); Carlisle Lumber Co., 2 N. L. R. B. 248 (1936), affd. (C. C. A. 9th, 1938) 94 F. (2d) 138; Hopwood Retinning Co., Inc., 4 N. L. R. B. 922 (1938), affd. (C. C. A. 2d, 1938) 98 F. (2d) 97; Jacobs Bros. Co., Inc., 5 N. L. R. B. 620 (1938); Federal Carton Corp., 5 N. L. R. B. 879 (1938); David E. Kennedy, Inc., 6 N. L. R. B. 699 (1938); National Licorice Co., 7 N. L. R. B. 537 (1938); Centre Brass Works, Inc., 3 L. R. R. 620 (1939); National Meter Co., 3 L. R. R. 784 (1939).

[29] Sands Mfg. Co., 1 N. L. R. B. 546 (1936), revd. (C. C. A. 6th, 1938) 96 F. (2d) 721 at 724, affd. (U. S. 1939) 6 U. S. LAW WEEK 887; Cating Rope Works, Inc., 4 N. L. R. B. 1100 (1938); American Mfg. Co., 5 N. L. R. B. 443 (1938); Williams Mfg. Co., 6 N. L. R. B. 135 (1938). Compare Hanson-Whitney Machinery Co., 8 N. L. R. B., No. 18 (1938).

to an unlawful collective contract.[30] All such contracts are contrary to the act, not merely voidable by employees.[31] Individual contracts not animated by hostility to collective bargaining have received no attention in proceedings of this type. But in representation proceedings the board, while not denying the legal validity of individual contracts concerning terms and conditions of employment, has never allowed their existence to stop it in investigation and certification of representatives, and has indicated that such contracts cannot be effective as a restraint on collective bargaining.[32] This leaves room for individual contracts which are not contrary to the spirit of the act, so long as they are not overridden by a collective agreement.

The courts which have had occasion to mention individual contracts

[30] Joseph H. Meyer & Bros., 9 N. L. R. B., No. 65 (1938) (stipulation); Newark Rivet Works, 9 N. L. R. B., No. 47, pp. 13, 18, 25 (1938); Fanny Farmer Candy Shops, Inc., 10 N. L. R. B., No. 19 (1938).

[31] Whether an employer's misrepresentation as well as undue influence in making individual or collective contracts would generally fall within the scope of the act and the board's remedial power seems uncertain. But fraud (or possibly only unilateral mistake) (belief that labor leaders had approved) in the inducement of contracts of individual employees made the board doubly sure that they were no bar to a representation determination in McKesson & Robbins, Inc., 5 N. L. R. B. 70 at 77-81 (1938).

[32] "Even if we assume that the agreements are binding . . . the agreements in no wise prohibit the employees from changing their representative for bargaining. . . . The existing arrangements between the respondent and some of its mechanical employees are thus no bar to an election and consequent bargaining by the certified representatives of the employees. These representatives are of course free to bargain concerning changes in the existing arrangements, since parties may bargain with respect to the termination of existing contracts." New England Transportation Co., 1 N. L. R. B. 130 at 138, 139 (1936). (The word parties seems to identify the collective representative with the individual employees who had signed the contracts.)

After holding that the employer's conduct in inducing employees to sign individual contracts was unfair within § 8(1) (though a lower court had protected these contracts against interference), the board declined to treat it as a refusal to bargain collectively, under § 8(5), because "the acts particularized in the complaint," to wit "that the respondent had coerced its employees into signing individual contracts of employment, with the purpose of interfering with . . . collective bargaining," did "not constitute such unfair practice." Williams Mfg. Co., 6 N. L. R. B. 135 at 136 and 150 (1938).

"The fact that [a collective contract] has existed concurrently with the individual contracts demonstrates conclusively that the latter constitute no bar to collective bargaining." Metro-Goldwyn-Mayer Studios, 7 N. L. R. B. 662 at 697 (1938).

"The fact that an employee signs an individual contract can not be held to reflect the desires of such employee regarding representation and does not constitute any bar to collective bargaining on his behalf." Gates Rubber Co., 8 N. L. R. B., No. 35, p. 4 (1938).

Compare the caution of the former National Labor Relations Board in E. F. Caldwell & Co., 1 (Old) N. L. R. B. 12 at 14 (1934).

in reviewing board decisions seem to support the same interpretation, though perhaps this is not yet entirely clear. The doubts arise from broad language used by the Supreme Court when it sustained the constitutionality of statutory requirement of collective bargaining in *Virginian Ry. v. System Federation No. 40*[33] and in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*[34]

In the first of these cases, that arising under the Railway Labor Act, in which the railway sought to overthrow an injunction which the union had obtained to require the railway to bargain, and in which the Solicitor General was heard as *amicus curiae*, the latter's brief interpreted the statutory duty of collective bargaining not in itself to exclude individual bargaining, while recognizing that by the terms of a particular collective agreement individual bargaining might be limited:

> "When the majority of a craft or class has (either by secret ballot or otherwise) selected a representative, the carrier cannot make with anyone other than the representative a collective contract (i.e., a contract which sets rates of pay, rules, or working conditions), whether the contract covers the class as a whole or a part thereof. Neither the statute nor the decree prevents the carrier from refusing to make a collective contract and hiring individuals on whatever terms the carrier may by unilateral action determine. . . . The carrier may contract with the duly designated representative to hire individuals only on the terms of a collective understanding between the carrier and the representative, but any such agreement would be entirely voluntary on the carrier's part and would in no sense be compelled."[35]

The Court, after referring to this passage in the government's brief, makes a statement, not avowedly contrary to it, but certainly susceptible of an interpretation that might sustain individual contracts in disregard of a collective contract. It says that it understands the decree of the lower court, affirmed because it conformed "in both its affirmative and negative aspects" with the statute, as prohibiting "the negotiation of labor contracts generally applicable . . . with any representative other than respondent, but not as precluding such individual contracts as petitioner may elect to make directly with individual employees."[36]

[33] 300 U. S. 515, 57 S. Ct. 592 (1937).
[34] 301 U. S. 1, 57 S. Ct. 615 (1937).
[35] 300 U. S. 515 at 548-549, note 6, 57 S. Ct. 592 (1937).
[36] Ibid. at p. 549.

Two weeks later in its first decision under the Labor Relations Act, the Court repeated this rule:

> "We also [in the *Virginian* case] pointed out that, as conceded by the government, the injunction against the company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was 'designed only to prevent collective bargaining with any one purporting to represent employees' other than the representative they had selected. It was taken 'to prohibit the negotiation of labor contracts, generally applicable to employees' in the described unit with any other representative than the one so chosen, 'but not as precluding such individual contracts' as the company might 'elect to make directly with individual employees.' We think this construction also applies to § 9(a) of the National Labor Relations Act."[37]

The endorsement in each case is of the government's explanation in the *Virginian* brief and cannot fairly mean more than the government conceded, to wit, that individual contracts, whether made before or after, continue effective unless contrary to the express or implied terms of a valid collective contract. One may paraphrase, I think, by saying that the collective contract is of higher rank than the individual contract in the same way that a statute outranks an ordinance.[38]

But if this is the thought of the Supreme Court, it needs to be made more explicit. Otherwise the passage is likely to mislead,[39] as it perhaps misled an inferior New York court into saying that an order, entered by the New York State Board under like language in the New York Labor Relations Act, requiring an insurance company to negotiate exclusively with a designated union, must, to avoid uncon-

[37] 301 U. S. 1 at 44-45, 57 S. Ct. 615 (1937).

[38] In the Jones & Laughlin opinion the Court, quoting the Solicitor General, further says that the act "does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.' " 301 U. S. at 45. But this is clearly subordinate to the duty to *try* to reach agreement by collective bargaining.

[39] See National Labor Relations Board v. Sands Mfg. Co., (C. C. A. 6th, 1938) 96 F. (2d) 721 at 724, revg. 1 N. L. R. B. 546 (1936) in reliance on this passage, and Peninsular & Occidental S. S. Co. v. National Labor Relations Board, (C. C. A. 5th, 1938) 98 F. (2d) 411 at 415, revg. on other grounds 5 N. L. R. B. 959 (1938), in which the court refers to this passage and says: "Not only did the company have the right to make individual contracts, evidenced by the shipping articles, but [it] was required by law to do so." The Supreme Court has granted certiorari in the Sands case, 59 S. Ct. 91 (1938), and has denied it in the Peninsular case, 59 S. Ct. 248 (1938).

