II. LABOR LAW DECISIONS OF THE SUPREME COURT, OCTOBER TERM 1967-68,

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PROFESSOR CHARLES H. LIVENGOOD, JR.: I took due note, as I am sure all of you did, Mr. Chairman, Members of the Section and Distinguished Guests, of the not-very-subtle reference to the verbose Senator. I trust I shall avoid any further suggestion that I am comparable to him.

It may have been the same Senator who was riding home with his wife one evening and, in an expansive mood, having been honored in the course of the dinner, informed her, "My dear, you know, there are very few men in this world of distinguished presence and probing perception."

And she promptly said, "Yes, and there is one less than you think." [Laughter]

Now, let me assure you that I do not compare myself with that Senator either.

This is an almost impossible task which I undertake in the effort within the time which your patience will permit me to review the entire term of the Supreme Court, even in the single area of labor law. Nevertheless I shall attempt, albeit superficially, at least to refresh your recollection and perhaps pull together for you some of the things which our High Court has done.

Last fall, at the beginning of the 1967 Term, it appeared that the year which has just passed was likely to be one of frenetic activity and significant law-making on the part of the Supreme Court in the area of labor law.[1] Before the close of the Court's 1966 Term, it had agreed already to review six cases of potential importance. By October there were 66 cases on its docket which presented questions of substantial interest to labor lawyers. Before the Term ended on June 17, the Court had received 155 petitions for certiorari involving labor law issues. In short, there was considerable reason to anticipate a major year in labor law history.

The actual course of events was somewhat disappointing to those who anticipated definitive answers to a lot of troublesome labor relations questions. Activity there was—the Court took final action on 135 petitions, 42 more than during its preceding Term. However, while hindsight may dic-

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[1]See, *e.g.*, BNA, Labor Relations Reporter, 66 Analysis 17 (1967).

tate a different conclusion, the 1967 Term appears to have been "distinguished more by the variety than the importance of the issues resolved."[2]

Let me hasten to say that the Term did not fail to produce some important—and controversial—decisions. The Court handed down 15 labor law opinions, disposing of 18 petitions—in addition to per curiam orders which dealt with the issues posed by two other petitions, and orders denying review in the remaining 115 cases where final action was taken. Twenty cases were carried over to the 1968 Term, including five in which review already has been granted.[3] While the magnitude of the issues actually resolved was hardly overwhelming, there was—as Professor Sanford Kadish aptly observed when he addressed this group in Montreal two years ago—"sustenance enough for those who labor in the field, and even more for judicial head-hunters on ceremonial reunions of the tribe."[4]

In beginning this review, I suggested that the Court's 1967 labor decisions were notable for their variety. The Taft-Hartley Act produced four opinions and one per curiam order by the Court. Other decisions involved a broad spectrum of legislation which included the Fair Labor Standards Act, the Norris-La Guardia Act, the Railway Labor Act, the Landrum-Griffin Act, the Sherman Antitrust Act, the Universal Military Training and Service Act, and the Federal Bankruptcy Act. Three of the Court's 1967 decisions, disposing of four cases, were based on constitutional grounds.

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[2]BNA, Labor Relations Reporter, 68 Analysis 33 (1968).

[3]Cases carried over in which review has been granted include: NLRB v. Strong, No. 1339 (authority of NLRB to require retroactive payment of fringe benefits which employer would have had to pay had he not unlawfully refused to sign contract negotiated in his behalf by multi-employer group); Railroad Trainmen v. Jacksonville Terminal Co., No. 1378 (power of state court to enjoin, as violation of state law, peaceful picketing by railroad employees of terminal facilities owned and used jointly by struck and non-struck railroads, in connection with ""major dispute" under Railway Labor Act); Glover v. St. Louis-San Francisco Ry., No. 1193 (necessity of exhausting internal and administrative remedies as prerequisite to suit in federal court by railroad employees alleging racial discrimination in employment); Hardin v. Chicago, R.I. & P. Rr., No. 973, and Locomotive Firemen v. Chicago, R.I. & P. Rr., No. 950 (validity of state minimum train crew statutes under commerce clause of federal Constitution).

In addition to the cases mentioned, recent developments in connection with authorization-card bargaining orders and the Excelsior names-and-addresses rule raise the distinct possibility that these, and other much-debated issues which were denied review in 1967, may be considered during the 1968 Term.

[4]Kadish, Labor Law Decisions of the Supreme Court, 1965 Term, 1966 Proceedings of the ABA Labor Relations Law Section.

Before turning our attention to individual cases, one further general observation is perhaps appropriate. For the second successive year, the National Labor Relations Board was successful in all cases to which it was a party. This rather impressive batting average involved six cases during the 1966 Term, and four in 1967. The government was also the victor in the three 1967 Landrum-Griffin cases, and the FLSA case, to which the Secretary of Labor was a party.

A. *The Taft-Hartley Act*

As usual, the Taft-Hartley Act led the field, both in the number of decisions rendered and the number of petitions filed.[5] *ILGWU Local 415 v. Scherer & Sons, Inc.*[6] did not give the Court much pause. The Florida District Court of Appeal had ruled that the Garment Workers' picketing of a Florida employer, and its use of secondary as well as primary economic pressures, to compel the employer to contract with the union and to enforce an industry agreement forbidding subcontracting of work to nonunion shops, was enjoinable by the state court under the right-to-work clause of the Florida Constitution. Not surprisingly, the Supreme Court reversed the judgment below by a per curiam order, deeming the issue presented to be foreclosed by well-established principles of primary jurisdiction and federal preemption.[7]

The Court took more time—but not much—to explain its reversal of another Florida decision involving alleged conflict between state and federal legislation. In *Nash v. Florida Industrial Commission*,[8] the question presented was whether a state could refuse to pay unemployment insurance to a claimant solely because an unfair labor practice charge filed in connection with her discharge was pending before the NLRB. The Florida Industrial Commission ruled that filing of the charge by a union on behalf

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[5] In addition to the six Taft-Hartley cases decided (two of them in a single opinion), 68 petitions for certiorari involving the Act were denied.

[6] No. 400, 1967 Term; 88 S.Ct. 690, 1402 (1968).

