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SOME ASPECTS OF EMPLOYEE DEMOCRACY UNDER THE WAGNER ACT

JACOB M. MURDOCK

I.

A wide variety of interesting decisions have resulted from certain conflicting purposes in the law of collective bargaining. This subject of conflict concerns a change of bargaining representatives during the life of a collective bargaining agreement, or following a prior certification of a bargaining agent by the Board. The problems presented are both of law in that there is a clashing of legal concepts, and of practical policy in the functioning of the collective bargaining process. Often where existing statutes are silent, the interplay of sociological and economic forces require that directive decisions be made.

Workers, having selected an agent, have many bona fide reasons for later desiring a change. Dissatisfaction with one union often arises where the rank and file feel that their union has not achieved necessary and desirable gains for the employees. In a particular field of collective bargaining, rival unions often newly appear, promising greater advantages to the workers than the certified organization. In many cases, the existing representative may lack internal democracy which another organization can provide; or malfeasance, practiced by strongly entrenched union officers, may make the existing representative no longer desirable. In a democratic economy, employees must not be subjected to the yoke of monopoly from within their own union whose avowed purpose is to further their interests, but which under certain circumstances may be used to exploit the workers for the benefit of those in control.

We find in Section I of the National Labor Relations Act¹ the stated purpose to protect the workers' "full freedom of association, self-organization, and designation" of bargaining representatives. This would seem to indicate that employees are free at any time and as often as they desire to change their representative. Moreover, Section 9 (c)² contains no exception to the Board's administrative duty to investigate and certify an appropriate agent "whenever a question affecting commerce arises concerning the representation of employees. . . ." Yet, one must realize that the problems concurrent with a change of representative have only achieved their degree of

¹49 STAT. 449 (1935), 29 U. S. C. § 151 (1940).

²49 STAT. 453 (1935), 29 U. S. C. § 159 (1940).

importance as the theory and application of collective bargaining have been accepted by and become a part of our economic society. The drafters of the Labor Act were thinking mainly of the initial decision to be made by the workers and were most concerned that this decision should not be influenced by forces antagonistic to the stated rights of employees. The primary job was to establish a system of collective bargaining in an economic society which had thus far fought it, and refused to accept the idea as necessary or desirable. Many problems of the future could not be specifically foreseen or provided for. Therefore, it is hardly surprising that there is no definite specification in the statute regarding a desire on the part of the workers to change their representative after making their initial choice.

The right of employees to change their bargaining agent freely is opposed by another *desideratum* in our system of industrial and labor relations. This is stability. Continual changing of representatives is invariably accompanied by continual labor strife. This in turn upsets production and economic conditions generally. The machinery of collective bargaining should prevent unnecessary conflicts, especially those which do not directly aim at the betterment of working conditions and peaceful labor relations. The Labor Act encourages the practice and procedure of collective bargaining for the stated purpose that industrial relations may be stabilized. It naturally follows then that promiscuous use of the right to change representatives is to be discouraged. Public and business interests wish to be able to place reliance on a particular arrangement which has been properly achieved; and it would seem to be politic to say they have a right to do so. It is for this reason that historically there has been a constant struggle to protect contractual rights both in the courts and out of them. In any field of endeavor, relationships, once set up, must be given reasonable opportunity to function and produce results. Thus, the right to change bargaining representatives cannot be so absolute as to permit workers to substitute one agent for another whenever the spirit moves them.

The National Labor Relations Board's policy in dealing with these cases has been one of weighing the clashing interests, and slowly developing a set of general rules through its decisions, to be applied as a guide in a particular case. The employees' guaranteed statutory right to select and change their bargaining representatives freely is balanced against the interest of the employees and the public in industrial stability.

A specific discussion of the various factual situations where this question of change of representatives arises, and of the general rules which the Board has adopted, follows.

II.

If there is no contract in existence, the Board, regardless of the workers' wishes, will usually deny a rival's request for certification for a reasonable period—usually one year following the original certification.³ In *In the Matter of Kimberly-Clark Corporation*,⁴ the Board said: "We have consistently held, both in unfair labor practice cases involving Section 8 (5) of the Act, and in cases arising under Section 9 (c), that a Board election and certification must be treated as identifying the statutory bargaining agent with certainty and finality for a reasonable period of time—about a year, under ordinary circumstances. This policy serves the dual purpose of encouraging the execution of collective bargaining contracts and of discouraging 'raiding' and too frequent elections. It means, in operation, that a demand for recognition, or petition for investigation of representatives, filed unseasonably early in the year following a certification, will be ineffective to raise a question concerning representation, for the certification is deemed to foreclose any such question for a reasonable time."⁵ However, as previously pointed out, this rule is only a guide, and exception will be made where there is evidence of an unusually large shift in employee desires, or where, for example, quick expansion or contraction of the plant is occurring due to the war or to reconversion.⁶

³In the Matter of U. S. Stamping Company, 5 N. L. R. B. 172 (1938); In the Matter of General Motors Corporation, 24 N. L. R. B. 159 (1940); In the Matter of Aluminum Company of America, Newark Works, 57 N. L. R. B. 913 (1944); In the Matter of Bohn Aluminum and Brass Corporation, 57 N. L. R. B. 1684 (1944); In the Matter of American Woolen Company (National and Providence Mills), 61 N. L. R. B. 1045 (1945); In the Matter of Monarch Aluminum Manufacturing Company, 41 N. L. R. B. 1 (1942); In the Matter of Beatty Logging Company, 55 N. L. R. B. 810 (1944); In the Matter of Whittier Mills Company, 15 N. L. R. B. 457 (1939), *enfd* 111 F. (2d) 474 (C. C. A. 5th, 1940); In the Matter of Botany Worsted Mills, 41 N. L. R. B. 218 (1942), *enfd* 133 F. (2d) 876 (C. C. A. 3rd, 1943), *cert. denied*, 319 U. S. 751, 63 Sup. Ct. 1164 (1942); In the Matter of Century Oxford Manufacturing Corporation, 47 N. L. R. B. 835 (1943), *enfd* 140 F. (2d) 541 (C. C. A. 2d, 1944); In the Matter of Motor Valve and Manufacturing Company, 58 N. L. R. B. 1057 (1944), *enfd* 149 F. (2d) 247 (C. C. A. 6th, 1945); *Frank Brothers v. National Labor Relations Board*, 321 U. S. 702, 64 Sup. Ct. 817 (1944); In the Matter of Con P. Curran Printing Company, 67 N. L. R. B. No. 192 (1946); *National Labor Relations Board v. Blair Quarries, Inc.*, 152 F. (2d) 25 (C. C. A. 4th, 1945).

⁴61 N. L. R. B. 90, 92 (1945).

⁵PA. STAT. (Purdon, 1941) tit. 43, § 211.7 (c) and R. I. ACTS AND RESOLVES (1941) c. 1066, § 6 (5) make certifications effective for at least a year. WIS. STAT. (1945) § 111.05 (4) provides that the fact that one election has been held shall not prevent the holding of another election "provided that it appears to the Board that sufficient reason therefore exists." Note: In a few instances, state statutes are cited to illustrate how a particular problem has been handled by legislation other than national. However, this article does not include a coverage of interpretation and policy under the various state acts—being limited to the federal field only.

⁶In the Matter of New York and Cuba Mail Steamship Company, 2 N. L. R. B. 595

In a recent decision, the Circuit Court of Appeals forced an exception on the Board, under what it considered an unusual set of facts. The case was *National Labor Relations Board v. Intercity Advertising Company, Inc.*⁷ On May 12, 1944 the Board certified a union as representative of technicians working at the transmitter of a radio station. The company felt that this selection of bargaining unit was incorrect; that employees at the studio should also have been included. They notified the Board and the union of their refusal to bargain in order to get a hearing on the issue under charges which the union would bring. At the time of the Board's election, the vote had been three for—and one against—the union. During the rest of the year, normal changes in the business resulted in only one union man out of three being at the transmitter. At the subsequent hearing, the Board found the employer guilty of violating section 8 (5) of the Act, but not guilty of any other unfair practices. The Circuit Court refused enforcement of the order to bargain, saying that they would not order an employer to bargain with a union which had lost its majority, where the change has not been occasioned by the refusal of the employer to bargain or by any other illegal practice on his part. The court based its conclusion on the distinction that in all similar cases in point, the employer was guilty of an unfair labor practice of some sort, whereas here the Board had specifically found him innocent of all unfair practices except a refusal to bargain. A dissenting opinion urged that this decision neglected the rule that a bargaining relationship, once established, must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. The wrongful refusal to bargain collectively with the certified union cannot be twisted into a defense because the facts change during the period of such refusal. It would seem that the dissent here is the stronger argument, and that the Board does not exceed its broad power by insisting that a company bargain with a certified union, even where the loss of majority has not demonstrably been due either to an unfair refusal to bargain or to any other unfair labor practice.