Since this article was written, the Supreme Court has affirmed the decision in the Sands case. 6 U. S. LAW WEEK 887 (Feb. 28, 1939).—*Ed.*

stitutionality, be construed "not to prevent negotiations between the petitioner and any of its employees each acting for himself."[40] Without citation of authority, the court reasons:

> "It is contended that this [the board's order] prevents petitioner from making individual contracts with such of its agents as desire to deal with it individually and that this is repugnant to constitutional provisions guaranteeing freedom of contract. . . . If the intent of the board is to prevent such dealings its acts are unconstitutional. . . . It is assumed that the board intended no such direction. . . ."[41]

Such an exception to the obligation to bargain collectively would mean the destruction of the majority rule principle, the cornerstone of the labor relations acts, both national and state. It is, so far as I know, without support in any other judicial opinion.

As a result of the NLRA, then: (1) an individual contract which by its terms impedes statutory collective bargaining is illegal, that is, not merely is it disregarded by the board but its repudiation in express terms is required in unfair practice cases; (2) any other individual contract is void if in conflict with the terms of a statutory contract; otherwise it is valid.

II

INITIAL EFFECT OF COLLECTIVE CONTRACTS UNDER THE NATIONAL LABOR RELATIONS ACT

Far more numerous among the NLRB's decisions than the cases involving individual contracts are those involving collective contracts that are invoked by an employer to justify refusal to bargain with some competing claimant for employee representative; or, where the contract establishes a closed shop, to justify discrimination against nonmembers; or that are invoked by a union to defeat a rival union's petition for certification of representative.

Like individual "yellow dog" contracts, collective contracts may violate the standards or the policy of the act. In that case, if the board is engaged in a proceeding to end unfair practices, the board's wont has been to order the employer to repudiate the contract, if still extant;

[40] Metropolitan Life Ins. Co. v. New York Labor Relations Board, 168 Misc. 948, 6 N. Y. S. (2d) 775 at 780 (1938), affd. without opinion by Appellate Division, 7 N. Y. S. (2d) 1008 (1938), one judge dissenting. Appeal to the Court of Appeals is pending.

[41] 6 N. Y. S. (2d) at 779.

while if the proceeding is for certification of representatives, it has disregarded the contract.

The most numerous types of contract within the condemnation of the act are, first, those between an employer and an employee-representative over which the employer exerts such control, by fear or favor, as impairs the latter's freedom to bargain;[42] and, second, closed shop contracts between an employer and a representative chosen by less than a majority of the unit for which it speaks.[43]

But the act gives to statutory closed shop contracts the very opposite effect of legitimizing acts of the employer that are otherwise unfair practices.

On the other hand, contracts that cover members of the bargaining union only are almost or quite disregarded in administering the act.

A. *Contracts of Employer-Fostered Unions*

The sharpest attacks upon the law and its administration have been founded on decisions undermining contracts of affiliates of the American Federation of Labor which the board found to have been company-fostered. The great majority of its determinations which ignore, and of its orders which require the repudiation of, contracts of company-fostered unions have concerned non-affiliated unions embracing a single plant. But the board has meted out the same "remedy," so far as the contract is concerned, whether or not the incidental sufferer was nationally affiliated.

The very first final order entered by the board[44]—fully sustained by the Supreme Court[45]—required the employing company to withdraw from a company-kept union all recognition as representative of

[42] The board condemns such contracts usually as within N. L. R. A., § 8 (2). If they are made with a nationally affiliated union, however, the board tenderly condemns them only as within § 8 (1) and (3). See Consolidated Edison Co. v. National Labor Relations Board, (C. C. A. 2d, 1938) 95 F. (2d) 390. No disestablishment order is issued in the latter cases, and, if an election is held, the union, not being disestablished, may be a candidate for representative.

The board disregards as contrary to the policy of the act "an agreement by which a labor organization binds itself to refrain from filing charges under the Act." Ingram Mfg. Co., 5 N. L. R. B. 908 at 912 (1938).

[43] Probably contracts in making which the minority-choice union purports to represent all employees are bad even though not closed shop contracts. See heading "Pseudo-Majority Contracts," below.

[44] Pennsylvania Greyhound Lines, Inc., 1 N. L. R. B. 1 at 51 (1935).

[45] National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261, 58 S. Ct. 571 (1938).

its employees and to notify them that this union was "disestablished." This first case did not involve a contract, but the board soon took the step of holding that any contract that such a union may have made should at the same time be dissolved.[46] And even in the case where the board refrains from disestablishing an employer-fostered union (as it always has refrained, where the union is nationally affiliated), it will still cancel the union's contract.[47]

[46] The earlier cases were hesitant. In Delaware-New Jersey Ferry Co., 2 N. L. R. B. 385 (1936), the board had entered an order, 1 N. L. R. B. 85 (1935), which had been remanded for further hearing when the board tried to enforce it. National Labor Relations Board v. Delaware-New Jersey Ferry Co., (C. C. A. 3d, 1936) 90 F. (2d) 520. After taking more testimony the board stood by its order and added nothing concerning a contract meanwhile made or concerning the committee which made the contract, though it described the committee in an accompanying opinion as "not the result of a free choice on the part of the licensed engineers." "In coming to this conclusion," said the board, "we do not pass judgment on the validity of the contract entered into between respondent and the committee. . . . Assuming the contract is valid, it does not preclude further bargaining between respondent and the [proper representative] with reference to extension, modification, or termination of the agreement upon its expiration date." Delaware-New Jersey Ferry Co., 2 N. L. R. B. 385 at 389 (1936).

In Hill Bus Co., Inc., 2 N. L. R. B. 781 (1937), the board, while disestablishing the union, characterized the contract as void only in its opinion ("findings of fact") and did not require the employer specifically to repudiate it. [The contract was specifically enforced by the New Jersey courts. Hudson Bus Transp. Drivers' Assn. v. Hill Bus Co., 121 N. J. Eq. 582, 191 A. 763 (1937).]

But the board now habitually uses in its order the formula that the respondent desist "from dominating or interfering with the administration of [named group] or any other labor organization of its employees, and from contributing support to [the same]; from giving effect to its contract with [named group];" and that it "withdraw all recognition from [named group] as representative of any of its employees for the purpose of dealing with respondent . . . and completely disestablish [named group] as such representative; . . . immediately post notices . . . that the respondent will cease and desist as aforesaid, and . . . will withdraw all recognition from [named group] . . . and that [named group] is disestablished as such representative." Quoted from Phillips Packing Co., 5 N. L. R. B. 272 at 286-287 (1938). Recent cases often require also that the notice state that the contract is void. McKaig-Hatch, Inc., 10 N. L. R. B., No. 4 (1938); Cupples Co., 10 N. L. R. B., No. 13 (1938); Fanny Farmer Candy Shops, Inc., 10 N. L. R. B., No. 19 (1938).

Where such a contract establishes a "check-off" system—deduction by the employer of union dues from wages—the board requires that the employer reimburse the employees to the extent of such deductions. Heller Bros. Co., 7 N. L. R. B. 646 (1938), 8 N. L. R. B., No. 34 (1938); Lone Star Bag & Bagging Co., 8 N. L. R. B., No. 30 (1938); West Kentucky Coal Co., 10 N. L. R. B., No. 10 (1938). (This remedy has not yet been considered by any court.)

[47] In National Electric Products Corp., 3 N. L. R. B. 475 (1937), the first case of this kind, the board (despite a United States court decree of specific enforcement) required the respondent "to disavow the agreement," to cease to carry it out in certain

However, the lawfulness of the board's remedy of destroying the contract has recently become a little doubtful. The reach of the Supreme Court's partial reversal of the NLRB in the *Consolidated Edison* case [48]

respects, and to post notices in the plant stating that the contract was void. Ibid., pp. 499, 507, 508.

In Consolidated Edison Co., 4 N. L. R. B. 71 at 109 (1937) (where the respondent treated the contracts as exclusive, though by their terms they applied to union members only), the respondent was ordered to cease "giving effect to their contracts" (which are "invalid") and post notices stating that it will so cease. The board's order was reversed. See note 48, below.

In Lenox Shoe Co., 4 N. L. R. B. 372 at 390 (1937), the respondent was ordered to desist from "giving effect to its contract" (which is "clearly invalid," "void and of no effect") and post notices accordingly.