[7] The Court regarded its decision as adequately explained by citation of Retail Clerks International Assoc. v. Schermerhorn, 375 U.S. 96, 84 S.Ct. 219 (1963) and Local No. 438 v. Curry, 371 U.S. 542, 83 S.Ct. 531 (1963). In the Schermerhorn litigation, the Court had made explicit what its earlier decisions implied: that, although Section 14(b) authorizes the states to prohibit union security agreements, they cannot employ such a prohibition as a justification for state sanctions against concerted organizational activities which are arguably within the ambit of federal law, except in connection with the actual negotiation or administration of a contract offensive to the law of the state.

[8] No. 48, 1967 Term; 88 S.Ct. 362 (1967).

of the claimant brought her within the disqualification provisions of the state's Unemployment Compensation Act because her unemployment then became attributable to a "labor dispute";[9] and the state Court of Appeal denied review of the Commission's ruling. Observing that the machinery of the NLRB is not self'starting and that someone must file a charge before the Board can act, the Supreme Court concluded that an important constitutional question was involved: "specifically whether the Commission's ruling violates the Supremacy Clause of the Constitution (Art. VI, cl.2) because it allegedly 'frustrates' enforcement of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*" The Court answered this question affirmatively and reversed, relying on the language of a long line of cases dating back to *McCulloch v. Maryland*[10] and including *Hill v. Florida*.[11] Speaking for the Court, Mr. Justice Black said:

> "We have no doubt that coercive actions which the Act forbids employers and unions to take against persons making charges are likewise prohibited to be taken by the States . . . .It appears obvious to us that this financial burden which Florida imposes will impede resort to the Act and thwart congressional reliance on individual action."[12]

In basing its decision on the Supremacy Clause, the Court evaded the more complex and intriguing question posed by the petitioner's alternative argument that the Florida ruling violated her privileges and immunities of United States citizenship in contravention of the Fourteenth Amendment.

Mr. Justice Black's words, quoted above, presaged the Court's holding in *NLRB v. Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, Local 22*.[13] In reversing a decision by the Third Circuit Court of Appeals, the Supreme Court held that the union restrained and coerced a member in the exercise of his Section 7 rights, thus violating Section 8(b)(1)(A), by expelling him for filing charges against the union

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[9]The Florida Unemployment Compensation Act, § 443.06, typically provides that "an individual shall be disqualified for benefits . . . (4) For any week with respect to which the commission finds that his total or partial unemployment is due to a labor dispute. . . ."

[10]See 4 Wheat. 316, 436 (1819).

[11]See 325 U.S. 538, 542, 65 S.Ct. 1373, 1375 (1945).

[12]The Court rejected the argument that the petitioner might enjoy a windfall if she was paid unemployment benefits and later awarded back pay by the NLRB. In doing so, it relied on its earlier assurance, perhaps more theoretical than real, that a state can recoup such benefits if paid for a period covered by a subsequent back-pay award. NLRB v. Gullett Gin Co., 340 U.S. 361, 365 n.1, 71 S.Ct. 337, 340 (1951).

[13] No. 796, 1967 Term; 88 S.Ct. 1717 (1968).

with the NLRB without having first exhausted internal union procedures.

The basic philosophy which governed the *Nash* case seems to have been the decisive factor in the *Marine and Shipbuilding Workers* case. As the Court rephrased it:

> A proceeding by the Board is not to adjudicate private rights but to effectuate a public policy. The Board cannot initiate its own proceedings; implementation of the Act is dependent "upon the initiative of individual persons." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238. The policy of keeping people "completely free from coercion," *id.*, against making complaints to the Board is therefore important in the functioning of the Act as an organic whole.

While *Nash* and *Shipbuilding Workers* thus have much in common, the issues in the latter case were considerably more intricate, its result much less predictable, and its implications far more elusive.

The Court of Appeals—and Mr. Justice Stewart, who agreed with that court's opinion in dissenting from the Supreme Court's decision—were persuaded that the proviso of Taft-Hartley Section 8(b)(1)(A),[14] together with Landrum-Griffin Section 101(a)(4),[15] authorized the union to require—as it did by its constitution—that every member should exhaust his remedies within the union before resorting to an outside tribunal. Delivering the Supreme Court's decision, Mr. Justice Douglas conceded that the statutory language was susceptible to this reading, and that there was legislative history which tended to support it. However, he regarded the legislative history as inconclusive and found that it was outweighed by the thrust of the Act as a whole.

The Court of Appeals had recognized that its decision—unless qualified—might mean that issues of public policy would never be presented for decision, and stated that resort to intra-union remedies would not be required if it "would impose unreasonable delay or hardship upon the complainant." This did not satisfy Mr. Justice Douglas, who replied:

> The difficulty is that a member would have to guess what a court ultimately would hold. If he guessed wrong and filed the charge with

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[14] "*Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . . ."

[15] "No labor organization shall limit the right of any member thereof to institute an action in any court or in a proceeding before any administrative agency . . .: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings. . . . "

> the Board without exhausting internal union procedures, he would have no recourse against the discipline of the union. That risk alone is likely to chill the exercise of a member's right to a Board remedy. . . .That is the judgment of the Board; and we think it comports with the policy of the Act. That is to say, the proviso in § 8(b)(1)(A) that unions may design their own rules respecting "the acquisition or retention of membership" is not so broad as to give the union power to penalize a member who invokes the protection of the Act for a matter that is in the public domain and beyond the internal affairs of the union.
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> The Court of Appeals found support for its contrary position in § 101(a)(4). . . .While that provision prohibits a union from limiting the right of a member "to institute an action in any court or in a proceeding before any administrative agency," it provides that a member "may be required to exhaust reasonable hearing procedures" "not to exceed a four-month lapse of time."
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> We conclude that "may be required" is not a grant of authority to unions more firmly to police their members but a statement of policy that the public tribunals whose aid is invoked may in their discretion stay their hands for four months, while the aggrieved person seeks relief within the union.

Mr. Justice Harlan, concurring in the *Marine and Shipbuilding Workers* result, agreed (on the basis of the legislative history) that a court or agency could entertain the complaint of a union member even though available intra-union procedures had not been exhausted. However, he took issue with the implication which he found in the Court's opinion that a distinction should be made between complaints concerning purely internal union affairs and those touching "the public domain covered by the Act." "[T]his dichotomy has," he said, "precisely the disadvantage that the Court has found in the Third Circuit's construction . . .: it compels a member to gamble his union membership, and often his employment, on the accuracy of his understanding of the federal labor laws." Mr. Justice Harlan did feel it appropriate to add the caveat that "courts and agencies will frustrate an important purpose of the 1959 legislation if they do not, in fact, regularly compel union members 'to exhaust reasonable hearing procedures' within the union organization."