Where no union has been designated by an election, the Board will order a new election in less than a year.⁸

During the War, another exception arose where a newly certified representative failed to achieve an initial bargaining agreement because of the

(1937); In the Matter of Novelty Slipper Company, 5 N. L. R. B. 264 (1938); In the Matter of Moulton Ladder Manufacturing Company, 31 N. L. R. B. 665 (1941); In the Matter of Aluminum Company, 52 N. L. R. B. 1040 (1943); In the Matter of M. R. Moller, 56 N. L. R. B. 16 (1944).

⁷154 F. (2d) 244 (C. C. A. 4th, 1946).

⁸In the Matter of Chrysler Corporation, 37 N. L. R. B. 877 (1941); In the Matter of New York Central Iron Works, 37 N. L. R. B. 894 (1941).

necessity of National War Labor Board approval or decision regarding the agreement. In these cases the National Labor Relations Board held that the period of immunity enjoyed by a certified representative would be extended beyond the usual year where the delay was the cause of the certified union not securing a contract.⁹

Normally, a valid written contract for a definite and reasonable term will bar a determination of representatives until the expiration date approaches.¹⁰ A contract which, although it may specify a duration period, is actually terminable at the option of either party, does not bar an election;¹¹ but an agreement which contains merely a provision allowing the parties to negotiate for modifications of its terms, without enabling either party unilaterally to terminate the contractual relationship, is not construed as terminable at will.¹² The contract must fix at least some important terms and conditions of employment. In *In the Matter of Standard Oil Company*,¹³ the Board held that an exclusive contract for a definite term which incorporated a wage agreement as well as a procedure for the settlement of grievances and the negotiation of other collective bargaining questions, was adequate to meet this test, and accordingly operated as a bar to determining representatives.¹⁴ In the event the contracting union becomes defunct, the rule becomes inoperative, and an election will be held prior to the expiration of the agreement.¹⁵

⁹In the Matter of Allis-Chalmers Manufacturing Company, 50 N. L. R. B. 306 (1943); In the Matter of Aluminum Company of America, 58 N. L. R. B. 24 (1944); In the Matter of Taylor Forge and Pipe Works, 58 N. L. R. B. 1375 (1944); In the Matter of Montgomery Ward and Company, 60 N. L. R. B. 574 (1945); In the Matter of American Locomotive Company, 67 N. L. R. B. No. 175 (1946); *cf.* In the Matter of Spencer Lens Company, 58 N. L. R. B. 953 (1944); In the Matter of Federal Screws Works, 61 N. L. R. B. 387 (1945); In the Matter of Allis-Chalmers Manufacturing Company, 64 N. L. R. B. 750 (1945).

¹⁰In the Matter of Pacific Greyhound Lines, 22 N. L. R. B. 111 (1940); In the Matter of Superior Electric Products Company, 6 N. L. R. B. 19 (1938); In the Matter of Pierce Contracting and Stevedoring Company, Inc., 20 N. L. R. B. 1061 (1940); In the Matter of Pressed Steel Car Company, Inc., 36 N. L. R. B. 560 (1941); In the Matter of Monarch Aluminum Manufacturing Company, 41 N. L. R. B. 1 (1942). The Board's earlier view was that the aims of the Act were furthered best by making a change at any time the employees desired. *See* In the Matter of New England Transportation Company, 1 N. L. R. B. 130 (1936).

¹¹In the Matter of Iona Desk Company, 59 N. L. R. B. 1522 (1945); In the Matter of Summerill Tubing Company, 60 N. L. R. B. 896 (1945); In the Matter of Fischer Lumber Company, 62 N. L. R. B. 543 (1945).

¹²In the Matter of Green Bay Drop Forge Company, 57 N. L. R. B. 1417 (1944); In the Matter of Douglas Public Service Corporation, 62 N. L. R. B. 651 (1945).

¹³63 N. L. R. B. 1223 (1945).

¹⁴*But cf.* In the Matter of The New York and Porto Rico Steamship Company, 58 N. L. R. B. 1301 (1944).

¹⁵In the Matter of Food Machinery Corporation, 36 N. L. R. B. 491 (1941); In the Matter of Container Corporation of America, 61 N. L. R. B. 823 (1945); In the Matter

Usually the contract is later than the certification, so that a one-year contract works an extension of the period which would exist without the contract. But sometimes the contract precedes the certification and the question arises whether the date of certification or the date of the contract will then be used in ascertaining whether a reasonable time has elapsed. The Board has held that the contract controls. In *In the Matter of Thompson Products, Inc.*¹⁶ where, subsequent to an election but five months prior to the Board's certification, the union and employer entered into a one-year contract, the Board held that the contract date determined when another election might be held.¹⁷

The rule is well settled that a contract for one year constitutes a reasonable term, and recent decisions indicate that this time may be extended to two years. Thus, in *In the Matter of Uxbridge Worsted Company, Inc.*,¹⁸ the Board said: "In the absence of satisfactory proof that an effective two-year contract runs counter to the well-established custom in the industry, or is otherwise unreasonable in terms under the circumstances of the particular case, we are presently of the opinion that, in the interest of industrial stability, no investigation of representatives should be undertaken until such contract is about to expire." Moreover, in *In the Matter of Sutherland Paper Company*,¹⁹ the Board explained that a petitioner seeking an election in the face of a two-year contract has the burden of establishing that the two-year term is unreasonable. Agreements longer than one or two years may be held reasonable if the evidence establishes that it is the custom in the industry to enter into contracts of longer duration.²⁰ A three-year contract, however, will not be permitted to bar a new determination of representatives after the first year unless the party urging the contract as a bar established that this abnormally long term is supported by custom. In other words, the burden of proof appears at present to shift when the contractual term exceeds two years.²¹

Contracts for indefinite or unduly long periods (where such contracts are not justified by custom) will not be permitted to bar an election after they

of *The Swartout Company*, 61 N. L. R. B. 832 (1945); *In the Matter of Black-Clawson Company*, 63 N. L. R. B. 773 (1945); *In the Matter of News Syndicate Company, Inc.*, 67 N. L. R. B. No. 153 (1946).

¹⁶47 N. L. R. B. 619 (1943).

¹⁷*In the Matter of Trackson Company*, 56 N. L. R. B. 917 (1944).

¹⁸60 N. L. R. B. 1395 (1945).

¹⁹64 N. L. R. B. 719 (1945).

²⁰*In the Matter of Chicago Curled Hair Company*, 56 N. L. R. B. 1674 (1944).

²¹*In the Matter of The A. S. Abell Company*, 62 N. L. R. B. 1414 (1945); *In the Matter of Lexington Water Company*, 58 N. L. R. B. 536 (1944); *In the Matter of United States Finishing Company*, 63 N. L. R. B. 575 (1945).

have been in effect for one year, because such contracts contravene the statutory policy of protecting the employees' freedom to select and change their representatives at reasonable intervals.²² During the War, contracts with such provisions as "to continue in force and effect during the period of National Emergency," were held to fall into this category.²³

A constant source of dispute is the question whether a valid contract exists, such as will bar an investigation and certification, and, if it has existed, whether it has been renewed. Negotiations between the parties during the term of the contract often indicate a cancellation of the contract, or at least the prevention of an automatic renewal. These issues require delicate determinations of the difficult questions of fact which they present.²⁴

In the event a rival union has asserted its claim to recognition, or has filed its petition for certification with the Board, before the date when the contract went into effect, or before the date when a renewal became operative, the rule has long been that this put the employer on notice, and the Board would make determination of the bargaining agent notwithstanding the existing contract.²⁵ A recent decision of the Board, *In the Matter of General Elec-*

²²In the Matter of Twentieth Century-Fox Film Corporation, 56 N. L. R. B. 117 (1944); In the Matter of Universal Pictures Company, 55 N. L. R. B. 52 (1944); In the Matter of Standard Oil Company of California, 58 N. L. R. B. 569 (1944); In the Matter of Metro-Goldwyn-Mayer Studios, 7 N. L. R. B. 662 (1938); In the Matter of M. & J. Tracey, Inc., 12 N. L. R. B. 936 (1939); In the Matter of Volupte, Inc., 22 N. L. R. B. 1029 (1940); In the Matter of Rosedale Knitting Company, 23 N. L. R. B. 527 (1940); In the Matter of Lewis Steel Products Corporation, 23 N. L. R. B. 793 (1940); In the Matter of Kahn & Feldman, Inc., 30 N. L. R. B. 294 (1941); In the Matter of Presto Recording Corporation, 34 N. L. R. B. 28 (1941); In the Matter of J. Charles McCullough Seed Company, 59 N. L. R. B. 259 (1944); In the Matter of Trailer Company of America, 51 N. L. R. B. 1106 (1943).

²³In the Matter of Peerless Pump Division, Food Machinery Corporation, 67 N. L. R. B. No. 131 (1946); In the Matter of Cotton Trade Warehouses, Inc., 68 N. L. R. B. No. 7 (1946).