See also the following decisions of the N. L. R. B.: Zenite Metal Corp., 5 N. L. R. B. 509 (1938); National Motor Bearing Co., 5 N. L. R. B. 409 (1938); Missouri-Arkansas Coach Lines, Inc., 7 N. L. R. B. 186 (1938); Jacob A. Hunkele, 7 N. L. R. B. 1276 (1938); Electric Vacuum Cleaner Co., Inc., 8 N. L. R. B., No. 14 (1938); Jefferson Electric Co., 8 N. L. R. B., No. 33 (1938); Ward Baking Co., 8 N. L. R. B., No. 57 (1938); Serrick Corp., 8 N. L. R. B., No. 66 (1938); Cowell Portland Cement Co., 8 N. L. R. B., No. 126 (1938).

Since it is the employer's relation to the union, not the contract itself, that is contrary to the act, the same contract between the same parties may be valid when this relation is corrected. Consolidated Edison Co. v. National Labor Relations Board, (C. C. A. 2d, 1938) 95 F. (2d) 390 at 396. The orders in Serrick Corp. and Cowell Portland Cement Co., supra, expressly recognized this.

[48] Consolidated Edison Co. v. N. L. R. B., (U. S. 1938) 59 S. Ct. 206. This is the first Supreme Court decision reversing any board action. It has been suggested that it may rest "upon the canon that there is evil in the uninterrupted litigatory success of an administrative agency." 52 HARV. L. REV. 695 at 696 (1939).

In this case the Court rejects the board's action for three reasons: (a) the International Brotherhood of Electrical Workers and its locals which made the contracts were not parties to the proceeding (though they might have interevened) and had not notice that the contracts were in jeopardy; (b) nor was their validity actually put in issue during the hearing; and (c) invalidation of these contracts was not such action as would "effectuate the policies of the Act," because (1) certainly some of the employees wanted to be represented by the Brotherhood, and from any who did not, coercion would be removed by other provisions of the board's order; (2) the contracts were made by the Brotherhood not as exclusive representative but only as representative of its members; (3) the contracts were "highly protective to interstate and foreign commerce"; and (4) (in rebuttal of the suggestion that they were invalid because made after complaint had issued) pendency of the proceeding does not "preclude the Brotherhood as an independent [i. e. of the employer] organization chosen by its members from making fair contracts on their behalf." The first two are procedural objections; while the third, the substantive objection, is based on an unusual combination of facts. Not improbably the Court would uphold an order dissolving a contract which was made as this one was but in making which the union acted as exclusive bargaining representative. Compare what the board said referring to the testimony of Carlisle, in charge of respondent's labor relations, that the contracts were exclusive bargaining agreements applicable to all employees: "The contracts were executed under such circumstances that they are invalid, notwithstanding that they are in express

is hard to predict, for the overthrow of that section of the board's order directed against the contracts there involved seems to be based on a cumulation of objections, perhaps not all of significance to each of the six justices for whom the Chief Justice speaks in this part of his opinion. Though the union had a majority in several of the units for which it bargained, all the contracts were made "for members only." The case therefore has no direct bearing on statutory contracts.

B. *Pseudo-Majority Contracts*

A contract may be outlawed by the board because the union professes to bargain for all when it is not the choice of the majority. The making of such a contract, regardless of its terms, is probably an unfair labor practice, because the employer thereby gives this union "a marked advantage over any other in securing the adherence of employees."[49] It is clearly unfair, because discriminatory, if, as is usual, it provides for a closed shop. Contracts of unions fostered by employers sometimes suffer from this further infirmity.[50] The failure of the union to represent the choice of the majority may, however, exist as the sole ground for ordering a contract to be set aside,[51] or for disregarding it in representation cases.[52]

terms applicable only to members of the I. B. E. W. locals. If the contracts are susceptible of the construction placed on them by the respondents, namely, that they were exclusive collective bargaining agreements, then, *a fortiori*, they are invalid." Consolidated Edison Co., 4 N. L. R. B. 71 at 94 (1937). Particularly it seems probable that a closed shop contract so made would not have found favor. Or a contract made by a union having *no* spontaneous membership in the plant. Perhaps if the union had not been of nation-wide reach, the result would have been different. This last fact, though nowhere given as a reason, is so frequently repeated in the opinion that it must have been strongly sensed by the Court. Two justices were for upholding the board's order fully.

[49] National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U. S. 261 at 267, 58 S. Ct. 571 (1938).

[50] Many of the cases in note 47, supra, are of this type, for example, Zenite Metal Corp., 5 N. L. R. B. 509 (1938).

[51] Jacob A. Hunkele, 7 N. L. R. B. 1276 (1938); Merry Shoe Co., 10 N. L. R. B., No. 32 (1938) (with order requiring reimbursement of dues "checked off," as in cases in last paragraph of note 46, supra). Under the Wisconsin Act such a contract (1) if for a closed shop, and (2) if there is no majority representative, is valid. United Shoe Workers v. Wisconsin Labor Relations Board, 227 Wis. 569, 279 N. W. 37 (1938).

[52] Interlake Iron Corp., 2 N. L. R. B. 1036 (1937); American-West African Line, Inc., 4 N. L. R. B. 1086 (1938).

C. *Valid Closed Shop Contracts as Justifying Conduct Otherwise Unfair*

The contract for a closed shop, when made in conformity with the act, has the peculiar effect of altering the statutory duties of the employer and thus of justifying acts which, but for the contract, would constitute unfair labor practices.[53] Just what terms come within the closed shop proviso of section 8(3)[54] remains an open question. For instance: (a) closure of the shop to all non-unionists excepting present employees, or closure effective only after some lapse of time; (b) preferential treatment of union members in engaging and discharging workmen;[55] (c) requirement, as an alternative to union membership, that each worker authorize the union to bargain[56] or that the employer deduct from wages, by means of check-off, an amount equal to union

[53] M. & M. Wood Working Co., 6 N. L. R. B. 372 (1938), quoted note 101, below; Smith Wood Products, Inc., 7 N. L. R. B. 950 (1938); National Shoe Corp., 9 N. L. R. B., No. 70 (1938) (stipulation); Williams v. Quill, 277 N. Y. 1, 12 N. E. (2d) 547 (1938). To have this effect, the contract must be published. Electric Vacuum Cleaner Co., Inc., 8 N. L. R. B., No. 14, pp. 5, 7, 11 (1938).

[54] "Nothing in this Act . . . or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees, as provided in section 9 (a), in the appropriate bargaining unit covered by such agreement when made."

[55] These very common variants of the closed shop apparently have never been attacked as unfair. And the board has casually said: "Under Section 8 (3) of the Act, an employer may enter into a closed-shop or preferential agreement." Electric Vacuum Cleaner Co., Inc., 8 N. L. R. B., No. 14, p. 11 (1938). Also see Peninsular & Occidental S. S. Co., 5 N. L. R. B. 959 (1938), revd., (C. C. A. 5th, 1938) 98 F. (2d) 411, cert. den. (U. S. 1938) 59 S. Ct. 248; Waterman S. S. Corp., 7 N. L. R. B. 237 (1938), where the preferential contract, which presumably was made by a statutory representative, was found not to call for the practices for which the employer was held liable. In the representation case of National Sugar Refining Co., 3 L. R. R. 685 (1939), the board noted a contract provision requiring the employer to encourage union membership, but did not consider its "legality" in the absence of unfair practice charges.

[56] In an early case the board rejected such a contract because made by a kept union and also because: "The closed shop is a method of achieving stability of organization and consequently of relations between employer and employees. . . . A power of attorney which leaves the signatory a non-member . . . is not conducive to such stability . . . . Therefore, by permitting the employees of the respondent a choice between membership in the Association or authorizing it to represent them . . . the parties . . . have not brought themselves within the proviso." Clinton Cotton Mills, 1 N. L. R. B. 97 at 110 (1935). This seems a questionable interpretation of the act.

dues.[57] Such questions, arising from these contracts that are shields of the employer against unfair practice charges, may in time so involve the board in the business of interpretation that it will not be a long step to a general recognition of breach of contract as an unfair labor practice. However, it would be unfortunate to have such a development as long as the board is incompetent to hear like claims of the employer.[58] So far, there have been no outstanding decisions relying on the terms of closed shop agreements.[59] In representation cases, valid closed shop contracts are no different from any other statutory contracts.