I am extremely diffident about my powers of prescience. However, I venture to suggest that *Marine and Shipbuilding Workers* may be the most significant and controversial of the Court's 1967 Taft-Hartley decisions—involving as it does such provocative issues as judicial obeisance to Board determinations, the use of fragmentary and ambivalent legislative history to justify debatable statutory construction, and the pervasive problem of accommodating responsible union self-government with the protec-

tion of individual and public interests. On the other hand, it is conceivable that the case will be closely restricted to its particular facts. The original complaint of the union member alleged discrimination by the employer as well as a union officer and, as the Court observed in partial defense of its holding, issues and remedies involving an employer "cannot be fully explored in an internal union proceeding."

To concurring Justices Harlan and Stewart, the issue presented in *NLRB v. Fleetwood Trailer Co.*[16] was a simple one, and its answer obvious. I agree. The case would deserve no more than passing comment were it not for the fact that the Court, speaking through Mr. Justice Fortas, went out of its way to resolve some of the ambiguities in *NLRB v. Great Dane Trailers*[17]—a case which was neatly dissected for you by Father Dexter Hanley when he addressed this group in Honolulu last year.[18]

In *Fleetwood,* the Court reversed a ruling by the Ninth Circuit Court of Appeals that the employer did not violate Taft-Hartley Sections 8(a)(1) and 8(a)(3) when he hired new applicants two months after the end of an economic strike, instead of reinstating strikers who were qualified and available. The strikers in question had first applied for reinstatement when a collective bargaining agreement terminated the stoppage, but at that time production had been temporarily curtailed because of the strike. As full operations were gradually resumed, further offers by the strikers to return to work were rejected. The Ninth Circuit held that the right of the strikers to jobs should be determined as of the date when they first applied, at the strike's end when no jobs were available, and that thereafter the employer committed no unfair labor practice so long as he treated their applications on the same basis as those of other applicants. This position seems clearly untenable. Section 2(3) of the Act provides that an individual whose work has ceased in consequence of a current[19] labor dispute continues to be an employee if he has not obtained regular and substantially equivalent employment; and, obviously, refusal of available work to an ex-striker tends to discourage organization and the exercise of other Section 7 rights. As the Trial Examiner succinctly concluded, the employer's error was to view the strikers "only as applicants for employment who were entitled to no

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[16]No. 49, 1967 Term; 88 S.Ct. 543 (1967).

[17]388 U.S. 26, 87 S.Ct. 1792 (1967).

[18]Hanley, Labor Law Decisions of the Supreme Court, 1966 Term, 1967 Proceedings of the ABA Labor Relations Law Section.

[19]One can quibble over the significance of the word "current" in the instant context but the Supreme Court, justifiably I think, did not see enough substance in the point for comment.

more than nondiscriminatory consideration for job openings. But they had a different standing—they were employees."

The concurring Justices would have stopped here, in reversing the Circuit Court and sustaining the Board's finding of 8(a)(1) and 8(a)(3) violations. However, the Circuit Court, as an obbligato to its major theme, had adverted to the problems of "legitimate business justification" and "employer motivation"—and the Supreme Court majority elected to elaborate its views on these questions, perhaps because of the speculation which had been aroused by *Great Dane*.

In that case, said Mr. Justice Fortas for the Court, "we held that proof of antiunion motivation is unnecessary when the employer's conduct 'could have adversely affected employee rights to *some* extent' and when the employer does not meet his burden of establishing 'that he was motivated by legitimate objectives'. . . . [B]ecause the employer here has not shown 'legitimate and substantial business justifications,' the conduct constitutes an unfair labor practice without reference to intent."

The Court also took occasion to observe—albeit by way of footnote—that the Board was not required to show that the jobs of the complainants in *Fleetwood* were still available. Again citing *Great Dane*, the Court said, "Such proof is not essential to establish an unfair labor practice. It relates to justification, and the burden of such proof is on the employer."

While the significance of *Fleetwood* is far from crystal clear, it suggests the following generalizations: (1) The presumption that a man intended the natural and probable consequences of his conduct is strongly viable in the context of unfair labor practices—specifically, Section 8(a)(3). (2) While the presumption can be rebutted by "legitimate and substantial business justifications," such justification is an affirmative defense, involving facts peculiarly within the knowledge of the respondent employer, and the latter has the burden of persuasion as well as the burden of coming forward with evidence. (3) "Legitimate and substantial business justifications" are characterized (to use the examples cited by Mr. Justice Fortas) by such things as "permanent replacements during the strike in order to continue operations," "the need to adapt to changes in business conditions or to improve efficiency," and similar situations "when the striker's job has been eliminated for substantial and bona fide reasons other than considerations relating to labor relations."

In *NLRB v. United Insurance Company of America*[20] and *Insurance*

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[20]No. 178, 1967 Term; 88 S.Ct. 988 (1968).

Workers International Union v. NLRB,[21] the Court was presented with the apparently inexhaustible question of who are employees for purposes of contemporary labor legislation. Specifically, the issue in these cases, which were dealt with in a common opinion, was whether the "debit agents" of an insurance company should be deemed "independent contractors," exempted from Taft-Hartley by Section 2(3), or whether, on the contrary, the Seventh Circuit Court of Appeals should have enforced the Board's order that the company bargain with the debit agents' union, which had been certified as the representative of these "employees."[22]

A quarter-century ago, in *NLRB v. Hearst Publications, Inc.*, the Supreme Court ruled that the question of who are employees "must be answered primarily from the history, terms and purposes of the legislation."[23] This criterion—sometimes called the "economic realities" test—still survives in determining the reach of some labor laws, notably the Fair Labor Standards Act.[24] However, the sponsors of Taft-Hartley were distinctly disturbed by the *Hearst* decision—partly because it rejected the equation of employer-employee with the ancient concepts of master and servant, and partly because they felt the Court had exhibited an unseemly deference to the NLRB and had abdicated judicial responsibility for the interpretation of a statutory term. They promptly inserted in the 1947 NLRA amendments an exclusion of "independent contractors" from the definition of "employee." The meaning of this insertion, on its face, was not beyond cavil; however, the Board and the Courts conceded that its purpose was to insure the application of common-law principles in distinguishing employees from independent contractors. The Court reaffirms this acquiescence in the instant case, saying "there is no doubt that we should apply the common-law agency test here." The Court makes a further conciliatory gesture in observing that "such a determination of pure

[21] No. 179, 1967 Term; 88 S.Ct. 988 (1968).