²⁴In the Matter of Green Bay Drop Forge Company, 57 N. L. R. B. 1417 (1944); In the Matter of Chicago Mill and Lumber Company, 59 N. L. R. B. 77 (1944); In the Matter of Story and Clark Piano Company, 59 N. L. R. B. 185 (1944); *cf.* Heat Transfer Products, Inc., 63 N. L. R. B. 1124 (1945); In the Matter of General Metals Corporation, Worsted Mills, Inc., 63 N. L. R. B. 1446 (1945); In the Matter of National Gypsum Company, 64 N. L. R. B. 59 (1945); In the Matter of Great Bear Logging Company, 59 N. L. R. B. 701 (1944); In the Matter of Swift & Company, 59 N. L. R. B. 1417 (1945); In the Matter of John Wood Manufacturing Company, Inc., 61 N. L. R. B. 846 (1945); In the Matter of Iroquois Gas Corporation, 61 N. L. R. B. 302 (1945).

²⁵In the Matter of California Wool Scouring Company, 5 N. L. R. B. 782 (1938); In the Matter of Silvray Lighting Inc., 18 N. L. R. B. 719 (1939); In the Matter of Malden Electric Company, 33 N. L. R. B. 79 (1941); In the Matter of The Texas Company, 64 N. L. R. B. 653 (1945); In the Matter of Whippany Paper Board Company, 61 N. L. R. B. 516 (1945); In the Matter of Cities Service Refining Company, 58 N. L. R. B. 28 (1944); In the Matter of The Mead Corporation, Heald Division, 63 N. L. R. B. 1129 (1945); In the Matter of American Smelting & Refining Company, 62 N. L. R. B. 1470 (1945).

tric X-Ray Corporation,²⁶ has placed a greater duty of diligence on the claiming union in this situation. An informal representation claim is no longer sufficient to prevent a subsequent contract from constituting a bar to investigation, unless it is followed within ten days by the claiming union's formal petition to the Board. The members of the Board admitted that in previous decisions they had not applied the contract-bar rule in situations in which rival claims antedated the execution or automatic renewal of the agreement, nor had they made any distinction between informal claims and formally filed petitions. They then stated the new rule to be: Where a petition is filed more than ten days after the assertion of a bare claim for representation, and no extenuating circumstances appear, an agreement, otherwise valid, which is executed in the interval should be held to constitute a bar. In adopting this new position the Board reasons that "it is no longer desirable to accord a mere naked assertion of majority equal dignity with that accorded a petition." By requiring filing, a claim is subjected to scrutiny of the Board, which prevents mere naked claims where there is no onus on the claimant to substantiate his interest. Such bare claims should not be able to defeat the legitimate bargaining process.²⁷

As suggested above, a common practice in contracts is to provide for automatic renewal of the contract at the end of the contract term, unless by a stipulated number of day's notice negotiations are reopened by one of the parties. An agreement renewed for a further term by the operation of such a clause is given the same effect as an agreement newly made. The leading decision on this is *In the Matter of Mill B., Inc.*,²⁸ where the Board discussed previous cases on the subject and upheld the validity of a sixty-day automatic renewal provision stating that such provisions were common in the field of collective bargaining agreements, and were within the policy of the Wagner Act as they tended to promote stability of employer-employee relations by avoiding a hiatus between contracts.²⁹ The Board has con-

²⁶67 N. L. R. B. No. 121 (1946).

²⁷If after a claim to representation has been made a petition is dismissed, the claim cannot be relied upon to prevent a contract from barring a determination of a representative in a new case instituted by the filing of a second petition. In the Matter of Dolese & Shepard Company, 57 N. L. R. B. 1598 (1944).

²⁸40 N. L. R. B. 346 (1942).

²⁹In the Matter of National Sugar Refining Company, 10 N. L. R. B. 1410 (1939); In the Matter of American Hair and Felt Company, 15 N. L. R. B. 572 (1939); In the Matter of Hettrick Manufacturing Company, 25 N. L. R. B. 722 (1940); In the Matter of Eaton Manufacturing Company, 29 N. L. R. B. 53 (1941); In the Matter of New York Central Iron Works, 56 N. L. R. B. 812 (1944); In the Matter of Elwood Machine & Tool Company, 61 N. L. R. B. 1618 (1945); In the Matter of Green Bay Drop Forge Company, 57 N. L. R. B. 1417 (1944). The Matter of Mill, B. case, *supra* note 28, *overruled* In the Matter of the American Oak Leather Company, 31 N. L. R. B. 1155 (1941).

sistently upheld thirty, sixty, or ninety-day automatic renewal provisions, but not those which specify an unreasonably longer period. Custom in the particular industry is the primary indication of what period of time is reasonable for this purpose.³⁰ Where a rival union has made proper claim to representation before the operative date of an automatic renewal clause or the effective date of a newly executed contract, the Board will proceed with the determination of the representative.³¹ And, of course, even before *In the Matter of General Electric X-Ray Corporation*,³² the filing of a petition prior to the effective date of an automatic renewal clause was sufficient to render the contract inoperative as a bar.³³ Likewise, where one of the parties to the contract has forestalled operation of an automatic renewal clause by giving timely notice to the other party, the contract cannot be relied upon to bar action by the Board.³⁴

In addition to the contracting parties, the employees themselves may prevent the operation of an automatic renewal clause and thereby terminate the contract by showing, prior to the effective date of the clause, an intent to choose a new bargaining representative.³⁵ An interesting case on this matter is *In the Matter of Dossin's Food Products*.³⁶ Here there was a closed shop contract with an automatic renewal clause. At a meeting, the majority of the employees voted to withdraw from the contracting union and affiliate with the petitioning union. Prior to the operative date of the renewal clause, two employees gave the employer a petition signed by less than a majority of the employees, requesting termination of the contract and of check-off thereunder, and enclosing a letter for the employer to send to the contracting union, to terminate the contract. The two employees informed the employer that a majority of the employees had affiliated with a new union. Then, after the date of the renewal clause, the petitioning union apprised the employer of its claim to representation, and initiated a representation case

³⁰In the Matter of Toledo Edison Company, 63 N. L. R. B. 217 (1945); In the Matter of New York Central Iron Works, 56 N. L. R. B. 812 (1944).

³¹In the Matter of Craddock-Terry Shoe Corporation, 55 N. L. R. B. 1406 (1944); In the Matter of Kimberly-Clark Corporation, 55 N. L. R. B. 521 (1944).

³²67 N. L. R. B. No. 121 (1946).

³³In the Matter of Portland Lumber Mills, 56 N. L. R. B. 1336 (1944). Where the petition alone is relied upon, the date when the petition was received and docketed by the Board's office, rather than the date of mailing, controls. In the Matter of Pointer-Williamette Company, 64 N. L. R. B. 469 (1945).

³⁴In the Matter of American Woolen Company (Webster Mills), 57 N. L. R. B. 647 (1944); In the Matter of Purepac Corporation, 55 N. L. R. B. 1386 (1944).

³⁵In the Matter of The Van Iderstine Company, 55 N. L. R. B. 1339 (1944); cf. *Triboro Coach Corporation v. Labor Relations Board*, 286 N. Y. 314, 36 N. E. (2d) 315 (1941).

³⁶56 N. L. R. B. 739 (1944).

with the Board. The Board, with Commissioner Reilly dissenting, refused to find that the contract precluded a new determination of a representative. It reasoned that since the petitioning union could have served proper notice prior to the operative date, there was no reason why a group of employees claiming to represent the majority could not do the same thing. Mr. Reilly argued that the Board's position was not tenable, because the petition had not been signed by a majority of the workers. The *General Electric X-Ray* case obviously limits this decision, but it would seem that if a minority of the employees now file a petition with the Board within the required ten days, claiming to represent a majority, this decision would validate their prior effort, by notice to their employer, to prevent an automatic renewal.³⁷

Quite often a contract will prematurely renew or extend (by amendment) an earlier agreement, thus apparently foreclosing the employees' opportunity to change their representative at the end of the original contract. The Board has consistently held that such a renewal or extension will not be a bar to a representation proceedings where the petitioning union files its claim prior to the expiration of the old contract.³⁸ This has been held even where the contract prematurely made was executed in good faith without any intent to evade the Act.³⁹

Contracts which violate important provisions of the Act are never a bar to investigation and certification. Examples occur where the employer bargains with the minority union, or where the contract is made with an employer-dominated organization.⁴⁰

³⁷In the Matter of *Colonie Fibre Company*, 9 N. L. R. B. 658 (1938); see *Triboro Coach Corporation v. Labor Relations Board*, 286 N. Y. 314, 36 N. E. (2d) 315 (1941), (dissenting opinion) cited by the Board in the Matter of *Mill B., Inc.*, 40 N. L. R. B. 346, 352 (1942). An employee, or any person acting on behalf of employees, may petition under Section 9 (c) of the Act. National Labor Relations Board, Rules and Regulations, Series 3, Art. III, Section 1.