D. *Contracts for Union Members Only*

As distinguished from the contracts made by actual or pretended statutory bargaining representatives, are the collective contracts made by unions for their members only and not for all employees in a unit—ordinarily by unions which are unable under the statute, because lacking majority backing, to represent all employees. These collective agreements are normally valid, at least if made by unions free from employer domination or support. However, they do not fulfill the requirements of statutory collective bargaining. Therefore, as the Supreme Court indicated in the *Consolidated Edison* case,[60] they cannot stand in the way of such bargaining by the statutory representative. For, while sustaining the contracts there involved, the Court by no means lays down a general prohibition against the overthrow of these minority union contracts. Indeed, it expressly recognizes that *statutory* bargaining must not be clogged by these very contracts that it vindicates; their "continued operation . . . is necessarily subject to the provision of the law by which representatives of the employees for the

[57] This was a term of the contract in National Electric Products Corp., 3 N. L. R. B. 475 at 486, note 11 (1937). The board condemned the contract because the union was not shown to have been the majority choice when the contract was made and because the union was assisted by the employer. That the board might have condemned the union also because of this term seems improbable. For what discrimination can be found in making an identical deduction from the wages of every employee in the unit?

[58] Compare the board's problem in dealing with violence of employees against whom it is incompetent to hear claims. Republic Steel Corp., 9 N. L. R. B., No. 33, pp. 169-176 (1938).

[59] See note 6, supra. Is it an unfair labor practice for the employer to discharge an employee disloyal to the union? National Electric Products Corp., 3 L. R. R. 488 (1938) (intermediate report).

[60] Consolidated Edison Co. v. N. L. R. B., (U. S. 1938) 59 S. Ct. 206.

purpose of collective bargaining can be ascertained."[61] Obviously there is no significance in their being ascertained unless they may proceed to negotiate contracts to which the operation of these nonstatutory contracts will give way.

But a contract negotiated by a union as representative of its own members only ordinarily is in fact effective with respect to all employees, for (except by means of a permitted closed shop contract) the act condemns discrimination between union members and others, contract or no contract. This condemnation of course applies equally to a collective contract made by a union as representative of all, except when the discrimination is validated by the closed shop proviso.[62]

In contrast to the board's treatment of the contract made by an employer-favored union which, in the eye of the board, is inherently bad whatever its provisions, these contracts are examined on their merits as a means of passing judgment upon the employer's conduct. It is the employer's unfair labor practices, whether or not called for by such a contract, that the board will redress; in so doing it impliedly requires—though apparently it never has expressly ordered—repudiation or non-performance of the contract in so far as the employer relies on it as justification of his unfair conduct.

These contracts are negligible factors in representation cases. They have never delayed or hindered the board. Often by their terms subordinate to the act's requirement of majority rule,[63] they are always so treated.[64] Except in so far as they call for unfair labor practices, presumably they are fully effective until and unless superseded by an overruling statutory collective contract.[65]

[61] The full sentence is: "The contracts do not claim for the Brotherhood exclusive representation of the companies' employees but only representation of those who are its members, and the continued operation of the contracts is necessarily subject to the provision of the law by which representatives of the employees for the purpose of collective bargaining can be ascertained in case any question of 'representation' should arise." Ibid at 221.

[62] The question of the validity of seniority preference for union members was raised but not decided in Reading Transportation Co., 10 N. L. R. B., No. 2, p. 4, note 2 (1938), a representation case in which the contract because of this provision was deemed one "for members only."

[63] General Mills, Inc., 3 N. L. R. B. 730 at 736 (1937); Allis-Chalmers Mfg. Co., 4 N. L. R. B. 159 (1937); Horton Mfg. Co., 7 N. L. R. B. 557 (1938).

[64] Northrop Corp., 3 N. L. R. B. 228 at 235 (1937); Pennsylvania Greyhound Lines, 3 N. L. R. B. 622 at 646 (1937), quoting Norman v. Baltimore & Ohio R. R., 294 U. S. 240 at 307, 55 S. Ct. 407 (1935) ("contracts, however express, cannot fetter the constitutional authority of Congress"). The number of these cases is legion and the decisions unequivocal. Interesting recent ones are: Bloedel-Donovan Lumber Mills, 8 N. L. R. B., No. 27 (1938); Aluminum Co. of America, 9 N. L. R. B., No. 89 (1938); White Sewing Machine Corp., 10 N. L. R. B., No. 69 (1938).

[65] City Auto Stamping Co., 3 N. L. R. B. 306 at 312 (1937).

III

EFFECT OF CHANGE OF CONDITIONS ON A STATUTORY CONTRACT

Finally we must consider the board's treatment of the statutory contract. The challenge of a collective contract made by a statutory representative may arise in either unfair practice or representation proceedings. Perhaps one should not say the challenge of the *contract*, for there is no disposition to treat the contract as invalid, if the union making it was, at the time of contracting, the statutory representative of the unit of employees for which it contracted. The challenge is of its continuing effect after that situation has ceased to exist. More specifically, in the unfair practice proceeding it is a challenge of the employer's right to continue under the contract to deal exclusively with the union that made it, now that it is no longer the choice of the majority;[66] in the representation proceeding it is a challenge of the contracting union's right to continue under the contract to deal with the employer as the representative of all the employees, now that the union is no longer the choice of the majority.

A. *Unfair Practice Proceedings*

I cannot discover any instance of an unfair practice proceeding in which the union initiating the action charges or the board complains that, though another union has been certified by the board, the employer is nevertheless liable for refusing to bargain with the initiating union. The language of section 8(5) probably precludes such a complaint, for the unfair practice is refusal to bargain "subject to the provisions of Section 9(a)." If the statute itself does not directly preclude it, it does so indirectly, for every complaint issues from the board, and it may be presumed that the board would refuse thus to challenge its own certification. If a certification is to be challenged, the only means, or at least the normal means, is a petition for certification of a different union.[67]

Nor are there any instances, apparently, of complaints against an employer because of continuing to carry out a collective contract duly consummated with a union which at that time was actually the statutory

[66] There is no duty to bargain collectively with a minority. Segall-Maigen, Inc., 1 N. L. R. B. 749 (1936); Mooresville Cotton Mills, 2 N. L. R. B. 952 at 955 (1937), quoted and affd. (C. C. A. 4th, 1938) 94 F. (2d) 61 at 65; Republic Steel Corp., 9 N. L. R. B., No. 33, p. 161 (1938).

[67] Compare New York & Cuba Mail S. S. Co., 2 N. L. R. B. 595 (1937), 9 N. L. R. B., No. 11 (1938) (no contract; certification "no longer offers bar" to new

representative though not certified, but which now lacks majority support. In the few unfair practice proceedings[68] involving them, such contracts have been in fact respected; but the board has never said that they *must* be respected, and there is every reason to suppose that any deference accorded them by the board is subject at least to the narrowing restrictions set forth in its representation decisions, now to be discussed.

B. *Representation Proceedings*

The significance of statutory contracts in representation cases is still a good deal of a puzzle. Here the board does not have to determine their meaning or their duration except so far as they bear on its exercise of the power of investigation and certification. The board decides —and its decision is, I think unfortunately, not subject to court review[69] except incidentally to an unfair practice order[70]—only whether the contract bars consideration of a rival's claim for certifica-

certification, apparently because over one year old); Walla Walla Meat & Cold Storage Co., 6 N. L. R. B. 386 (1938), 9 N. L. R. B., No. 106 (1938) (no contract; incidental determination in unfair practice case expressly indefinite in duration, of bargaining representative, now followed by certification).

[68] The validity of such contracts has never been expressly upheld by the board but is more or less implied in several of its decisions (especially those cited in notes 52-55, supra). In Peninsular & Occidental S. S. Co. v. NLRB, (C. C. A. 5th, 1938) 98 F. (2d) 411, cert. den. (U. S. 1938) 59 S. Ct. 248, where the employer attacked an order of the board requiring reinstatement of a crew discharged, as the board found, contrary to the act, the court held that, despite the fact that most of the crew of each of the ships had changed allegiance from the International Seamen's Union, which had a valid-when-made preferential hiring contract with the company, to the National Maritime Union, this contract was "a valid existing agreement at the time the crews were discharged," that because of the crews' incompetence the discharges were justified (herein overruling the board, which had held the discharges unfair practices and so had ordered reinstatement without passing on the continuing validity of the contract), and that the *contract obliged* the company, "no other bargaining agent having been designated by the Board, in employing new crews . . . to give preference to the International Seamen's Union." 98 F. (2d) at 414, 415. Note that the court implies that the board might certify the N.M.U. despite the I.S.U. contract and that such a certification would or might alter the court's decision.

[69] Rice, "The Determination of Employee Representatives," 5 LAW & CONTEMP. PROB. 188 at 191 (1938). This view is doubted in 38 COL. L. REV. 1243 at 1255 (1938), which would give to NLRA, § 10 (f), a broader application than to the preceding paragraphs of the section, which clearly relate solely to orders in unfair practice cases. This interpretation disregards the fact that representation determinations are not called "orders" either by the act or by the board. Nevertheless, I should welcome the success of the persistent attempts to obtain review, 3 L. R. R. 109 and 253 (1938); or an amendment with like effect.