[22] Section 2(3) provides that the "term 'employee' . . . shall not include . . . any individual having the status of an independent contractor." Section 8(a)(5) declares that it "shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Section 9(a) stipulates that representatives selected by the majority of employees in an appropriate unit "shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining." Section 9(c) directs the Board, upon finding that a question of representation exists, to conduct an election and "certify the results thereof."

[23] 322 U.S. 111, 124, 64 S.Ct. 851 (1944).

[24] See, *e.g.*, Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S.Ct. 1473 (1947); Asia, Employment Relation: Common Law Concept and Legislative Definition, 55 Yale L. J. 76 (1946).

agency law involved no special administrative expertise that a court does not possess."

Having thus observed the amenities, the Court proceeded to sustain the Board's conclusion that the debit agents were employees, and reversed the Seventh Circuit's refusal to enforce the Board's order. It reiterated Mr. Justice Rutledge's observation in the *Hearst* case that the master-servant concept had never been as simple as commonly supposed,[25] and pointed out that in the instant case there was substantial evidence of such relevant factors as integration with the company's normal operations, minimal requirements of skill except as provided by company training, permanency and exclusiveness of service, extensive supervision and guidance by managerial personnel, and limitation of independent discretion. In the final analysis, the Court fell back on the doctrine of *Universal Camera Corp. v. NLRB*,[26] and concluded:

> Here the least that can be said for the Board's decision is that it made a choice between two fairly conflicting views, and under these circumstances the Court of Appeals should have enforced the Board's order. It was error to refuse to do so.[27]

What does the *United Insurance* case prove? Not much—except that judicial and administrative tribunals will continue to be plagued by the hybrid factuo-legal question of what is an employee so long as we continue our anachronistic adherence to the old master-servant concept as the touchstone for determining the reach of modern social legislation.

B. *Bill of Rights Cases*

Two other decisions of the Court during its 1967 Term involved potential Taft-Hartley issues but were determined on other grounds. In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,[28] a divided Pennsylvania court had sustained an injunction against peaceful picketing of the porch, pick-up zone, parking spaces and other areas in the vicinity of a supermarket located in a privately-owned shopping center. No

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[25]See ALI, Restatement of the Law, Agency 2d, § 220 (1958).

[26]340 U.S. 474, 71 S.Ct. 456 (1951).

[27]The Court of Appeals was irritated by the Trial Examiner's indiscreet remark that the debit agents waiting to testify before him exhibited a deference toward company officials characteristic of employees, and felt that this vicarious dictum tainted the whole record. The Supreme Court elected to ignore this abrasive and superfluous comment.

[28]No. 478, 1967 Term; 88 S.Ct. 1601 (1968).

issue was raised as to the manner or purpose of the picketing, which informed the public that the store was non-union and paid substandard wages. The state appellate court sustained the injunction on the sole ground that the picketing was a trespass on the property of the store and shopping center owners. This ruling was attacked on the grounds (1) that the picketing was either protected or prohibited by Taft-Hartley, so that the issues presented lay within the primary jurisdiction of the NLRB, and (2) that the injunction abridged freedom of speech in violation of the First and Fourteenth Amendments. The Supreme Court reversed, relying on the free-speech argument, and did not reach the preemption problem.

The *Thornhill*[29] and *Marsh*[30] decisions of the 1940's—notwithstanding their attenuation in subsequent cases[31]—provided some reason to anticipate the decision in *Logan Valley*. However, the result was by no means a foregone conclusion, as reflected by the fact that *Logan Valley* produced five opinions, including three dissents and one concurrence.

Mr. Justice Marshall, speaking for the Court, found the instant case strikingly similar to the *Marsh* case, which had recognized the First Amendment right of a Jehovah's Witness to distribute religious literature in the business district of Chickasaw, Alabama, even though that company town was wholly owned by a private corporation. Relying mainly on the *Marsh* case, he said:

> . . . .[I]t may well be that respondents' ownership of the property here in question gives them various rights, under the laws of Pennsylvania, to limit the use of that property by members of the public in a manner that would not be permissible were the property owned by a municipality. All we decide here is that because the shopping center serves as the community business block "and is freely accessible and open to the people in the area and those passing through," . . . the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.

Mr. Justice Douglas concurred in a separate opinion, presumably be-

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[29]Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736 (1940). See also AFL v. Swing, 312 U.S. 321, 61 S.Ct. 568 (1941).

[30]Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276 (1946).

[31]See, *e.g.*, International Bhd. of Teamsters v. Vogt, 354 U.S. 284, 77 S.Ct. 1166 (1957); Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242 (1966); Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476 (1964); Cameron v. Johnson, 390 U.S. 611, 88 S.Ct. 1335 (1968).

cause he did not regard as necessary or appropriate all of the elaborate explanations in the Court's opinion and considered the *Marsh* case adequate precedent. Mr. Justice Harlan, dissenting, would have preferred to deal with the case on preemption grounds. Since the posture in which the case was presented would not permit this, as he reluctantly conceded, he concluded that the Court should exercise its discretion not to reach the First Amendment issue and should dismiss the writ as improvidently granted. Justices Black and White, though they wrote two separate dissents, were agreed that the *Marsh* case was distinguishable and were concerned about where the majority's extension of that case might logically lead. They would limit *Marsh* to the situation where property has taken on *all* of the attributes of a town—residential areas, streets, a sewer system, etc.—so that for practical purposes it could be regarded as functioning like a state-created municipality. Otherwise, said Mr. Justice White:

> It is not clear how the Court might draw a line between "shopping centers" and other business establishments . . . . I am fearful that the Court's decision today will be a license for pickets to leave the public streets and carry out their activities on private property . . . . I do not agree that when the owner of private property invites the public to do business with him he impliedly dedicates his property for other uses as well.

Perhaps I have said enough to suggest the scope of the provocative questions which *Logan Valley* leaves open. This is not the time to attempt a reasoned prediction of its ramifications, and I must leave you to your own speculations.