³⁸In the Matter of *Memphis Furniture Manufacturing Company*, 51 N. L. R. B. 1447 (1943) (Partly overruling In the Matter of *Valve Bag Company*, 50 N. L. R. B. 481 (1943)); In the Matter of *Wichita Union Stockyards Company*, 40 N. L. R. B. 369 (1942); In the Matter of *Virginia-Lincoln Corporation*, 63 N. L. R. B. 590 (1945); In the Matter of *American White Cross Laboratories, Inc.*, 60 N. L. R. B. 1148 (1945); cf. In the Matter of *Erie Concrete & Steel Supply Company*, 55 N. L. R. B. 1124 (1944); In the Matter of *United States Finishing Company*, 63 N. L. R. B. 575 (1945).

³⁹In the Matter of *Michigan Light Alloys Corporation*, 58 N. L. R. B. 113 (1944). "Recently however, In the Matter of *Swift and Company*, 64 N. L. R. B. 880, Chairman Herzog expressed doubt whether the so called premature extension doctrine should apply in a situation where the extending contract is made in good faith and in the absence of any conflicting claims or knowledge thereof." 10th Annual Report, National Labor Relations Board, p. 20, n. 30.

⁴⁰For the latter type of situation, see *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 58 Sup. Ct. 571 (1938); *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72, 61 Sup. Ct. 83 (1940).

An interesting problem arises where a union, in a collective bargaining contract, has agreed not to organize or represent a certain class of employees employed by the contracting company. Then, later, but while the contract is in effect, the union brings a representation petition to represent the employees so excluded. The Board originally adopted the view that the contractual provision contravened the policy of the Wagner Act, by bargaining away rights guaranteed to the employees, and therefore should not be recognized by a dismissal of the petition.⁴¹ *In the Matter of Briggs Indiana Corporation* overruled this view and all cases following it.⁴² Here, still holding the contract a violation of the Act, a divided Board held that the intervention of the Board would be withheld from a union which thus sought to avoid its commitment. Mr. Reilly, who had dissented from the Board's original policy, concurred on the grounds of estoppel. Mr. Houston dissented, following the reasoning of the *In the Matter of Briggs Manufacturing* case,⁴³ now overruled. Thus, while agreed in principle that the union's contract is illegal, the Board as yet, is in disagreement on the application of the general rule to this particular situation.

A temporary situation, affecting representation proceedings generally, may affect the disposition of some cases involving our problem. This situation occurs during the period of reconversion, from war to peacetime economy. Sometimes, during this transition, operations are so disrupted that any collective bargaining set-up would be impracticable. If so, the Board will decline to proceed with a determination of the representative until conditions become more settled.⁴⁴ However, a mere reduction in the size of the working forces or a mere change in character or size of operations, will not bring this policy into play. The obstacle must be real and apparent.⁴⁵

⁴¹*In the Matter of Packard Motor Car Company*, 47 N. L. R. B. 932 (1943).

⁴²*In the Matter of Briggs Indiana Corporation*, 63 N. L. R. B. 1270 (1945). Cases specifically overruled by this case on this point: *In the Matter of Ford Motor Company*, 47 N. L. R. B. 946 (1943); *In the Matter of Briggs Manufacturing Company*, 49 N. L. R. B. 57 (1943) (Mr. Houston first considered this question in this case; it is to this decision he refers in his dissent in *In the Matter of Briggs Indiana Corporation*, 63 N. L. R. B. 1270 (1945)); *In the Matter of Briggs Indiana Corp.*, 49 N. L. R. B. 920 (1943); *In the Matter of The Murray Corporation of America*, 49 N. L. R. B. 925 (1943); *In the Matter of Arvey Corp.*, 50 N. L. R. B. 999 (1943); *In the Matter of Federal Motor Truck Co.*, 54 N. L. R. B. 984 (1944); *In the Matter of Great Lakes Steel Corp.*, 56 N. L. R. B. 242 (1944); *In the Matter of International Harvester Co., Farmall Works*, 56 N. L. R. B. 502 (1944); *In the Matter of Reo Motors, Inc.*, 61 N. L. R. B. 1579 (1945).

⁴³49 N. L. R. B. 57 (1943), see *supra* note 42.

⁴⁴*In the Matter of Armour and Company*, 62 N. L. R. B. 1194 (1945); cf. *In the Matter of Curtiss-Wright Corporation*, 63 N. L. R. B. 919 (1945).

⁴⁵*In the Matter of Edison General Electric Appliance Company, Inc.*, 63 N. L. R. B. 968 (1945); *In the Matter of Thompson Products Inc.*, 63 N. L. R. B. 1495 (1945);

III.

Thus far we have dealt with the problem of changing the bargaining representative generally, taking up the wide variety of situations that have arisen, and pointing out the guide-posts established by the decisions of the Board. The rest of the article will be confined to the closed-shop contract, where the problem of change is more complex and its difficulties are more acute. Here the rules of individual and collective freedom of action are more strictly limited. A certification of a new representative means a termination by the employer of a previously legal discrimination against employment of the new representative's members. The problem further involves protection of employees who desire a change yet, as a practical matter, may be in peril due to the power of the union over its internal affairs, and due to the ease with which the contracting union and employer may collaborate to maintain their contractual controls.

In order to face the problem it is important to see the precarious position of the individual worker, or minority group, under existing law, if they wish to oppose the certified union—a union which may expel them from the union and then require the company to expel them from their jobs. It is clear that such dissident workers cannot legally seek relief from their employer.

For several years following the *Jones and Laughlin Steel Case*,⁴⁶ which upheld the constitutionality of the Wagner Act, confusion existed as to individual and minority rights under the Act. This was because one of the reasons given for validating the statute was that the employer remained free to make contracts with individual employees, even though a majority had designated a representative. In 1944, three United States Supreme Court decisions⁴⁷ erased all doubt and established that collective bargaining must be entirely under the principle of majority rule so far as national policy is concerned. The chosen union and employer, through collective bargaining, establish and change the conditions of employment from time to time, binding all workers of a unit irrespective of individual or minority wishes or intent. An employee cannot by any individual contract alter the conditions

In the Matter of Reliable Nut Company, 63 N. L. R. B. 357 (1945); In the Matter of Consolidated Vultee Aircraft Corporation, 64 N. L. R. B. 400 (1945).

⁴⁶National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U. S. 1, 57 Sup. Ct. 615 (1937).

⁴⁷J. I. Case Company v. National Labor Relations Board, 321 U. S. 332, 64 Sup. Ct. 576 (1944); Order of Railroad Telegraphers v. Railway Express Agency, 321 U. S. 342, 64 Sup. Ct. 582 (1944); Medo Photo Supply Corporation v. National Labor Relations Board, 321 U. S. 678, 64 Sup. Ct. 830 (1944). For discussion of these cases, see Weyand, *Majority Rule in Collective Bargaining* (1945) 45 Col. L. Rev. 556.

governing his employment. Thus, through the principle of majority rule, whatever rights an employee theretofore had to bargain individually are now surrendered to the certified representative. Employers, in dealing with the certified bargaining agent, must accept this policy and abide by it. Thus, so far as the employer is concerned, individual or minority appeals for change or recognition must fall on deaf ears, or be referred back to the certified representative.

What, then, may employees do to protect themselves against a union which may expel them for their hostility? Relief in equity is the answer that might be first suggested. However, the courts have shown a great reluctance to meddle with the internal affairs of voluntary unincorporated associations. Where admission to membership in a union has been requested by an original applicant, it has been uniformly denied, both in cases of open and closed shops.⁴⁸ In a few cases, equitable relief has been granted where the plaintiff was a former member of the union seeking reinstatement in the face of an arbitrary refusal to admit him or after an arbitrary suspension.⁴⁹ There is little or no precedent at law to show what relief, if any, an employee may have in a suit for damages.⁵⁰ However, the very nature of the injury in most cases shows that the legal remedy is inadequate. Furthermore, the time and money necessary to go to court is in many cases a sufficient obstacle to prevent such actions from being maintained. In one case,⁵¹ the employer sued in equity and was denied relief on the basis that an injured party cannot enjoin enforcement of a by-law of a union. Thus, we see that at com-

⁴⁸Mayer v. Journeyman Stonecutters Association, 47 N. J. Eq. 519, 20 Atl. 492 (Ch. 1890); Greenwood v. Building Trades Council of Sacramento, 71 Cal. App. 159, 233 Pac. 823 (1925); Maguire v. Buckley, 301 Mass. 355, 17 N. E. (2d) 170 (1938); Harmon v. United Mine Workers, 166 Ark. 255, 266 S. W. 84 (1924); Shein v. Rose, 12 N. Y. S. (2d) 87 (Sup. Ct. 1939); Seman Muller v. Bricklayers, Masons, and Plasterers International Union of America, 6 N. J. Misc. 226 (Sup. Ct. 1928); Miller v. Ruehl, 166 Misc. 479, 2 N. Y. S. (2d) 394 (Sup. Ct. 1938); and Murphy v. Higgins, 12 N. Y. S. (2d) 913 (Sup. Ct. 1939), *aff'd* 260 App. Div. 854, 23 N. Y. S. (2d) 552 (1st Dept. 1940) where a closed shop existed.