[70] Rice, "The Determination of Employee Representatives," 5 LAW & CONTEMP. PROB. 188 at 190 (1938).

tion. Beyond that, anything the board says about the validity or life of the contract is dictum. Nevertheless it is important dictum because it explains why the board does, or much more often does not, let the contract influence its representation determination.

Always there is the preliminary question whether the union that made the contract was really the statutory bargaining representative.

Had it majority backing? If not, the contract is no bar to a determination.[71] Employees' preference at some past date is hard to determine, and evidence on it cannot be obtained by a poll of the employees,[72] the customary procedure when there is doubt concerning *present* employees' preference.[73]

Then, was this preference a free choice, not affected by unfair labor practices? If not, the contract is no bar to a representation determination.[74]

In both these situations the board allows no favorable presumption; it disregards contracts whenever it is doubtful whether the union was freely favored by the majority at the time the contract was made.[75]

The board mentioned as an additional consideration, in several

[71] Ibid., 194-199. Interesting cases of this type are: Charles Cushman Shoe Co., 2 N. L. R. B. 1015 (1937), quoted note 75, infra [compare Charles Cushman Co. v. Mackesy, (Me. 1936) 195 A. 365]; Southern Chemical Cotton Co., 3 N. L. R. B. 869 (1937); American-West African Line, Inc., 4 N. L. R. B. 1086 (1938); McKesson & Robbins, Inc., 5 N. L. R. B. 70 (1938); American France Line, 7 N. L. R. B. 79 (1938).

[72] Rice, "The Determination of Employee Representatives," 5 LAW & CONTEMP. PROB. 188 at 216, note 144 (1938). The result of a present election can hardly be evidence of a past preference. But it creates a presumption for the future. United States Stamping Co., 5 N. L. R. B. 172 at 182 (1938).

[73] Rice, "The Determination of Employee Representatives," 5 LAW & CONTEMP. PROB. 188 at 216 (1938).

[74] Federal Knitting Mills Co., 3 N. L. R. B. 257 at 261 (1937); National Electric Products Corp., 3 N. L. R. B. 475 at 479, 486, 499 (1937) (but see 512); Friedman Blau Farber Co., 4 N. L. R. B. 151 at 155 (1937) (citing Federal Knitting Mills Co., above); Mine B. Coal Co., 4 N. L. R. B. 316 (1937) (where the employer had favored CIO); Lenox Shoe Co., Inc., 4 N. L. R. B. 372 at 380, 386 (1937) (but see 5 N. L. R. B. 124 at 126 (1938); Wilmington Transportation Co., 4 N. L. R. B. 750 at 753 (1937); Zenite Metal Corp., 5 N. L. R. B. 509 (1938); H. E. Fletcher Co., 5 N. L. R. B. 729 at 734-736 (1938); Eagle Mfg. Co., 6 N. L. R. B. 492 (1938); Electric Vacuum Cleaner Co., Inc., 8 N. L. R. B., No. 14 (1938); Ward Baking Co., 8 N. L. R. B., No. 57 (1938); Serrick Corp., 8 N. L. R. B., No. 66 (1938).

[75] "The Association and the Independent Union had written contracts with several of the Companies at the time of the hearing and they contend that the elections tend toward the abrogation of the right of contract guaranteed to them by the Constitution of the United States. These contracts were all entered into after the calling of the strike, however, and the first hearing indicated that there was considerable doubt as to whether these unions represented a majority of the workers in the

early cases where it found contracts to be negligible on one of the foregoing grounds, that the contract was made after the filing of a representation petition by a rival union. This has now grown into a rule of disregarding not only original contracts made after the filing of a petition but also automatic extensions of contracts according to their terms, when the extension occurs after such filing.[76] The board has not adequately explained its theory. It may be described as a rule of *lis pendens* applied to representation proceedings. But in the recent *Colonie Fibre Co.* case the board goes even further, for it disregarded a closed shop agreement originally valid and automatically renewed *before* the rival union's petition was filed, but *after* its claim had been formally stated to the employer.[77]

plants involved at the time of the contracts. The objection is overruled." Charles Cushman Shoe Co., 2 N. L. R. B. 1015 at 1032 (1937).

"If, as in this case, an employer enters into an agreement with one of two labor organizations at a time when both are claiming the right of exclusive representation, we must hold that the agreement cannot bar our conducting an election, unless we are convinced that at the time of its execution the labor organization with which it was made represented a majority of the employees." Southern Chemical Cotton Co., 3 N. L. R. B. 869 at 877 (1937).

"Even if we should adopt the contention of the Amalgamated, which we do not, that the agreement [of exclusive dealing] raises a presumption that the Amalgamated represented a majority of the Company's employees at that time. . . ." Pacific Greyhound Lines, 4 N. L. R. B. 520 at 533 (1937). "Mere membership of these employees at that time in the Amalgamated would not necessarily remove the doubt [due to the employer's favoring tactics] as to the freedom of their choice of that organization." Pacific Greyhound Lines, 9 N. L. R. B., No. 51, p. 14 (1938).

[76] *Making of contract:* Wilmington Transportation Co., 4 N. L. R. B. 750 at 753-754 (1937) (agreement concerning unit may be disregarded especially because "entered into subsequent to the time . . . when notice of hearing was served"); American-West African Line, Inc., 4 N. L. R. B. 1086 at 1090 (1938) (agreement no bar, among other reasons because signed after notice of filing of petition); California Wool Scouring Co., 5 N. L. R. B. 782 at 785 (1938) (that agreement was made after petition was known to have been filed is reason to disregard it); Tennessee Electric Power Co., 7 N. L. R. B. 24 at 30 (1938); Monon Stone Co., 10 N. L. R. B., No. 6 (1938).

Continuation or renewal of contract (failure to give notice of termination): American France Line, 7 N. L. R. B. 79 at 83 (1938); Unit Cast Corp., 7 N. L. R. B. 129 (1938) (for members only); Pressed Steel Car Co., Inc., 7 N. L. R. B. 1099 (1938) (same); Pacific Lumber Inspection Bureau, Inc., 7 N. L. R. B. 529 (1938); Quality Furniture Manufacturing Co., 8 N. L. R. B., No. 105, p. 5, note 2 (1938); Colonie Fibre Co., 9 N. L. R. B., No. 60 (1938) (even before petition was actually filed); Postal Telegraph-Cable Corp., 9 N. L. R. B., No. 98 (1938). And so of course possibility of such tacit renewal still in the future. Utica Knitting Co., 8 N. L. R. B., No. 91, p. 3 (1938); Pacific Greyhound Lines, 9 N. L. R. B., No. 51, p. 14 (1938).

[77] "Even if the agreement was renewed, for the reasons just stated [notice, given to the employer before the renewal date by the rival union of its claim, and doubt as to the renewing union's majority standing at the time of automatic renewal] such

The board frequently makes investigations and certifications before contracts have expired, often disclaiming intention to pass upon the validity of the extant contract.[78] At first only preliminary decisions (such as a direction of election) would be made before the expiration date.[79] Now, however, certification itself is sometimes given not only in advance of the terminal date of the statutory contract, but likewise, where a contract contains provision for termination or renewal by notice on or before a certain date, in advance of and with reference to that notice date.[80]

The board also refuses to accord deterrent effect to collective contracts after they have been in effect for some time (a year?) and if they still have some time to run,[81] or a fortiori if they are without a

renewal could not operate to prevent a determination and certification of representatives for collective bargaining in this proceeding." Colonie Fibre Co., 9 N. L. R. B., No. 60, p. 3 (1938), citing American France Line, 7 N. L. R. B. 79 (1938), and Unit Cast Corp., 7 N. L. R. B. 129 (1938). The union that had the contract afterwards withdrew from the election. 9 N. L. R. B., No. 60b (1938). Accord: Enterprise Garnetting Co., (N. Y. L. R. B.) 3 L. R. R. 316 (1938), discussed note 97, infra.

[78] The board's *certificate*, however, never has *express* time limits. But in Roche Harbor Lime Co., 9 N. L. R. B., No. 96 (1938), an unfair labor practice proceeding was settled by an *order* grounded on a stipulation recognizing a union as representative for the next nine months. A similar settlement was effected in Creamery Package Mfg. Co., (Wis. L. R. B. July 1937), but without a board order. The *implied* duration of board decisions is involved in cases in note 67, supra. See also Todd-Johnson Dry Docks, Inc., 10 N. L. R. B., No. 48 (1938), discussed note 92, infra; 38 COL. L. REV. 1243 at 1253 (1938).