In *United Mine Workers of America, District 12 v. Illinois State Bar Assoc.*,[32] the union had been enjoined from engaging in practices alleged to constitute the unauthorized practice of law. The injunction was premised upon undisputed evidence that the union employed a licensed attorney on a salary basis to represent any of its members who desired to use his services in prosecuting workmen's compensation claims under the Illinois act. The Illinois courts rejected the union's contentions (1) that the decree abridged their freedom of speech, petition and assembly under the First and Fourteenth Amendments, and (2) that the decree violated union members' rights to engage in concerted activities, as guaranteed by Taft-Hartley Section 7. The Supreme Court reversed on the basis of First Amendment considerations, and did not reach the Taft-Hartley question.

The Court, per Black, J., ruled that the instant case was controlled by

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[32]No. 33, 1967 Term; 88 S.Ct. 353 (1967).

NAACP v. Button[33] and *International Bhd. of Railroad Trainmen v. Virginia State Bar.*[34] The fact that the *Button* case was "bound up with political matters of acute social moment," and that in *Trainmen* the attorney was merely recommended and not actually paid by the union, was not regarded as sufficient to distinguish those cases from the present one. The Court conceded that "the States have broad power to regulate the practice of law" in order "to protect the public and to preserve respect for the administration of justice." However, it concluded that, on balance, the state's interest was outweighed by the fundamental character of the First Amendment rights invoked, the demonstrated need of the mine workers for the mutual protection afforded by the plan, the doubtful availability of any superior method of providing such protection, the plan's long history of satisfactory operation, and the minimal potential for conflicts of interest or other abuses. "The decree at issue here," said the Court, "thus substantially impairs the associational rights of the mine workers and is not needed to protect the State's interest in high standards of legal ethics."

Mr. Justice Stewart concurred in the result on the sole ground that the *Trainmen* case was controlling. Mr. Justice Harlan dissented, as he had in the *Button* case. He agreed with the "balancing approach" employed by the majority, but found that the scales tipped differently. In his opinion, the alleged needs of the mine workers could be met by arrangements more consistent with the views of the Illinois courts and the American Bar Association[35] as to what is appropriate to protect the public interest in a regulated bar.

Without getting involved in detail, about all I can say about the *Illinois Bar* decision is that it will surely send cold chills up the spines of those who view with alarm the advent of socialized law in the wake of socialized medicine.

One other constitutional decision perhaps deserves brief mention here, although its relation to labor law is peripheral. In *Mancusi v. De Forte,*[36] the Court affirmed a ruling by the Second Circuit Court of Appeals that a union official had standing to challenge the state's use of incriminating union records seized from his union office, though not his personal proper-

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[33]371 U.S. 415, 83 S.Ct. 328 (1963).

[34]377 U.S. 1, 84 S.Ct. 1113 (1964).

[35]*Cf.* ABA Committee on the Unauthorized Practice of Law, Information Opinion No. A of 1950, 36 A.B.A.J. 677; ABA Committee on Professional Ethics, Informal Opinion No. 469 (Dec. 26, 1961); 1964 ABA Reports 381-383 (Special Committee on Ethical Standards); 1966 ABA Reports 589-594 (Special Committee on Availability of Legal Services).

[36]No. 844, 1967 Term; 88 S.Ct. 2120 (1968).

ty; that the seizure of such records pursuant to subpoena duces tecum but without a warrant violated his Fourth Amendment rights; and that he was entitled to relief in federal habeas corpus proceedings challenging the final state court judgment of conviction.

C. The Fair Labor Standards Act

For the first time in nearly three decades, a major constitutional attack was mounted against the Federal Wage and Hour Law. The litigation was provoked by the 1961 and 1966 amendments which extended the Act's coverage to schools, colleges, hospitals and medical-care facilities, including those owned and operated by a state. In *Maryland v. Wirtz*,[37] with two Justices dissenting, the Court rebuffed 28 states which had joined in an attempt to invalidate this extension of the minimum wage, overtime compensation, child labor, equal pay, record keeping and other requirements of the federal statute.

The plaintiffs made four basic contentions: (1) that the "enterprise" test of coverage introduced in 1961 exceeded the powers of Congress under the Commerce Clause; (2) that coverage of state-operated schools and hospitals was beyond the commerce power; (3) that the remedial provisions of the Act, insofar as they would authorize private suits against the states in the federal courts, would conflict with the Eleventh Amendment; and (4) that even if the constitutional arguments were rejected, the Court should declare that schools and hospitals do not have the statutorily required relationship to interstate commerce.

The attack on the enterprise criterion of coverage gave the Court little difficulty, although that test means that, unlike the situation before the 1961 amendment, some employees will be protected by the Act even though not individually engaged in commerce or production therefor, provided fellow employees in the same enterprise are so engaged. "Elucidating litigation" has long since established that the Commerce Clause empowers Congress to control activities which affect interstate commerce though not intrinsically a part of it.[38] As to the issues involving the Eleventh Amendment and statutory construction, the Supreme Court agreed with the court below that the plaintiffs' contentions were premature, and that resolution of these issues should not be attempted in the abstract context of a declaratory judgment suit but should be deferred until an actual case required their decision.

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[37] No. 742, 1967 Term; 88 S.Ct. 2017 (1968).

[38] See, *e.g.*, U.S. v. Darby, 312 U.S. 100, 61 S.Ct. 451 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615 (1937).

Thus the instant case boiled down to the elementary problem of federalism presented by the plaintiffs' contention that application of national wage and hour standards to state employees was an indefensible interference with "sovereign state functions." As to this central issue, the position of the Court is perhaps reasonably well reflected in the following quotation from the Court's opinion, delivered by Mr. Justice Harlan:

> [A]ppellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to perform medical and educational functions is not factually accurate. Congress has "interfered with" these state functions only to the extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals.

The court cited abundant statistical data to support its conclusion that labor conditions in schools and hospitals affect commerce, and an extensive array of cases[39] deemed to establish the proposition that "[i]f a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." Specifically, the Court declared that the "principle of *United States v. California*[40] is controlling here." In that case the Court had unanimously held that a non-profit, intrastate railroad operated by the state was subject to the Federal Safety Appliance Act, observing that "we think it unimportant to say whether the state conducts its railroads in its 'sovereign' or in its 'private' capacity."