⁴⁹Spayd v. Ringling Rock Lodge, 270 Pa. 67, 113 Atl. 70 (1921); Walsche v. Sherlock, 110 N. J. Eq. 223, 159 Atl. 661 (Ch. 1932); Cameron v. International Alliance, 118 N. J. Eq. 11, 176 Atl. 692 (1935); Collins v. International Alliance, 119 N. J. Eq. 230, 182 Atl. 37 (Ch. 1935); Fleming v. Motion Picture Operators Union, 124 N. J. Eq. 269, 1 A. (2d) 386 (1938); Wilson v. Newspaper and Mail Deliverers Union of New York and Vicinity, 123 N. J. Eq. 347, 197 Atl. 720 (Ch. 1938); Dorrington v. Manning, 135 Pa. Super. 194, 4 A. (2d) 886 (1939); Carral v. Local No. 269, 133 N. J. Eq. 144, 31 A. (2d) 223 (Ch. 1943). For a more complete discussion of the subject, see Newman, *The Closed Union and the Right to Work* (1943) 43 Col. L. Rev. 43.

⁵⁰Relief granted in Lucke v. Clothing Cutters Assembly, 77 Md. 396, 26 Atl. 505 (1893); *denied* in O'Keefe v. Local 463, 277 N. Y. 300, 14 N. E. (2d) 77 (1938); Shinsky v. O'Neil, 232 Mass. 99, 121 N. E. 790 (1919).

⁵¹Rhodes v. Musicians Protective Union, 37 R. I. 281, 92 Atl. 641 (1915).

mon law, there has been little that could be accomplished by way of forcing a discriminatory union to cease its activities against qualified employees.

When the National Labor Relations Act was passed, the question of a closed shop was the subject of considerable discussion because of the recognized monopoly it gives to labor unions, and the acts—otherwise discriminatory—which the employer must do in such a situation. The National Railway Labor Act had outlawed the closed shop.⁵² Both the Senate and House Reports on the Wagner Act show a reluctance to have the inclusion of the provision appear as a Congressional indorsement of the closed shop.⁵³ As a result, the closed shop clause was limited as much as possible by inserting it as a proviso in the subsection which in all other respects makes discrimination based on union affiliation an unfair labor practice: "Provided that nothing in this Act . . . or in any other statute of the United States, shall preclude an employer from making an agreement with a [statutory] labor organization . . . to require, as a condition of employment, membership therein. . . ."⁵⁴ The decisions of the Labor Board and the courts show that this proviso has been construed very strictly, so as to assure that it does not permit employers to discriminate against employees and unions outside the exception created by the very letter of the proviso.⁵⁵ But, since the limitations imposed by the Wagner Act apply only against the employer, the unions, so far as present legislation is concerned, are free to discriminate at will concerning internal matters.

Historically, the Labor Board has recognized this and adopted a hands-off policy regarding union affairs.⁵⁶ Lacking any specific authority to regulate the structure and practices of labor organizations (except as an incident to the enforcement of Section 8 (2) of the Act prohibiting "company unionism") the Board refused to permit alleged violations of civil or criminal law, or of moral and democratic precepts, to affect a union's status as a bargaining agent.⁵⁷

⁵²48 STAT. 1188 (1934), 45 U. S. C. § 152(5) (1940).

⁵³SEN. REP. No. 573, 74th Cong., 1st Sess. (1935) 11-12; H. R. REP. No. 1147, 74th Cong., 1st Sess. (1935) 19-20; 79 CONG. REC. 7674 (1935).

⁵⁴49 STAT. 452 (1935), 29 U. S. C. § 158 (3) (1940).

⁵⁵In *National Labor Relations Board v. Electric Vacuum Cleaner Company*, 315 U. S. 685, 695, 62 Sup. Ct. 846, 851 (1942) the Court said: "The provision for a closed shop, as permitted by Section 8 (3), follows grammatically a prohibition of discrimination in hiring. These words of exception must have been carefully chosen to express the precise nature and limits of permissible employer activity in union organization." See Note (1943) 56 HARV. L. REV. 613.

⁵⁶In *Matter of Aluminum Company of America*, 1 N. L. R. B. 530 (1936).

⁵⁷In *Matter of Eppinger & Russell*, 56 N. L. R. B. 1259 (1944); In *Matter of Wisconsin Gas and Electric Company*, 57 N. L. R. B. 285 (1944); In *Matter of Miehle Printing Press & Manufacturing Company*, 58 N. L. R. B. 1134 (1944); In the

During the past ten years, the public has had a growing appreciation of the problems and injustices resulting from the existing law. At the same time, sentiment against all form of racial and religious discrimination has resulted in agitation for legislation forbidding such discrimination in any field. Some states have passed statutes forbidding or restricting discriminatory rules of admission to labor unions, such as the Wisconsin Act which, referring to close-shop contracts, requires that the State Board "shall declare any such all-union agreement terminated whenever it finds that the labor organization involved has unreasonably refused to receive as a member any employee" of the contracting employer.⁵⁸

Progress against discrimination has been made recently in the courts as well, chiefly against discrimination on account of race. The case of *James v. Marinship Corporation*⁵⁹ is interesting in this connection. The defendant corporation had a closed-shop contract with the defendant union, Local No. 6 of the International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers of America. The union refused to admit negroes, but set up an auxiliary Local A-41 for them under which they were controlled and dominated by the main local. Members of A-41 had to procure work clearances from Local No. 6 and pay dues. Yet they had no voice in the selection of business agent or grievance committee nor in the establishment of job classifications. Moreover, A-41 could be abolished at any time by Local No. 6. Local No. 6 demanded of the company that all negro employees must be members of A-41 in order to be employed. In compliance with this demand, the company gave a 48-hour discharge notice to all negroes not affiliated with A-41.

Plaintiff, a negro employee, on behalf of himself and about one thousand others, brought a bill in equity alleging the auxiliary was not a *bona fide* union but rather a means of discriminating against negro workers. The California Supreme Court granted an injunction restraining the union from compelling negroes to join A-41 and from inducing or compelling the company to fire or not hire negroes for this reason; and from refusing to admit negroes into Local No. 6 on the same terms as whites. Under existing conditions, the company was restrained from refusing to hire negroes without clearance from Local No. 6, but if negroes were admitted to the union with-

Matter of Land O'Lakes Dairy Company, 59 N. L. R. B. 255 (1944). *But see* 10th Annual Report, National Labor Relations Board, pp. 17-18.

⁵⁸WIS. STAT. (1945) § 111.06 (1) (c); KAN. REV. STAT. ANN. (Supp. 1945) par. 44-801; N. Y. CIVIL RIGHTS LAW § 43; N. Y. EXECUTIVE LAW § 131; PA. STAT. ANN. (Purdon 1945) tit. 43, § 211.6 (1) (c) and 211.3 (f).

⁵⁹25 Cal. (2d) 721, 155 Pac. (2d) 329 (1944).

out discrimination, then the company might require the clearances. The court said:

"In our opinion an arbitrarily closed or partially closed union is incompatible with a closed shop. Where a union has, as in this case, attained a monopoly of the supply of labor by means of a closed shop agreement and other forms of collective labor action, such union occupies a quasi public position similar to that of a public service business and has its corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal organizations. Its asserted right to choose its own members does not merely relate to social relation; it affects the fundamental right to work for a living."⁶⁰

In this case, the court expressly refused to pass upon discrimination where the union does not have a monopoly, and the court laid down no test as to what would constitute a labor monopoly. But concededly, a closed shop or maintenance of membership would fall within the rule.⁶¹

The United States Supreme Court has spoken even more strongly, and to the same effect, in the *Tunstall* and *Steele* cases⁶² under the Railway Labor Act. Here there was no closed shop, but nevertheless the court held that where a union represents a unit of employees, it represents the minority just as much as it does the majority, and must do so fairly and without discrimination or any sacrifice of the rights of the minority for the benefit of the majority. The court found that the powers and rights of the bargaining agent are comparable to those of a legislature and must be exercised in a like manner, fairly and without discrimination.

A recent leading decision by the National Labor Relations Board regarding racial discrimination is *In the Matter of Larus & Brother Company, Inc.*⁶³ Here, the Board recognized that it has no authority to issue orders to labor organizations, but said that a union which discriminates against employees in the bargaining unit in regard to tenure of employment, rates of pay, or other substantive conditions of employment on the basis of race,

⁶⁰*Contra*: *Miller v. Ruehl*, 166 Misc. 479, 2 N. Y. S. (2d) 394 (Sup. Ct. 1938), and *Murphy v. Higgins*, 12 N. Y. S. (2d) 913 (Sup. Ct. 1939) held such relief required statutory action, and resulted in N. Y. CIVIL RIGHTS LAW (note 58, *supra*) which was held constitutional in *Railway Mail Association v. Corsi*, 293 N. Y. 315, 56 N. E. (2d) 721 (1944), *aff'd* 326 U. S. 88, 65 Sup. Ct. 1483 (1945).