[79] Atlantic Footwear Co., Inc., 5 N. L. R. B. 252 at 254 (1938); Sandusky Metal Products, Inc., 6 N. L. R. B. 12 (1938); Martin Bros. Box Co., 7 N. L. R. B. 88 (1938). But see Hubinger Co., 4 N. L. R. B. 428 (1937).

[80] Shipowners' Assn. of Pacific Coast, 7 N. L. R. B. 1002 (1938) (five weeks before notice date); Brown Saltman Furniture Co., 7 N. L. R. B. 1174 (1938); Gowanus Towing Co., 8 N. L. R. B., No. 99 and 99a (1938), quoted note 102, infra.

[81] In Hubinger Co., 4 N. L. R. B. 428 (1938) (petition filed June 5, 1937) the board certified on December 4, 1937, though a statutory contract effective December 15, 1935, was operative till January 1, 1938, and though, while respondent was willing, the union that had made the contract had refused to consent to a ballot before then. The duration of this contract (over two years) probably explains the decision. But the board was not explicit. The case also might be explained as a certification in anticipation of the approaching expiration of a subsisting contract.

In Superior Electrical Products Co., 6 N. L. R. B. 19 at 22 (1938), the board refused to determine representation in view of the existence of a contract and mentioned that its duration (one year) was not so long "as to be contrary to the policies or purposes of the Act."

In Metro-Goldwyn-Mayer Studios, 7 N. L. R. B. 662 (1938), and Columbia Broadcasting System, Inc., 8 N .L. R. B., No. 54 (1938), the board expressly refused to be deterred by the unexpired balance of five-year contracts which had already run for one or more years when the petition was filed.

fixed terminal date.[82] The same is true of contracts expressly subject to maintenance of majority favor.[83] No contract can bar the board's independent determination of the appropriateness of an employee unit for bargaining,[84] or of who are employees.[85] Nor is the board restricted by a contract concerning how employees' preference shall be determined.[86] Neither, of course, does the board refuse a determination when it is agreed to by all the parties to existing contracts,[87] nor when the representative which negotiated the contract is defunct.[88]

Are there then any collective contracts, even statutory ones, that do stop the board? [89] Three 1938 decisions deserve individual examination.

[82] Sante Fe Trails Transp. Co., 7 N. L. R. B. 358 (1938) (respondent ready to give 30 days notice of termination fixed by contract); Seiss Mfg. Co., 7 N. L. R. B. 481 (1938); Sound Timber Co., 8 N. L. R. B., No. 103 (1938); Aluminum Co. of America, 9 N. L. R. B., No. 89 (1938) (for members only); Reading Transp. Co., 10 N. L. R. B., No. 2 (1938) (also said to be for members only). These are indistinguishable from self-renewing contracts, note 76, above.

[83] Novelty Slipper Co., 5 N. L. R. B. 264 (1938); Red River Lumber Co., 5 N. L. R. B. 663 (1938); Consolidated Aircraft Corp., 7 N. L. R. B. 1061 (1938); Northwest Publications, Inc., 9 N. L. R. B., No. 49 (1938); Postal Telegraph-Cable Corp., 9 N. L. R. B., No. 98 (1938); Farr Alpaca Co., 9 N. L. R. B., No. 110 (1938); Monument Mills, 10 N. L. R. B., No. 23 (1938).

[84] Shell Chemical Co., 4 N. L. R. B. 259 (1937); Kinnear Mfg. Co., 4 N.L.R.B. 773 (1938); American Tobacco Co., 9 N. L. R. B., No. 52 (1938) (for members only). But see Superior Electrical Products Co., 6 N. L. R. B. 19 (1938) and Admiar Rubber Co., 9 N. L. R. B., No. 35 (1938) discussed later. The board is not disposed to apply any doctrine of res judicata to unit determinations. Pacific Greyhound Line, 9 N. L. R. B., No. 51, p. 18 (1938); Postal Telegraph-Cable Corp., 9 N. L. R. B., No. 98, note 7 (1938), 10 N. L. R. B., No. 16 (1938). But compare Combustion Engineering Co., Inc., 7 N. L. R. B. 123 (1938).

[85] Seattle Post-Intelligencer, 9 N. L. R. B., No. 119, pp. 11-14 (1938).

[86] R. C. A. Mfg. Co., 2 N. L. R. B. 159 (1936). But compare Bloomingdale Bros., Inc., (N. Y. L. R. B.) 3 L. R. R. 316 (1938).

[87] American France Line, 3 N. L. R. B. 64 at 71 (1937((but this explanation is unnecessary, for the board proceeds "under the present condition of unrest in the maritime industry" without consent of other unions also having contracts); Joseph S. Finch & Co., 7 N. L. R. B. 1 (1938); Cote Bros., Inc., 7 N. L. R. B. 70 (1938) (stipulation); Woodville Lime Products Co., 7 N. L. R. B. 396 (1938); International Lumber Co., 9 N. L. R. B., No. 103 (1938). (That the *employer* consented in all these cases is not clear.) Compare note 83, above. But in R. C. A. Mfg. Co., 2 N. L. R. B. 159 (1936), and in Northrop Corp., 3 N. L. R. B. 228 at 235 (1937), the board decided that the petitioning union's self-limiting agreement with the employer did not prevent its obtaining the board's regular certification process.

[88] Showers Bros. Furniture Co., 4 N. L. R. B. 585 (1937) (consent election disregarded).

[89] The prevailing disregard of collective contracts by the board contrasts to the cautious practice of earlier administrative agencies, particularly the Bituminous Coal Labor Board. Fuchs, "Collective Labor Agreements under Administrative Regulation of Employment," 35 COL. L. REV. 493 at 498 (1935).

The first is *Superior Electrical Products Co.*,[90] where the board's refusal to determine representation rests apparently on two grounds. Whether either alone would suffice is not clear. The petitioning union asked that the employees of the metal polishing department be established as a separate bargaining unit. After it filed its petition, a rival union contracted with the employer, on the basis of a more inclusive unit, for one year; and a majority of the metal polishing department personnel approved this agreement when made. This approval of an agreement of statutory character (and of reasonably short duration) appears to be the ground for the board's refusal to pursue an investigation "until such time as the contract is about to expire."

In dismissing the petition in *Admiar Rubber Co.*,[91] where the petitioning union desired a unit composed of employees of *a single employer*, the board relied markedly on the series of contracts that had been made year by year between *an association of employers* and a rival union. It held that the employees of the whole group of employers formed a unit for bargaining. The effect of this was again to leave in full operation the existing closed shop contract though it had been renewed after the petition had been filed. But as the history of bargaining relations has always been one of the factors considered by the board in determining unit boundaries, the contracts here are treated as creating rather a custom that helped to guide the board's discretion in setting a proper unit than a legal obligation with which it could not tamper. Because it had been made after the controversy arose, the contract probably would not have stood in the way of a determination if the petitioning union had asked for a unit acceptable to the board.

The board's uncertainty is revealed by the two opinions in *Todd-*

[90] 6 N. L. R. B. 19 (1938).

[91] 9 N. L. R. B., No. 35 (1938). When the union seeking certification is willing to draw the unit line so as not to disturb an existing contract with another union, the board always agrees, though the unit may be somewhat anomalous. News Syndicate Co., 4 N. L. R. B. 1071 at 1074 (1938); Postal Telegraph-Cable Corp., 9 N. L. R. B., No. 98 (1938). In many cases before Admiar Rubber Co., the board has denied the petition of a union wishing to have a unit covered by an existing contract segmented. 38 COL. L. REV. 1243 at 1252 (1938). The Admiar case is striking because it upholds a contract covering employees of a group of employers. That the employees of several corporately unconnected employers may, in view of past bargaining practice, be a single bargaining unit, despite the employers' objection, was first announced last June in Shipowners' Association of Pacific Coast, 7 N. L. R. B. 1002 (1938). Compare Monon Stone Co., 10 N. L. R. B., No. 6 (1938).

Johnson Dry Docks, Inc.[92] Here the implication of previous cases[93] that a contract will not be disturbed during its first year of operation is confirmed, though the board actually decides to proceed with the case because more than a year has elapsed since representation was determined[94] (informally by a NLRB regional director's "certificate") and nearly a year since the contract was made.

In every case involving a statutory contract in which the board had issued an opinion up to the end of 1938, the board found some special reason for proceeding with its determination of representation despite the contract, or some reason additional to the mere existence of the contract, for refusing so to proceed. The board clearly wished to avoid committing itself prematurely.