Justices Douglas and Stewart, dissenting in the present case, felt that the FLSA 1966 amendments will "disrupt the fiscal policy of the States and threaten their autonomy." As Mr. Justice Douglas put it:

> The Court's opinion skillfully brings employees of state-owned enterprises within the reach of the Commerce Clause; and as an exercise in semantics it is unexceptionable if congressional federalism is the standard. But what is done here is nonetheless such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism.

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[39]See, *e.g.*, Sanitary District of Chicago v. U.S., 266 U.S. 405, 45 S.Ct. 176 (1925); Oklahoma v. Atkinson Co., 313 U.S. 508, 61 S.Ct. 1050 (1941); Board of Trustees of University of Illinois v. U.S., 289 U.S. 48, 53 S.Ct. 509 (1933).

[40]297 U.S. 175, 56 S.Ct. 421 (1936).

The dissenters described the cases relied upon by the majority as "simply not apropos," and suggested that the guiding principles should be found in the several opinions in *New York v. U.S.*,[41] where a divided court held that the federal government could tax the sale of mineral waters owned and marketed by the state.

One of the implications of *Maryland v. Wirtz* is that, if the states and their subdivisions do not find palliatives for the currently vexatious problem of labor-management relations in the public sector, Congress may be tempted to step in and assert its own policies.

D. The Landrum-Griffin Act

All of the Court's 1967 Landrum-Griffin decisions arose out of suits by the Secretary of Labor under Section 402 to void union elections and require that new elections be conducted under the Secretary's supervision.

Wirtz v. Local 153, Glass Bottle Blowers Assoc.[42] and *Wirtz v. Local 125, Laborers' Int. Union of North America*[43] both raised the question of whether the union's holding of a new election rendered moot the Secretary's action challenging the validity of the prior election. In each case, the Supreme Court reversed the decision below, and held that neither a literal reading of the statute nor a consideration of its legislative history and general objectives would support the Circuit Court's holding that upon the occurrence of another unsupervised election the Secretary's cause of action should be deemed to have "ceased to exist." With considerable persuasiveness, the Court observed in the *Bottle Blowers* case:

> . . . Congress unequivocally declared that once the Secretary establishes in court that a violation of § 401 may have affected the outcome of the challenged election, "the court *shall* declare the election . . . to be void and direct the conduct of a new election under supervision of the Secretary . . . ." 29 U.S.C. § 482(c). (Emphasis supplied.)
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> We cannot agree that this statutory scheme is satisfied by the happenstance intervention of an unsupervised election. The notion that the unlawfulness infecting the challenged election should be considered as washed away by the following election disregards Congress' evident conclusion that only a supervised election could offer assurance that the officers who achieved office as beneficiaries of violations of the Act would not by some means perpetuate their unlawful control in the succeeding election.

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[41]326 U.S. 572, 66 S.Ct. 310 (1946).
[42]No. 57, 1967 Term; 88 S.Ct. 643 (1968).
[43]No. 58, 1967 Term; 88 S.Ct. 639 (1968).

The *Laborers' Union* case involved the additional issue of whether the Secretary's power to bring a Section 402 suit is limited to the specific allegation made by a complaining union member and to the particular election challenged by the complainant. Here, the complainant had challenged only a runoff election on July 13 for the office of business representative, on the ground that members not in good standing had been permitted to vote. The Secretary's investigation disclosed that a similar irregularity, with respect to both voting and candidacy for office, had occured in the preceding general election on June 8. The Court held that "[o]n the facts of this case we think the Secretary is entitled to maintain his action challenging the June 8 general election because respondent union had fair notice from the violation charged by Dial [the complainant] in his protest of the runoff election that the same unlawful conduct also occurred at the earlier election." In adopting this view, the Court rejected the union's contention that the Secretary's suit should be limited solely to the allegations made by the complainant. At the same time, the Court declined to pass upon the Secretary's argument that "a member's protest triggers a § 402 enforcement action in which the Secretary would be permitted to file suit challenging any violation of § 401 discovered in his investigation of the member's complaint." The merits of this broader construction of the Secretary's authority—which the Court again declined to discuss in the case next cited—must be deemed still open to debate.

In *Wirtz v. Hotel, Motel and Club Employees Union, Local 6*,[44] the Court explored (1) the meaning of "reasonable qualifications" as used in the Section 401(e) guarantee that "every member in good standing shall be eligible to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed)," and (2) the significance of the phrase "may have affected the outcome" as used in Section 402(c) to limit the category of irregularities which require that an election be voided. The subject of the Court's inquiry was a local bylaw which limited eligibility for major elective offices to members who then, or had previously, occupied responsible positions in the union hierarchy. The Court held that the restriction was not reasonable, that its enforcement may have affected the outcome of the election, and that the Secretary of Labor was therefore entitled to an order directing a new election under his supervision.

In dealing with the "reasonable qualifications" issue, the Court took note of the argument that there is some logic in restricting important union offices to members with administrative experience and demonstrated ability. Unlike the Circuit Court, however, the Supreme Court did not find this

[44]No. 891, 1967 Term; 88 S.Ct. 1743 (1968).

argument persuasive. It reviewed the union's history in some detail and concluded that the questioned bylaw gave the incumbent administration a distinct potential for self-perpetuation. Said the Court, "Congress plainly did not intend that the authorization in § 401(e) of 'reasonable qualifications uniformly imposed' should be given a broad reach." In the specific context of the case before it, the Court observed, "Plainly . . .a candidacy limitation which renders 93% of union members ineligible for office can hardly claim to be a 'reasonable qualification'."

With respect to the "may have affected" issue, the Court concluded that the purposes of the statute would be served "by ascribing to a proved violation of § 401 the effect of establishing a prima facie case that the violation 'may have affected' the outcome. This effect may, of course, be met by evidence which supports a finding that the violation did not affect the result." The Court took pains to emphasize, however, that the presumption it was creating could be rebutted only by evidence with inherent probative value, and that considerations involving mere conjecture would not suffice.

The Court recognized here, as it had in the other two Landrum-Griffin decisions, that its basic task was to accommodate Congressional interest in eliminating revealed abuses in union elections with minimal intervention in internal union affairs, and thus to achieve the objective of democratic and responsible self-government. Mr. Justice Brennan delivered the opinions in all three cases.

