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I. ECONOMIC POWER AND COLLECTIVE BARGAINING—A RATIONALIZATION

THE UNDERLYING THESIS of this critique is the notion that we are irrevocably committed to a federal labor policy of encouraging the establishment and maintenance of collective bargaining relationships. The economic wisdom of collective bargaining as a policy is somewhat beyond the scope of this discussion, yet some observations seem appropriate.

Collective bargaining means, among other things, price-fixing in the labor market on a large scale. This is perhaps a strange kind of activity to encourage in light of our historical lip-service to the notions of free competition. Yet we have never been quite sure whether competition means price competition or "fair" price competition, or

*This article is limited to a treatment of Title I of the Labor Management Relations Act of 1947, Pub. L. No. 101, 80th Cong. 1st Sess., 29 U.S.C.A. § 141 *et seq.* (Supp. July, 1947), which amends the Wagner Act by substantially rewriting it and which is herein termed the National Labor Relations Act of 1947

Title II, which deals with the Federal Mediation and Conciliation Service (formerly the United States Conciliation Service) and national emergency strikes and lockouts, Title III, which establishes substantive rights for private parties and defines some new crimes, and Title IV, which sets up a Joint Senate-House Committee to study and report on labor relations, are not discussed.

For two different approaches to the Taft-Hartley Act, see Cox, *Some Aspects of the Labor Management Relations Act,* 1947, 61 HARV. L. REV. 1, 274 (1947, 1948) and Watt, *The New Deal Court, Organized Labor, and the Taft-Hartley Act,* 7 LAWYERS GUILD REVIEW 193, 237 (1947).

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whether a free market means one in which prices are free from both private and public controls or one in which business men are free to destroy their competitors and impose their own controls.[1]

Even under the Sherman Act the courts have apparently been more concerned with the abuses of private price-fixing than they have been with private price-fixing itself.[2] And clearly the Sherman Act has not prevented the concentration of corporate power.[3] The rapid growth of vast corporate empires has produced an economy in which more and more people depend upon fewer and fewer people for their economic welfare,[4] and it is not surprising that workers have sought to exercise some control over their own destinies by forming powerful trade unions.

The trade union is, among other things, the workers' device for getting a larger share of the national income. It seems fair to say that we have helped to make the large-scale development of this institution inevitable (and economically necessary) by permitting the tremendous growth of the corporate structure as the business man's device for getting a larger share of the national income.

In addition to the political difficulties involved in establishing "free" labor markets by emasculating a trade union movement with about 15,000,000 members, we face the fact that such a policy would probably be economically unsound unless it were coupled with limitations on corporate power achieved by limiting corporate size. Paragraph two of Section 1 of the Wagner Act[5] made the point:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

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[1] Compare the term "competition" as used in Bowen v. Matheson, 96 Mass. 499 (1867), and by Justice Holmes in his dissenting opinion in Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896) with the same term as used by SIMONS, *A Positive Program for Laissez-Faire*, in ECONOMIC POLICY FOR A FREE SOCIETY 40 (1948).

[2] See Levi, *The Antitrust Laws and Monopoly*, 14 U. OF CHI. L. REV. 153 (1947).

[3] *Ibid.*

[4] In 1944, 31 per cent of the workers in manufacturing were employed by firms with 10,000 or more employees, 62 per cent were employed by firms with 500 or more employees. *Id.* at 165.

[5] 49 Stat. 449 (1935), 29 U.S.C. § 151 (1940).

Pumping purchasing power into the hands of the mass of consumers in order to convert desire into effective demand and implement the achievement of high levels of production and employment is certainly not a problem in 1948 (as it so clearly was in 1935). But the problem of the distribution of income remains. The point which the labor force's percentage takes of the national income must hit in order to sustain effective demand for our national product is speculative and highly controversial, but surely the fact that the percentage of the national income which goes into wages and salaries has declined since 1945 and is approaching the level of 1929 is a source of some concern.[6]

Fiscal policy, including the progressive income tax device, is one method for implementing the achievement of an equitable and sound distribution of income. But the 80th Congress has partially rejected this philosophy, with the result that the take of the national income which any man or group gets is even more clearly a function of economic power than it was before. The fact remains in 1948, then, that workers cannot expect to get the share which they need in order to sustain their standards of living (and which the requirements of a full employment-full production economy demand that they get) without their own instrument of economic power, the trade union.

In summary, it is politically unsound and economically impracticable to emasculate the trade union as an instrument of economic power unless the other great instruments of economic power—chiefly the corporation—are similarly emasculated. But who is to advocate, in a world situation where production is an urgent necessity, the economic atomization of the productive structures that dominate, for example, steel, rubber, oil, and automobiles?

The small producer probably has a future something like that of the dodo bird. Organization seems to be the immediate answer for the

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[6]

	In Billions of Dollars			*Per cent of the National Income*	
	National Income	*Wages and Salaries*	*Net Corporate Profits*	*Wages and Salaries*	*Net Corporate Profits*
1929	$ 87.4	$ 50.2	$ 8.4	57%	9.6%
1933	39.6	28.8	–0.4	73	....
1939	72.5	45.7	5.0	63	6.9
1940	81.3	49.6	6.4	61	7.9
1941	103.8	61.7	9.4	59	9.0
1942	136.5	81.7	9.4	60	6.9
1943	168.3	105.5	10.4	62	6.2
1944	182.3	116.9	9.9	64	5.4
1945	182.8	117.6	8.9	64	4.2
1946	178.2	111.1	12.5	62	7.0
1947	202.6	122.8	17.4	61	8.6

SURVEY OF CURRENT BUSINESS, July 1947 Supplement, and February 1948 issue

consumer and the nonunion worker. Thus we have erected, and are continuing to erect, an economy which will function effectively only so long as powerful private economic groups can agree and in which the unorganized groups must protect themselves from exploitation either by organizing or by granting vast amounts of regulatory power to a centralized government (with the rather futile hope that the grant will not become irrevocable)

This is the kind of economy in which the government must be highly centralized, more powerful than any of the economic organizations within it, and able to maintain balances of power, to restrict the private economic groups within it to the "reasonable" exercise of their powers, and to invoke—when necessary—the coercive power of the state to compel both agreement and compliance.