But by its recent decision in *National Sugar Refining Co.*[95] it has

[92] 10 N. L. R. B., No. 48 (1938). D. W. Smith and E. S. Smith, without committing themselves anent the temporary sanctity of the certificate that was issued by the regional director, felt that "Since more than a year has elapsed . . . such certification should not in any event constitute a bar to a designation of bargaining representatives at this time." Nor did they consider the agreement "a bar . . . inasmuch as it will shortly have been in operation for a period of one year." Ibid., p. 4. Chairman Madden, though deeming the original order directing investigation to have been improvidently made, concurred "in view of the lapse of time."

The history of this case, as recounted in the decision, reveals a practice of the board of dismissing (without opinion) representation petitions that are filed too soon after a certification or the making of a contract. (An alternative, and less commendable, practice of delaying the hearing until a contract is about to expire, has also been followed. See note 102, below.) It is to this practice apparently, rather than to any decisions accompanied by opinions, that Chairman Madden was referring when in a colloquy after addressing the October 1937 Convention of the American Federation of Labor, he said (if correctly quoted): "We have denied petitions in numerous cases because of the existence of valid contracts between the labor organization and an employer [i.e., a rival labor organization and the employer?]. . . . The Board has been scrupulously careful to respect contracts validly made between employers and labor organizations, and it has had petitions in numerous cases to get the Board to go into a subject like that, and upset a contract. It has not done so and will not in the future." 57 PROC. A. F. L. 236, 237 (1937). It is hard to reconcile this statement with the board's disregard, three months earlier, of contracts in American France Line, 3 N. L. R. B. 64 at 71 (1937): "under the present condition of unrest . . . such contracts should not preclude the holding of elections."

[93] See note 81, above.

[94] How far and how long a certification is a bar to a new determination of representation is a closely related question. While a probable change of majority allegiance after an election brought to the board's attention before it had certified led the board to disregard the election and hold another, a like situation first brought to its attention after its certification did not move the board. New York & Cuba Mail S. S. Co., 2 N. L. R. B. 595 at 605 and 608 (1937), 4 N. L. R. B. 716 (1937), 9 N. L. R. B., No. 11 (1938).

[95] 3 L. R. R. 685 (Jan. 25, 1939).

definitely ruled that it will refuse to disturb a short term statutory contract which still has some time to run. Noting that the duration of the existing contract (eleven months) was not for so long a period "as to be contrary to the purposes and policies of the Act," the board (deciding the case five months before the contract's terminal date) dismissed the representation petition presented by the rival union "without prejudice to renewal at a reasonable time before expiration of the contract."

Mr. Edwin S. Smith, dissenting, thought that the contract was not entitled to such respect in view of the fact that over a year had elapsed since the last determination of representation (by a consent election). Without committing himself to a different result if the lapse had been shorter, he recognizes that there is "merit" in the view the board had previously indicated that representation determinations—as distinguished from contracts—should not be disturbed within a year. Citing the *New England Transportation Co.* case,[96] he reiterated the opinion that "a change of bargaining representatives taking place as a result of proceedings under the Act need not operate to invalidate the substantive provisions of a contract otherwise valid."[97]

[96] Quoted in note 100, below.

[97] The New York State Board, which has a rule refusing to consider new certification within a year (apart from exceptional circumstances), Rules, art. 3, § 11, has by a series of decisions laid down a similar rule regarding collective contracts. Crystal Cab Corp., N. Y. L. R. B. Dec. 51, 1A Lab. Rel. Ref. Man. 560 (1938) (contract by representative certified within a year bars consideration); N. Y. Rapid Transit Corp., N. Y. L. R. B. Dec. 52 (1938) (authority of uncertified representative continues "for the reasonable period of one year from the date of the execution of the contract"); Kanter Dept. Stores, Inc., N. Y. L. R. B. Dec. 90 (1938) ("the established policy of this Board not to disturb an existing contract whose validity is not assailed"); Jamaica Wholesale Meat Co., Inc., N. Y. L. R. B. Dec. 165, 2 L. R. R. 861 (1938) ("we cannot find, at this time [three months after statutory contract], that there exists any question . . . concerning representation"); Triboro Coach Co., N. Y. L. R. B. Dec. 151, 151c, 2 L. R. R. 417, 860 (1938) (rule applied to three-year contract made before LRA was passed). But see Enterprise Garnetting Co., (N. Y. L. R. B.) 3 L. R. R. 316 (1938), refusing to recognize an automatic renewal of a contract after the rival union had notified employer of its claim but before it had petitioned the board for certification.

"The Wisconsin Board has felt that as a general proposition when a trade agreement is made under normal conditions with a genuine union chosen by a majority of the employees, no elections should be held during the life of the agreement except to determine what union may bargain for terms and conditions to apply after the expiration of the existing agreement, unless the existing agreement is for such an unreasonably long time as in effect to deny to employees their fundamental right of self-organization." WISCONSIN LABOR RELATIONS BOARD, Report covering April 1937 to November 1938, p. 20. According to the Wisconsin board's Rules of Procedure, art. 3, § 6, the board's certificate is "conclusive until revoked by the Board."

Here was quite a drama. The A.F.L. having repeatedly denounced the board for disregarding contracts, a local of one of its members, the International Longshoremen's Union, was petitioning for certification as bargaining representative, despite the existence of a contract between the Sugar Company and a local of the C. I. O.'s United Sugar Workers! And because of this contract the board denied relief. The A. F. L. having particularly disliked Board Member Edwin S. Smith as pro-C. I. O., Mr. Smith dissented from his colleagues and favored ordering an election which might upset the C. I. O. as bargaining representative! Yet the positions of the members—at least of Chairman Madden and Member Edwin S. Smith—were quite consistent with their opinions in the *Todd-Johnson* case, which concerned an A. F. L. contract. A nicer vindication of the impartiality of their attitude could hardly have been devised.

C. *The Status of a Statutory Contract after Certification of a New Bargaining Representative*

In deciding cases in which it has been urged that existing contracts bar a representation proceeding, the board has frequently intimated views concerning the legal force of the contracts. These views seem not to have been constant. They will probably remain uncertain until more cases involving contracts have been decided by the courts, occasionally in indirectly[98] reviewing representation determinations or more often adjudging private suits to enforce contracts that may be discredited by the board.

The first dicta of the board, following language of the National Mediation Board,[99] treated the statutory contract as one between the employer and the employees acting by an agent—an agent that could

[98] See note 70, above.

[99] "When there is an agreement in effect between a carrier and its employees signed by one set of representatives and the employees choose new representatives who are certified by the Board, the Board has taken the position that a change in representation does not alter or cancel any existing agreement made in behalf of the employees by their previous representatives. The only effect of a certification by the Board is that the employees have chosen other agents to represent them. . . ." NATIONAL MEDIATION BOARD, FIRST ANNUAL REPORT 23-24 (1935); repeated, SECOND ANNUAL REPORT 12 (1936). The Railway Labor Act provides for continuous open shop arrangements that can be changed only upon notice by either party. Such a regime differs from the term contracts, frequently requiring a closed shop, which prevail in most industries. Brisbin v. E. L. Oliver Lodge No. 335, (Neb. 1938) 279 N. W. 277 at 285.

be changed without affecting the contract.[100] This view, set forth again by Mr. E. S. Smith in the *National Sugar Refining Co.* case, would compel the continuation of the contract, however inappropriate or unsatisfactory to the replacing representative it may be, until it expires according to its terms, or is changed by agreement with the employer.

The board seems to have since taken the less definite position that the new representative and the employer together decide whether terms of the existing contract shall be continued. Until the certification the contract remains in effect; how the contract fares thereafter in default of agreement, the board does not indicate.[101] This view often

[100] "The whole process of collective bargaining and unrestricted choice of representatives assumes the freedom of employees to change their representatives, while at the same time continuing the existing agreements under which the representatives must function." New England Transportation Co., 1 N. L. R. B. 130 at 138-139 (1936).

"Even if the agreement is assumed to be valid and binding, it nevertheless is no bar to an election and consequent bargaining by the certified representatives of the employees, and can in no wise be construed so as to curtail the right of the employees to change their representatives. . . . Whichever organization is chosen as representative of the employees for the purpose of collective bargaining will be free to continue the existing agreement, to bargain concerning changes in the existing agreement, or to *follow the procedure provided therein* for its termination." Swayne & Hoyt, Ltd., 2 N. L. R. B. 282 at 286, 287 (1936) (italics added).