E. The Norris-LaGuardia Act

When certiorari was granted last October, *Avco Corp. v. Aero Lodge No. 735, IAM*[45] appeared to hold out the promise of some containment of the forensic fireworks about whether injunctive relief is available against strikes in breach of contract. Instead, the ultimate decision may have added fuel to the flames by exacerbating the dispute over *Sinclair Refining Co. v. Atkinson*,[46] where the Court by a 5-3 decision had held that although a suit for breach of a no-strike clause was properly in the federal district court by virtue of Taft-Hartley Section 301, the Norris-LaGuardia Act barred that court from issuing an injunction.

In the present case, the company sued in a Tennessee court to enjoin a strike which allegedly violated its contract with the union, and the state court issued an ex parte injunction. The union then removed the case to the federal district court, which denied a motion to remand and dissolved the injunction. The Sixth Circuit Court of Appeals affirmed, stating inter alia

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[45]No. 445, 1967 Term; 88 S.Ct. 1235 (1968).
[46]370 U.S. 195, 82 S.Ct. 1328 (1962).

that "the remedies available in State Courts [in Section 301 suits] are limited to the remedies available under Federal law."

The Supreme Court's opinion, per Douglas, J., reiterated the well-established proposition that a Section 301 action is controlled by federal substantive law even though it is brought in a state court,[47] and asserted that it was thus clear that the company's claim was one arising under the "laws of the United States" within the meaning of the removal statute and likewise clear that the suit was within the "original jurisdiction" of the federal district court.[48] With respect to the claim that the Norris-LaGuardia Act, as interpreted in *Sinclair*, denied jurisdiction to the federal court, Mr. Justice Douglas said:

> The nature of the relief available after jurisdiction attaches is of course, different from the question whether there is jurisdiction to adjudicate the controversy . . . . [That] is a distinct question from whether the court has jurisdiction over the parties and the subject matter.

Since the district court had denied the motion to remand, and had dissolved the state court's injunction on undisclosed grounds, the Supreme Court found it unnecessary to rule on the critical question posed by the Circuit Court's assertion that "the remedies available in State Courts are limited to the remedies available under Federal law." This statement the Court classified as mere obiter dictum, and concurring Justices Stewart, Harlan and Brennan took occasion to emphasize that "the Court expressly reserves decision on the effect of *Sinclair* in the circumstances presented by this case." They then proceeded to compound the confusion by adding that the "Court will, no doubt, have an opportunity to reconsider the scope and continuing validity of *Sinclair* upon an appropriate future occasion."

It is doubtful that either employers or unions can, with confidence, find much comfort in the *Avco* decision.

The storm of controversy which has swirled around the *Sinclair* case ever since it was decided is also reflected by the opinions in *International Longshoremen's Assoc., Local 1291 v. Philadelphia Marine Trade Assoc.*, two cases which the Court disposed of in a joint decision.[49] Here the employer had obtained in the federal district court an order that an arbitrator's award, which sustained the employer's interpretation of the collective bargaining agreement, "be specifically enforced." The union contended that the district court's order was an injunction against work stoppages and

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[47]Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363 (1964).

[48]See 28 U.S.C. §§ 1337, 1441.

[49]Nos. 34 and 73, 1967 Term; 88 S.Ct. 201 (1967).

relied on the *Sinclair* holding that a federal court lacks jurisdiction to enjoin a strike even when the applicable contract contains a no-strike clause. However, the Court elected not to deal with the significant question of whether a federal court can enforce an arbitrator's award even though the practical effect would be the same as that of a prohibited injunction. Instead, it based its decision on Rule 65(d) of the Federal Rules of Civil Procedure, which provides that any order "granting an injunction and every restraining order . . . shall be specific in terms; [and] shall describe in reasonable detail . . . the act or acts sought to be restrained . . . ." The Court observed, in its opinion by Mr. Justice Stewart, that the award contained "only an abstract conclusion of law, not an operative command," and that the district judge had rebuffed persistent efforts by union counsel to ascertain just what the court's order required the union to do. The Court held that the order was too vague to satisfy Rule 65(d), and that with it must fall the district court's decision holding the union in contempt.

"Whether or not the District Court's order was an 'injunction' within the meaning of the Norris-LaGuardia Act," said the Court, "it was an equitable decree compelling obedience under the threat of contempt and was therefore an 'order granting an injunction' within the meaning of Rule 65(d)."

Mr. Justice Douglas, dissenting in part, would have remanded for more precise findings. Disagreeing with the majority, he said:

> If the order of the District Court is an "injunction" within the meaning of Rule 65(d), then I fail to see why it is not an "injunction" within the meaning of the Norris-LaGuardia Act . . . and since I feel strongly that *Sinclair Refining Co. v. Atkinson* . . . caused a severe dislocation in the federal scheme of arbitration of labor disputes, I think we should not set our feet on a path that may well lead to the eventual reaffirmation of the principles of that case.

Mr. Justice Brennan concurred in the Court's result, but emphasized that it "in no way implies that *Sinclair* . . . determines the applicability of the Norris-LaGuardia Act to an equitable decree carefully fashioned to enforce the award of an arbitrator."

F. *Other Cases*

Three other cases I shall mention very briefly, simply to complete the picture.

By a per curiam order in *Eagar v. Magma Copper Co.*,[50] the Court

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[50]No. 659, 1967 Term; 88 S.Ct. 503 (1967).

reversed a ruling below that reemployed veterans are not entitled, under Section 9(c) of the Universal Military Training and Service Act, to recover holiday and vacation pay from their employer, even though they would have been eligible for paid vacations and holidays but for their military service. Justices Douglas, Harlan and Stewart dissented on the ground that the majority had failed to recognize a distinction, which the dissenters found in the language and history of the statute, between the seniority rights of reinstated servicemen and their entitlement to such fringe benefits as those in question.

In *Joint Industry Board of Electrical Industry v. U.S.*, [51] a divided court ruled that claims for a bankrupt employer's unpaid contributions to an employees' annuity fund, though credited to the individual accounts of designated workmen and required by the collective bargaining agreement, were not entitled to priority as "wages . . . due to workmen" under Section 64(a)(2) of the Bankruptcy Act.

It seems to me that the issues in the *Eagar* and *Joint Industry Board* cases are close ones, for which creditable arguments can be made both ways. However, their relation to the general law of labor relations is at most tangential, and I leave their detailed exploration to another time and place.