⁶¹New Jersey has adopted a similar rule. *See Carral v. Local No. 269*, 133 N. J. Eq. 144, 31 A. (2d) 223 (Ch. 1943) and *Wilson v. Newspaper and Mail Deliverers Union of New York and Vicinity*, 123 N. J. Eq. 347, 197 Atl. 720 (Ch. 1938).

⁶²*Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210, 65 Sup. Ct. 235 (1944); *Steele v. Louisville & Nashville R.R.*, 323 U. S. 192, 65 Sup. Ct. 226 (1944), both cases of discrimination against negroes.

⁶³62 N. L. R. B. 1075 (1945).

color, or creed will not be permitted certification by the Board as statutory representative. In adopting this policy, the Board is construing the term "representative" as employed in the Act not only in the light of the express policies of the statute (to fairly represent all employees of a bargaining unit),⁶⁴ but also in view of the national policy against racial discrimination.⁶⁵ A labor organization's right to prescribe the qualification for membership will be respected, but if it seeks to become the representative under a closed-shop arrangement, then it must not exclude employees on a discriminatory basis. An earlier case, decided the same year, *In the Matter of Atlanta Oak Flooring Company*,⁶⁶ held that a statutory bargaining agent may segregate racial groups within its membership into separate but equally privileged locals or branches of its organization. Thus, the present rule of the Board is: "Neither exclusion from membership nor segregated membership *per se* represents evasion on the part of a labor organization of its statutory duty to afford 'equal representation.' But in each case where the issue is presented the Board will scrutinize the contract and conduct of a representative organization and withhold or withdraw its certification if it finds that the organization has discriminated against employees in the bargaining unit through its membership restrictions or otherwise."⁶⁷

The Board concedes that its statutory authority to require a union to offer membership to all employees in the bargaining unit, except in the situation where the union has a closed-shop contract, is open to serious question. The Board has said: This Board has no express "authority to remedy undemocratic practices within the structure of union organizations, but we have conceived it to be our duty under the statute to see to it that any organization certified under Section 9 (c) as the bargaining representative acted as a genuine representative of all the employees in the bargaining unit. Lacking such authority to insist that labor organizations admit all the employees they purported to represent to membership, or to give them equal voting rights, we have in closed shop situations held that where a union obtained a contract requiring membership as a condition of employment, it was not entitled to insist upon the discharge of, and the employer was not entitled to discharge, employees discriminatorily denied membership

⁶⁴49 STAT. 452 (1935), 29 U. S. C. § 159 (a) (1940).

⁶⁵Policy found in U. S. CONST. AMENDS. V, XIV; EXEC. ORDER No. 8802 and 9346 prohibiting discrimination in employment in war industries, and calling on all labor organizations to eliminate such practices; *Steele* and *Tunstall* cases, *supra* note 62; *Wallace Corporation v. National Labor Relations Board*, 323 U. S. 248, 65 Sup. Ct. 238 (1944); *Hunt v. Crumbach*, 325 U. S. 821, 65 Sup. Ct. 1545 (1945).

⁶⁶62 N. L. R. B. 973 (1945).

⁶⁷10th Annual Report, National Labor Relations Board, pp. 17-18.

in the union. In such situations, being without power to order the union to admit them, we have ordered employers to reinstate them."⁶⁸

IV.

The subject of racial discrimination has been explored in some detail because it presents problems collateral to the ones arising out of changing the bargaining representative, and because it is illustrative of the unilateral action possible against employees within union structure as it exists today, free from control. Destroying racial discrimination in unions is for several reasons, however, much the simpler task; *first*, because it is more easily recognized. The by-laws of the union will state, for example, that negroes will not be admitted; or lacking such definite proof, investigating authorities can at least start with the definite fact that those discriminated against were of a particular race or creed. *Secondly*, the issue of racial discrimination has become a national one, not only in labor organizations but in all phases of society, so that the trend of general legislation outlawing such conditions will greatly assist in cleaning them up in the labor field as well. Because the statutes deal only with racial and religious discriminations, and because the Board lacks power to regulate the internal affairs of unions, solution of the general problem has been most difficult.

Lacking power to issue affirmative orders against labor organizations, the Board has circumvented the restriction in some instances by placing an order against the employer, whose compliance has had the effect of correcting the union activities which the Board believes are against the policy and spirit of the Act. The difficulty here is that the employer must bear the burden of legal penalty alone, and in some cases even though he has acted in good faith and without discriminatory motive. Another method has been to withhold certification of a union which the Board thinks is wrongfully discriminating against employees, based on the fact that under Section 9 of the Act, certification by the Board is not mandatory. The difficulty here is to know whether the Board is going beyond its administrative powers and in effect legislating on a matter which only Congress should decide. If so, then a solution would be to amend the Wagner Act giving the Board supervisory powers over the reasonableness of admission and expulsion requirements in labor organizations. Enforcement could be obtained by providing that failure to meet the Board's standards would constitute an unfair labor

⁶⁸In the Matter of Larus & Brothers Company Inc., 62 N. L. R. B. 1075, 1082 (1945); In the Matter of Monsieur Henri Wines Ltd., 44 N. L. R. B. 1310 (1942); In the Matter of Rutland Court Owners Inc., 44 N. L. R. B. 587, 46 N. L. R. B. 1040 (1943); In the Matter of Wallace Corporation, 50 N. L. R. B. 138 (1943).

practice and subject the union to both affirmative and negative orders similar to those now in effect against employers;⁶⁹ or by denying such a union the privilege of being certified by the Board as the statutory bargaining representative; or by merely denying the union the right to enter into a closed-shop contract. Of these three possibilities, the first would apply the same sort of a remedy for an unfair labor practice to the labor organization as that which is applied to employers. Moreover, as a corrective measure it would be effective because it applies the penalty to the precise activity which it is desired to correct, rather than destroying other legitimate rights which the union, or—more important—the union's members, may have under the Act.⁷⁰

A practical difficulty in suggesting Congressional action of this sort is that it opens the door to those who would seek to cut down the legitimate rights which employees have gained under the Wagner Act. By creating one instance here where a labor organization could be guilty of an unfair labor practice, the whole frankly one-sided theory of the Act would be changed. Therefore, it is doubtful whether such a step would be wise; and certainly the forces in Congress friendly to labor would be reluctant to accept such legislation.

The other two remedies are to a certain extent now being imposed by the Board under its existing powers. By writing them into legislation, the question of the Board's power so to police the internal affairs of undemocratic labor organizations would be resolved, and the present policy of the Board could be extended to open shop situations. However, here again, there is doubt as to the wisdom in laying the Act open to attack. The Board has done reasonably well in coping with the situation under the present statute, and perhaps it is wiser to continue with this method of meeting the problem, at least so long as the courts do not reject the legality of the Board's present policy. If for other reasons, Congress should undertake the task of overhauling the Act, provisions assuring democracy and preventing discrimination in labor organizations might well be inserted. Unless this occurs, the evils of piecemeal amendments could well be greater than the benefits.

Under a closed-shop contract, if the contracting union is permitted complete control over selection and expulsion of members, and the contract is

⁶⁹For an example of a state statute setting up unfair labor practices by employees, see WIS. STAT. (1945) § 111.06 (2).

⁷⁰Failure to comply with the Board's order, when enforced by a court order, would subject the union and its officers to contempt proceedings. The Board already has the power to make such orders against the employer.

given strict legal efficacy similar to that of commercial contracts, one can easily see that the relationship set up between an undemocratic union and the employer could be maintained in perpetuity. By no stretch of the imagination can one conceive that the drafters of the Wagner Act intended or would condone such a situation, which defeats the very purpose of the legislation. To prevent such a conspiracy or combination, and to achieve the true results envisaged by the policy of Congress as stated in the Act, has been no easy task for the Board. The courts, shackled by their traditional devotion to the protection of contract rights, have been faced with even more of an anomaly. Perhaps, if the drafters of the Act could have foreseen this difficulty, they would have given the Board some supervisory power over the contracts; but it is possible that to have done so in 1935 would have been to construct a constitutional barrier which the courts would have found impassable.

The Board has sought to give due recognition to valid closed-shop contracts, yet it examines the facts of each case to be sure that no other section of the Act is violated by acts resulting from the contract. Thus *In the Matter of M. & J. Tracey, Inc.*,⁷¹ under a contract similar to a closed shop, the Board permitted the employer to enforce the provisions of the agreement, on request from the bargaining agent, that only members in good standing in that organization be permitted to hold jobs. Yet in a representation petition arising out of the same case, the Board ordered that, since the contract in question, though valid, was for three years and over two years of the term had expired, the contract would not bar a determination of which union the majority of the employees now wished to represent them.