[101] "The continued *acceptance or modification* of the terms of the contract [which was for members only] *will become* one of the subjects of . . . negotiations. . . . For the present the . . . contract . . . should be adhered to. As noted above, the *continued existence . . . can be made* the subject of agreement between the Company and such agents." City Auto Stamping Co., 3 N. L. R. B. 306 at 311, 312 (1937) (italics added).

The board's language and conduct in two unfair practice cases is also apposite: [Local No. 2351 of the United of Carpenters (AFL), after making, as statutory representative of the employees, a closed shop contract, having lawfully, as the board found, withdrawn from the Brotherhood and having been chartered by the International Woodworkers (CIO) as Local No. 102] "we do not here determine the status of a valid contract where . . . such withdrawal is not effected strictly in accordance with the constitution of the parent body or the charter of the local union. Nor de we here determine the status of a valid contract where the union . . . continues in existence under the same name and affiliation but a majority of the employees in the bargaining unit have shifted their allegiance to another union. . . . Either local No. 102 succeeded to the rights of local No. 2531 under the contract, in which case only membership in Local No. 102 was required, or, Local No. 2531 being extinct, the contract provision no longer was in force." M. & M. Wood Working Co., 6 N. L. R. B. 372 at 381, 382 (1938). Accord: Smith Wood Products, Inc., 7 N. L. R. B. 950 (1938). In both these unfair labor practice proceedings the board, while ordering the reemployment of the men discharged, did not require payment of wages for their jobless period because the employer had acted according to its interpretation of the closed shop contract, the interpretation, moreover, of the United States District Court for Oregon. M. & M. Wood Working Co. v. Plymouth & Veneer Workers Local Union No. 102, (D. C. Ore. 1938) 23 F. Supp. 11.

takes the form of an express disclaimer of any intimation of the status of the contract before its appointed expiration date.[102]

The "trade agreement" which ten or fifteen years ago was usually described as just a gentlemen's agreement constituting a custom[103] has not only changed into an enforceable obligation, but is now becoming, at least when made by the accredited statutory representative of the employees, a supercontract or norm that prevails over all indi-

[102] See cases in notes 79 and 80, above. The attitude of the board in recent cases is usually expressed in brief and vague statements: "it is not necessary in this case to determine the effect of the contract on the question of representation prior to [its expiration in the near future]. It is clear that the [any?] contract does not preclude the Board from investigating or certifying a bargaining representative for the purpose of negotiating new agreements for the period following [its expiration], if such are desired." Utica Knitting Co., 8 N. L. R. B., No. 91, p. 3 (1938).

"Without determining whether or not this contract would prevent the Board from certifying representatives other than those party to the contract during its existence, the Board's power to do so in this instance is clear [because it is automatically renewed from year to year unless denounced thirty days before the terminal date, now sixty days ahead]. . . . The right of free choice of representatives guaranteed by the Act must prevent, at least, the renewal of a contract, even though valid during its term, if a majority of the employees wish to be represented by another collective bargaining representative at the time such renewal might become effective." Gowanus Towing Co., 8 N. L. R. B., No. 99, p. 5 (1938).

(Two AFL locals having made with the employer statutory contracts, one of which was to be automatically renewed from year to year unless denounced thirty days before expiration, and by the other of which negotiations for renewal were to be commenced sixty days before expiration, afterwards lost many of their members to a CIO local, which, nearly four months prior to the critical dates, petitioned for certification.) "Since [the expiration dates are in this month] it is not necessary in this case to decide the precise legal status of [the AFL locals] with respect to the contracts or to determine the effect of the contracts during the periods prior to the said expiration dates. The contracts clearly do not preclude an investigation or certification of a bargaining representative for the period following the expiration dates of the contracts." Quality Furniture Mfg. Co., 8 N. L. R. B., No. 105, pp. 4-5 (1938). Accord: California Woodturning Co., 8 N. L. R. B., No. 131 (1938). The board's unusually long delay in hearing these petitions was perhaps motivated by a desire to avoid this problem. Even where contracts are for members only the board apparently sometimes has delayed hearing so that decision is rendered after the contract has run out. Unit Cast Corp., 7 N. L. R. B. 129 (1938); Pressed Steel Car Co., Inc., 7 N. L. R. B. 1099 (1938).

"Since the initial period of the contract ends on December 20, 1938, it plainly does not preclude the Board from making an investigation and determining a bargaining representative for the purpose of negotiating a new agreement for the period following December 20, if one is desired." H. Margolin & Co., 9 N. L. R. B., No. 78, p. 4 (1938).

[103] COMMONS and ANDREWS, PRINCIPLES OF LABOR LEGISLATION 118 (1920); Hamilton, "Collective Bargaining," 3 ENCYC. SOC. SCIENCES 628 (1930); articles cited in note 9, above.

vidual employment arrangements. The remaining question is how far the existence of this normative contract prevents the making of a conflicting normative contract. Here we see one phase of the everlasting conflict within the administration of the law between the justice of certainty, here in general favored by the employer, and the justice of change, favored by the employees; we see the rule of *stare decisis* or *stare contractibus* competing with the rule of *rebus sic stantibus*.

If the decision be for changeability, the collective contract becomes definitely quasi-legislative in value. It must then be further decided whether the shop must continue to operate under the old norm until a new norm is jointly formulated by the union and the employer, or whether the old statutory contract is extinguished by the selection of a new representative, either automatically or perhaps at the option of the new representative or of the employer; and, until it is extinguished, which representative administers it.[104] The board's decision being for temporary fixity—so far as its own procedure for estab-

[104] The closed shop agreement (unlawful in railroading) to which a *national* union is a party, presents the most perplexing problem. (For local union total secession cases, see note 93 above.) When the employees in majority wish a change of representative, do they get it or do they lose their jobs? If they can name a new representative, does the old agreement subsist at all; and if so, with what automatic modifications? The cases seem to be in a state of confusion. Rice, "The Determination of Employee Representatives," 5 LAW & CONTEMP. PROB. 188 at 197, note 51 (1938); Mason Mfg. Co. v. United Furniture Workers, (Cal. Super. Ct. 1938) 3 LEAGUE FOR INDUSTRIAL RIGHTS Mo. BULL. 196; Peninsular & Occidental S. S. Co. v. NLRB, (C. C. A. 5th, 1938) 98 F. (2d) 411; Larson, "The Labor Relations Acts—Their Effect on Industrial Warfare," 36 MICH. L. REV. 1237 at 1252 (1938).

Witmer, "Collective Labor Agreements in the Courts," 49 YALE L. J. 195 at 221 (1938), discussing liability for breach of contract, believes that the best way "would be to recognize such closed shop agreements as in force only so long as the contracting union maintains its leadership in the employer's plant, and subject always to an implied condition that if this leadership is lost, the union shall have no cause of action against the employer for breach." The writer of a note in 38 COL. L. REV. 1243 at 1253 (1938) would limit "the duration of contracts and of certifications by the Board to one year, save under extraordinary circumstances, thus normally permitting the selection of new bargaining agents at regular and foreseeable intervals." Collective contracts of indefinite duration, terminable by their own terms on reasonable notice, but subject, as a matter of law, if the employee representative is changed, to termination by either party or by the new representative, would seem to me the wisest solution. In the case of closed shop contracts it would further have to be recognized that a mass change of affiliation results in the establishment of a new representative, not the discharge of the employees. Numerous analogies suggest themselves for such a diverse treatment of piecemeal and wholesale movements: accretion and change due to avulsion in the law of property; individual and mass naturalization in the law of persons; even the basic process of creation of legal rights—adjudication on the one hand, legislation on the other.

lishing representation is concerned—does not answer these questions; for while the bargaining representative is thus protected for a period, there still may be an interregnum after the new representative qualifies and before a new contract is made. Meanwhile, does the old contract (unless ended by its own terms) continue to govern and does its negotiator still have rights and duties by virtue thereof?

Before a clear answer to these questions of detail is made, the custom of collective bargaining may result in replacing time-limited agreements by perpetual agreements subject to revision upon notice and in achieving continuity of their administration much as it has been achieved in the railroad industry.[105]

[105] Compare contracts in cases cited in note 83, above. Under the Railway Labor Act such notice may be given by the employees' present statutory representative, not necessarily the negotiator of the contract. 44 Stat. L. 582 (1926), 48 Stat. L. 1197 (1934), 45 U. S. C. (1934), § 156; Railway Employees' Co-op. Assn. v. Atlanta, B. & C. R. R., (D. C. Ga., 1938) 22 F. Supp. 510.