American Federation of Musicians v. Carroll and *Carroll v. American Federation of Musicians,* jointly decided,[52] add another chapter to the history of the long and agonizing search for accommodation between the respective policies of labor relations law and the Sherman Act. Discussion of these cases will be limited to superficial comment for two reasons. In the first place, this litigation, which began back in 1960, primarily involves what Mr. Justice White (dissenting) described as "the peculiar role of bandleaders and the peculiar economics of the club-date music industry." In the second place, even a cursory examination of the intricacies of the authorities and arguments upon which the majority and the dissent rely would lead far beyond the intended scope and modest purpose of this paper.

"The question," said Mr. Justice Brennan for the Court, "is whether union practices . . . affecting orchestra leaders violate the Sherman Act as activities in combination with a 'non-labor' group, or are exempted by the Norris-LaGuardia Act as activities affecting a 'labor' group which is party to a 'labor dispute'."

[51] No. 616, 1967 Term; 88 S.Ct. 1491 (1968).
[52] Nos. 309 and 310; 88 S.Ct. 1562 (1968).

The decisions below were premised on the assumption that, although orchestra leaders in the club-date field were employers and independent contractors, they were nevertheless a 'labor' group because of an economic relation with union members affecting legitimate union interests. The Supreme Court agreed that, conceptually, this was a proper point of departure. It therefore sustained the lower courts' rulings that it was lawful for the union to force the orchestra leaders through economic pressure, to acquiesce in a wide variety of restrictive practices.[53]

The most divisive issue in the Carroll cases concerned the union's insistence that orchestra leaders (whether they actually participated in an appearance, or delegated the entire performance to subleaders and sidemen), as well as caterers and other booking agents, should observe a "Price List" which established minimum fees for club-date engagements. The District Court thought that "[i]n view of the competition between leaders and sidemen and subleaders . . . the union has a legitimate interest in fixing . . . minimum engagement prices." However, the Court of Appeals (Judge Friendly dissenting) concluded that the "Price List" was outside the labor exemption from the antitrust laws because its concern was prices and not wages. The Supreme Court answered this with Mr. Justice White's statement in *Local Union No. 189, Amalgamated Meat Cutters v. Jewell Tea Co.*[54] that "[t]he crucial determinant is not the form of the agreement—*e.g.*, prices or wages—but its relative impact on the product market and the interests of union members."

The Court majority went on to deplore the tendency to find in *Jewell Tea* a magical equation between "mandatory subjects of collective bargaining" and the scope of labor's immunity from the antitrust laws. As the majority put it:

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[53]Specifically, the Court held that "it was lawful for petitioners to pressure the orchestra leaders to become union members [citing Los Angeles Meat and Provision Drivers Union v. U.S., 371 U.S. 94, 83 S.Ct. 162 (1962) and Milk Wagon Drivers Union v. Lake Valley Farm Prods., 311 U.S. 91, 61 S.Ct. 122 (1940)], to insist upon a closed shop [citing U.S. v. American Fed. of Musicians, 318 U.S. 741, 63 S.Ct. 665 (1943)], to refuse to bargain collective with the leaders [citing Hunt v. Crumboch, 325 U.S. 821, 65 S.Ct. 1545 (1945)], to impose the minimum employment quotas complained of [citing U.S. v American Fed. of Musicians supra], to require the orchestra leaders to use the [standard] Form B contract [citing Local 24, Int. Bhd. of Teamsters v. Oliver, 362 U.S. 605, 80 S.Ct. 923 (1960)], and to favor local musicians by requiring that higher wages be paid to musicians from outside a local's jurisdiction [citing Rambusch Decorating Co. v. Brotherhood of Painters, 105 F2d 134 (2d Cir. 1939)] "

[54]381 U.S. 676, 85 S.Ct. 1596 (1965).

> Even if only mandatory subjects of bargaining enjoy the exemption—a question not in this case and upon which we express no view—nothing Mr. Justice White or Mr. Justice Goldberg said remotely suggests that the distinction between mandatory and nonmandatory subjects turns on the form of the method taken to protect a wage scale, here a price floor.

For obvious reasons, the majority relied heavily on the decisions in *Local 24, International Bhd. of Teamsters v. Oliver* (Oliver I and Oliver II),[55] which indicated that "where independent contractors are doing work for an employer in competition with the work of union members, the union can bargain with the employer to make certain that they are not doing that work at a lower wage." The dissenters (Justices White and Black) conceded that "*Oliver* is relevant," but regarded as decisive here the teaching of *Allen Bradley* and *Pennington:* that unions lose whatever antitrust immunity they might otherwise enjoy when they enter into combinations—whether voluntary or coerced—with entrepreneurs.[56] Said Mr. Justice White:

> I am sure the Clayton and Norris-LaGuardia Acts never intended to give unions this kind of stranglehold on any industry. It may be that the Court views this industry as having special problems . . . . If this is the case, the Court should frankly say so and . . . leave to Congress the task of making special provisions in the antitrust laws for the special circumstances of the music industry.

Organized labor has come a long way in its 80-year war with the trust-busters. It has won some major battles in the last three decades, and it seems to have emerged with only minor casualties from the skirmishes involved in the *Carroll* cases. I state the obvious, however, in observing that the struggle between unions and the factions which would subject them to the commands of the Sherman Act, and its progeny, has the potential for longevity of our nation's current involvement with North Viet Nam and its sympathizers in the Far East.

SUMMARY

This is the picture of the Supreme Court's posture in the labor law arena at its 1967 Term—drawn with broad strokes, frankly uncritical, largely impressionistic. Some of the decisions will undoubtably provide fodder for

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[55]358 U.S. 283, 79 S.Ct. 297 (1959); 362 U.S. 605, 80 S.Ct. 923 (1960).

[56]Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797, 65 S.Ct. 1533 (1945); United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S.Ct. 1585 (1965).

reams of comment—student and professional—in the legal periodicals; for example, *Marine and Shipbuilding Workers, Fleetwood Trailer, Logan Valle, Illinois State Bar, Maryland v. Wirtz,* the Landrum-Griffin election cases, *Avco,* and *Carroll.*

In several cases, involving relatively narrow issues, the Court faced up to some tough questions and provided answers which, whether right or wrong, were at least unequivocal.

In other cases, involving issues of more general interest and importance, the Court chose to ignore opportunities to provide guidance, and opted for less controversial bases of decision—creating doubts rather than resolving them.

This, however, is the price we pay for the ad hoc system of judicial law-making. It is a high price, but most of us are prepared to agree that, in the juridical market of the world today, it still a good buy.