In *National Labor Relations Board v. Electric Vacuum Cleaner Company*,⁷² the Board had found a closed-shop contract in violation of the Act and had ordered reinstatement of employees discharged thereunder. Here a valid contract had existed whereby men employed at the time of the signing of the contract were treated as being in an open shop, and all new employees as being in a closed shop. When a rival union sought to organize the workers, the company aided the bargaining agent in coercing the old employees to remain in the union, and closed the plant temporarily to permit the union "to get their lines in order," during which time they negotiated a new contract providing for a closed shop for all. The Board was sustained in its findings that this violated the Act which prohibits contracts entered into

⁷¹12 N. L. R. B. 916 (1939).

⁷²315 U. S. 685, 62 Sup. Ct. 846 (1942).

with a labor organization assisted by an employer under the closed shop proviso of section 8 (3).

In another case, where the employer shut down his shop during rival-union difficulties, his action was upheld. This was the leading case of *In the Matter of Ansley Radio Corporation*.⁷³ Following a close victory in a consent election, an A. F. of L. union signed a closed-shop contract for one year in October, 1936. During an internal dispute in the union in the spring of 1937, the company discharged two employees who advocated switching to the C.I.O., yet were still in good standing with the A. F. of L. The Board held that such an act violated sections 7 and 8 (1), as coercing employees in the exercise of their rights. Toward the end of May, 20 out of the 24 employees swung over to the C.I.O. and requested that the company bargain with them. The company, feeling bound by its contract, referred the petitioners to the N.L.R.B., and sought aid from the Board itself without effect. It then closed down its plant temporarily to avoid being caught by the closed-shop contract and to give the workers time to reconsider. There was no evidence of discrimination or preference shown by the company. During the shut-down, the A. F. of L. suspended the insurgents, and notified the company that it was ready to supply workers under the contract if the company would open up. This was done, and pursuant to the terms of the contract, those workers not in good standing with the A. F. of L. were not rehired. The Board held that the company's action was not an unfair labor practice. The actual lay-offs were made under the closed-shop contract which was valid,⁷⁴ and Chairman Madden said: ". . . to hold that a closed shop or other collective agreement may be disrupted at any time that a majority of the employees in the unit determine upon another bargaining representative would open the door wide to that very instability and uncertainty in labor relations which the Act is designed to remove."⁷⁵

⁷³18 N. L. R. B. 1028 (1939).

⁷⁴The contract was actually a preferential contract, later changed to a closed shop contract, but in either case, the discharges were valid, and the facts found by the Board showed that all parties and employees considered the contract as one for a closed shop.

⁷⁵Mr. Smith, dissenting, did not subscribe to the majority's desire for stability at this price. On the grounds that the right to change representatives freely under section 9 is paramount to contractual rights under the section 8 (3) proviso, Mr. Smith felt that the lay-off by the company was discriminatory because a change of representatives (the majority's switch to the C.I.O.) had rendered the contract no longer effective, so that the employer would not have been bound to discharge C.I.O. members. He felt that the employer's honesty was immaterial.

For other cases showing that under a valid closed-shop contract, the employer must not in any other way aid the contracting union, see *Hazel-Atlas Glass Company v. National Labor Relations Board*, 127 F. (2d) 109 (C. C. A. 4th, 1942); In the *Matter of American-West African Lines, Inc.*, 21 N. L. R. B. 691 (1940).

The difference in approach between the courts and the Board, especially in the early days of the Act, is well shown in the early leading case of *M. & M. Wood Working Company v. National Labor Relations Board*.⁷⁶ Here an A. F. of L. union had a closed-shop contract running from May 3, 1937 to March 1, 1938. On September 12, 1937, a large majority of the workers, including union officers, transferred their allegiance to the C.I.O., forming a new union. They demanded jobs and were refused them by the company which maintained that it was bound by the contract. Its position was supported by the fact that 39 of the employees had remained in the A. F. of L. union, whose charter stated that it could only be withdrawn in the event that less than ten members remained in good standing. The A. F. of L. never consented to the dissolution of the union, nor considered it dissolved. The Board found that the C.I.O. union had succeeded to the rights of the older union, and ordered the company to cease and desist its unfair labor practices under sections 7 and 8 (1) of the Act by coercing the workers in their choice of representatives, etc. The Court denied enforcement of the order and sustained the position taken by the employer, holding that the contract was valid, and therefore that there had been no discrimination. The strict contract rule applied by the court in this case was followed by the Circuit Court of Appeals in the *Electric Vacuum* case⁷⁷ in reversing the Labor Board. The court there found that the employees were ethically and legally bound not to disrupt the original contract to which most of them had given written authorization. Therefore, when they brought in an outside union organizer, they violated their agreement and became subject to discharge. Since the reversal of this decision by the Supreme Court, the Board and the Courts have narrowed their area of divergence in approaching this problem. Thus, the rigidity of a contract no longer will be permitted to prevent a change in representatives where the purposes of the Act would permit such a change.

In recent years, further progress has been made toward protecting the rights of employees under section 9, where a closed-shop contract exists. On the theory that freedom to make such a contract does not permit its use in any way to block the Board's duty to determine what union the employees desire, a buffer period has been set up toward the end of closed-shop contracts, during which time employees may not be discharged under the contract for their activities on behalf of a rival union. This policy was established in *In the Matter of Rutland Court Owners, Inc.*⁷⁸ In this case, two

⁷⁶101 F. (2d) 938 (C. C. A. 9th, 1939).

⁷⁷120 F. (2d) 611 (C. C. A. 6th, 1941), *rev'd in* 315 U. S. 685, 62 Sup. Ct. 846 (1942).

⁷⁸44 N. L. R. B. 587 (1942).

weeks prior to the end of a closed-shop contract for one year, six of the seven employees joined a rival union due to their dissatisfaction with their representative. The rival notified the employer of this. Subsequently, on request of the contracting union, five of the workers were discharged and replacements were furnished by the contracting union. After this, a new contract was negotiated. The Board held that the discharge of the employees was an unfair labor practice. To discharge the very employees whose representation was in issue, because they had placed their representation in question, was held to be inconsistent with the policy of the Act. To hold otherwise would impair, rather than protect, self-organization, and thwart, rather than encourage, collective bargaining by representatives of the employees' genuine choice. The Board said that the mere fact that all closed shops are not unlawful does not mean that they can be made perpetual because they were validly initiated pursuant to the Act; and the workers' right to choose their own bargaining representative necessarily includes the right "at some appropriate time" to change that representative.⁷⁹

The Board has limited the exception period, established in the *Rutland* case, to an indefinite period close to the end of the contract term. Where a contract had eight months to run, the Board held, in a recent case,⁸⁰ that an employer was justified in granting the contracting union's request that an employee be discharged after his expulsion from the union for attempting to persuade other union members to designate a rival organization as representative. The Board placed emphasis on the time element and stated that dual unionism is justified only if the existing contract is near termination. Just how near the end of the agreement one must be to come within the rule is not known. Evidently the Board intends to keep its rule flexible in this respect, and to judge each case on its own merits. Employees campaigning for a change must run the risk that the *Rutland* rule might not cover them, and likewise employers are forced into the difficult position of guessing which way the Board will hold before they discharge under a closed-shop contract. But certainty may be coming in from another quarter—the most recent decisions indicate that discharges for purely organizational activities on behalf of a rival union will never be condoned by the Board so long as the employee does all he can do to maintain his membership in the contracting union.⁸¹

⁷⁹The Board cited *Hamilton Brown Shoe Company v. National Labor Relations Board*, 104 F. (2d) 49 (C. C. A. 8th, 1939) and the *Electric Vacuum* case, 315 U. S. 685, 62 Sup. Ct. 846 (1942).

⁸⁰In the Matter of *Southwestern Portland Cement Co.*, 65 N. L. R. B. No. 1 (1945).

⁸¹See In the Matter of *Federal Engineering Co.*, 60 N. L. R. B. 592 (1945), *enfd.* 153 F. (2d) 233 (C. C. A. 6th, 1946).

In this connection, a leading and controversial case was *Wallace Corporation v. National Labor Relations Board*,⁸² where the Supreme Court sustained the Board's position that a closed-shop contract was invalid where entered into by an employer who knew at the time that the contracting union would use it to discriminate against the members of a rival organization. In the dissenting opinion, Mr. Justice Jackson took vigorous exception to the idea that the Board, or worse in this case, the employer, should police the conduct of unions in their collective-bargaining agreements. The majority of the court, in line with the *Tunstall*⁸³ and *Steele*⁸⁴ cases decided the same day, took the view that the union selected as the bargaining agent became the agent of all of the employees within the unit, and as such was required to represent their interests fairly and impartially. Knowing of the unlawful scheme, the company had a duty not to make the contract. It is interesting to note, however, that the Court did not state squarely that the closed shop and a closed union are illegal in combination. Since the Act sanctions the closed shop and contains no language that suggests an intention to regulate internal union affairs, the question how far the Board and the courts may go is left in doubt. The dissenting opinion in the principal case, and the Board itself,⁸⁵ indicate that Congress should clear up the controversy by legislative pronouncement.

While the point is not raised by the opinions in the *Wallace* case, one commentator⁸⁶ has forcefully suggested that the discrimination by this union, given by statute the delegated power to represent *all* the workers in the unit, was sufficiently arbitrary to constitute a violation of the Fifth Amendment to the Constitution. Although the employer should be permitted to rely on his closed-shop contract, if entered into in good faith, the union itself should be liable in some form of action in the courts for its unlawful discrimination against those whom it has a statutory duty impartially to represent. While this remedy would satisfactorily avoid the objectionable result of the *Wallace* case—the putting of an onus on the employer to police the contracting union—we have seen that the remedy of the employee against

⁸²323 U. S. 248, 65 Sup. Ct. 238 (1944), *affirming* 141 F. (2d) 87 (C. C. A. 4th, 1944), *which enforced* 50 N. L. R. B. 138 (1943). A five to four decision, Justices Jackson, Stone, Roberts, and Frankfurter dissented. *See also* In the Matter of Wallace Corp., 68 N. L. R. B. No. 33 (1946) ordering reinstatement of an employee discharged after the first case began, where he had been ousted from the contracting union for non-payment of dues. The Board said that any discharge under the contract would be unlawful because the first *Wallace* case had held the contract invalid.

⁸³323 U. S. 210, 65 Sup. Ct. 235 (1944).

⁸⁴323 U. S. 192, 65 Sup. Ct. 226 (1944).

⁸⁵*See* In the Matter of Larus & Brother Co., 62 N. L. R. B. 1075 (1945).

⁸⁶Dodd, *The Supreme Court and Labor, 1941-1945* (1945) 58 HARV. L. REV. 1037-1040.

the union in the courts is dubious at best, and it is doubtful that the Fifth Amendment was meant to cover this situation. The discrimination here is neither racial, nor religious, nor political, but arises out of the right of unions to govern themselves and to deal with those members who would seek to destroy the very existence of the union from within. The fact that some unions may abuse their privilege of self-government does not bring the issue under the Constitutional Amendment in question.

As suggested before, an amendment to the Wagner Act outlawing a closed union in the case of a closed-shop contract, and giving the Board power to assure democracy in unions, would solve the particular problem. Unions have received much from friendly legislation, which has enabled them to grow into a permanent, recognized part of our economy. In return, the public and individual working men have a right to be sure that labor organizations are democratic and non-discriminatory. The issue regarding the need for legislation was well stated by Mr. Justice Jackson's dissent in the *Wallace* case: "This and other cases before us give ground for belief that the labor movement in the United States is passing into a new phase. The struggle of the unions for recognition and rights to bargain, and of workmen for the right to join without interferences, seems to be culminating in a victory for labor forces. We appear now to be entering the phase of struggle to reconcile the rights of individuals and minorities with the power of those who control collective bargaining groups. . . . But here we deal with a minority which the statute has subjected to closed-shop practices. Whether the closed shop, with or without the closed union, should . . . be permitted without supervision is in the domain of policy-making," not for the courts or the National Labor Relations Board.⁸⁷

In view of the position taken by the majority of the Court in sustaining the Board in the *Wallace* case, it would seem that legislation is not imperative at this time, although it will be remembered that the majority does not hold affirmatively that a closed-shop and closed-union are incompatible, and the question of the Board's power was hotly contested by the dissenting Justices.

Lacking any legislative pronouncement, the Board has continued along the lines set up in the *Wallace* and *Rutland* cases. In the *Matter of Federal Engineering Company, Inc.*,⁸⁸ the contracting union demanded that a member in good standing be discharged because of his organizational activity on

⁸⁷*Wallace Corp. v. National Labor Relations Board*, 323 U. S. 248, 271, 65 Sup. Ct. 238, 248 (1944).

⁸⁸60 N. L. R. B. 592 (1945), *enforced in this respect*, 153 F. (2d) 233 (C. C. A. 6th, 1946); *rehearing denied, with opinion*, 155 F. (2d) 17 (C. C. A. 6th, 1946).

behalf of a rival union. The Board held that the contract did not provide justification for the discharge because the employee had complied with the membership requirements of the closed-shop contract within the meaning of the Act. In this case, the Board expressly overruled all previous decisions inconsistent with this holding.⁸⁹

In *the Matter of Portland Lumber Mills*,⁹⁰ an employee was discharged following expulsion from the contracting union for acting as an observer for a rival union in an election conducted by the Labor Board. The Board held that this action violated section 8 (3) of the Act because the employer knew of the grounds of expulsion. This was so even though the employer had acted in good faith believing that he was bound to accede to the terms of the contract, and the contracting union's demand for discharge.

A similar result obtained in *In the Matter of Phelps Dodge Copper Products Corporation, Habirshaw Cable and Wire Division*,⁹¹ where a discharge of employees for failure to maintain union membership on the basis of a maintenance of a membership contract which had expired the day before the discharges were effected, notwithstanding the fact that the employer had initiated the action on the failure to maintain membership prior to the expiration of the contract, was held to violate the Act. Another interesting development also arose out of this case, relating to the right of an employer to execute a closed-shop contract with one of two competing unions during the pendency of an undetermined question concerning representation. The Board held that that was an unfair labor practice by the employer insofar as the employees were required to join or remain members of the contracting union as a condition of their employment.

In *In the Matter of Midwest Piping and Supply Company, Inc.*,⁹² the Board again held it a violation of sections 7 and 8 (1) for the employer to make a closed-shop contract, under similar circumstances, where he had knowledge that conflicting representation petitions, filed by both unions, were still pending. In this case, the employer had concluded honestly that the contracting union had a majority. The Board held that nevertheless, granting a closed-shop contract constituted illegal assistance to the union, and the employer was required to withhold recognition of the contract until an adjudication by the Board. It reasoned that its power of investigation and certification is

⁸⁹In *the Matter of Taylor Milling Corp.*, 26 N. L. R. B. 424 (1940), and *In the Matter of United Fruit Co.*, 12 N. L. R. B. 404 (1939) and "other like cases" are overruled so far as inconsistent with the *Federal Engineering Company* case.

⁹⁰64 N. L. R. B. 159 (1945).

⁹¹63 N. L. R. B. 686 (1945).

⁹²63 N. L. R. B. 1060 (1945).

exclusive, and that when a representation case is pending before the Board an employer may not disregard the jurisdiction of the Board and preclude the holding of an election, by resolving the conflicting claims on the basis of proof which the employer deems sufficient but which is not necessarily conclusive. The effect of such action is to accord unwarranted prestige and advantage to one of two competing unions and thereby to prevent a free choice by the employees.

V.

In writing this article, the purpose has been to produce a panoramic view of the field, rather than to enlist in any crusade for reform. In fact, the need for any new law to deal with this subject by itself seems doubtful.

In the many problems that have arisen affecting changes in worker's collective bargaining representatives, the Board has done well. Those problems not completely settled are being resolved by the Board as forcefully as possible within the allowable limits of the Wagner Act. This conclusion is based on a belief that by adopting its approach of flexible interpretation of the Act, the Board has fulfilled wisely its function as the administrative agency charged with carrying out the provisions and purposes of the Act so far as change of representatives is concerned. As pointed out before, the drafters of such a major piece of legislation could not foresee many problems which have arisen during the past eleven years, and Congress has not produced any corrective amendments. Therefore, the only method has been for the Board to draw on its general discretionary powers and lay down a ruling which under its interpretation best satisfied the policy of the Act. As we have seen, the courts in recent years have generally upheld the Board in cases within our field of discussion.

Perhaps the most controversial situation has been that arising out of the closed-shop, and illustrated by the *Rutland* and *Wallace* cases. In both of these situations, the Board's decisions were directed toward the protection of employees' rights, which is certainly in line with the policy of the Act. That some such decisions may seem to penalize only the employer and leave a wrong-doing union untouched is not to be doubted, but that, we submit, should eventually be a matter for legislative action. One must remember that under the National Labor Relations Act, only the employer can be held liable, and a union can do no wrong. The field of union discipline was left by Congress for the states. Moreover, as was pointed out by the court in *National Labor Relations Board v. Intercity Advertising Company, Inc.*,⁹³

⁹³154 F. (2d) 244 (C. C. A. 5th, 1946).

the reported cases are few where the employer has been completely innocent.

Correction of the minor weaknesses of the Wagner Act should not be undertaken piecemeal. For reasons not within the scope of this article, a general revision of the nation's labor laws seems to many to be desirable, and the President has asked Congress repeatedly to undertake the task. When action of this sort is taken up, the difficulties involved in changing unions can be wiped out by amendments (also desirable for other reasons) to insure democracy in unions and to prevent union discrimination against employees within the bargaining unit which it represents. But as President Truman said in his veto of the Case Bill:⁹⁴ "We accomplish nothing by striking at labor here and at management there. Affirmative policy is called for. . . ."⁹⁵

⁹⁴H. R. 4908, 79th Cong., 2d Sess., May 25, 1946.

⁹⁵N. Y. Herald Tribune, June 12, 1946, p. 16.