We can only hope that all groups remain "reasonable" — that is, follow enlightened wage and price policies (or, at least, that when the state does exercise its coercive power, the groups are more patriotic than "unreasonable") and that the government (and the men who run it) with all of its (and their) power will be wiser, more sensitive to the common weal, and more willing to relinquish power should the electorate demand relinquishment than any sense of realism can lead us to expect.

To those libertarians who believe that power always corrupts and that economic and political freedom are indivisible,[7] the future (the present?) is not a happy one. Yet the trend seems clear, and until we determine to strike at private concentrations of power wherever they exist (a determination probably as impracticable in 1948 as it is unlikely) collective bargaining belongs in our economic picture.

II. THE RECENT DEVELOPMENT OF COLLECTIVE BARGAINING AS FEDERAL LABOR POLICY

The passage of the Norris-LaGuardia Act by Congress in 1932[8] withdrew from the federal courts the effective remedy for those persons injured by the activities of trade unions—the injunction.

This negative encouragement of the development of trade unionism was followed in 1935 by the Wagner Act,[9] which put the Federal Government into the business of actively and positively promoting the establishment of collective bargaining relationships. The rationale for

[7] See SIMONS, *A Political Credo, Some Reflections on Syndicalism,* in ECONOMIC POLICY IN A FREE SOCIETY 1, 121 (1948).
[8] 47 Stat. 70 (1932), 29 U.S.C. § 101 *et seq.* (1940).
[9] 49 Stat. 449 (1935), 29 U.S.C. § 151 *et seq.* (1940).

this governmental activity was largely the purchasing power-distribution of income theories mentioned above, and the result of the activity was a tremendous expansion in the size, scope, and strength of trade unions.

The United States Supreme Court made its contribution (a negative but nonetheless effective one). First, it freed trade unions from the restraints of the Sherman Act except when the union and the employer collusively engage in price-fixing in the products or services market[10]—and perhaps as a practical matter it freed them even in that situation.[11] Second, it identified peaceful picketing, a very effective economic weapon, with free speech and thus immunized it—at least in part—from legislative and judicial controls.[12]

III. THE 1947 STATUTE AND SOME MAJOR SHIFTS IN POLICY

A. The Right Not to Organize

The Wagner Act was grounded on the premise that collective bargaining could not achieve the economic objectives of the statute unless large numbers of employees were represented by strong unions. To recapitulate, these objectives were (1) prevention of depressed wage rates which decrease the purchasing power of wage earners and aggravate business depressions, and (2) encouragement of the stabilization of competitive wage rates and working conditions within and between industries because instability aggravates business depressions.

The National Labor Relations Act of 1947, while it sets out these same objectives,[13] is grounded on the premise that collective bargaining can attain them whether or not employees are represented by strong unions. To put this a different way, the 1947 statute assumes that it is a matter of public indifference whether or not collective bargaining exists in a particular plant or industry

[10] United States v. Hutcheson, 312 U. S. 219 (1941), Allen-Bradley Co. v. Local No. 3, Int'l Brotherhood of Electrical Workers, 325 U. S. 797 (1945).

[11] United Brotherhood of Carpenters and Joiners v. United States, 330 U. S. 395 (1947).

[12] Thornhill v. Alabama, 310 U. S. 88 (1940), American Federation of Labor v. Swing, 312 U. S. 321 (1941), Bakery and Pastry Drivers and Helpers Local 802 of Int'l Brotherhood of Teamsters v. Wohl, 315 U. S. 769 (1942), Cafeteria Employees Union v. Angelos, 320 U. S. 293 (1943). *But cf.* Milkwagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 312 U. S. 287 (1941), Carpenters and Joiners Union of America, Local 213 v. Ritter's Cafe, 315 U. S. 722 (1942), Gazzam v. Building Service Employees Int'l Union, Local 262, 129 Wash. Dec. 455 (1947).

[13] Section 1, paragraph 2.

Nowhere is this assumption made clearer than in Section 7 which adds to the employees' right to engage in union activity (a carry-over from the Wagner Act) "the right to refrain from any or all of such activities. "[14] The addition takes on significance when coupled with the duty of employers (another carry-over) not to interfere with, restrain, or coerce employees in the exercise of the rights set out in Section 7[15] and the newly established duty of labor unions or their agents not to restrain or coerce employees in the exercise of those rights.[16]

While giving the right to refrain from union activity, equal status with the right to engage in union activity establishes some legal obligations for employers, its primary impact is felt by unions and union agents engaged in organizational campaigns. Making it an unfair labor practice for a union or its agents to restrain or coerce employees in the exercise of their right not to engage in union activity is one of the policy shifts which has been widely defended, largely because of empirical data indicating that union organizers have in some instances coerced employees into joining against their will by threatening violence to them and/or their families and engaging in other forms of intimidation.

However, presumably a union organizer can propagandize with impunity, *e.g.*, tell workers that they will be wage slaves if they don't unionize. This presumption is strengthened by Section 8 (c) which says, "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute *or be evidence of* [italics supplied] an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."[17]

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[14] " except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3)." Briefly then, a union shop with a thirty-day minimum joining period entered into by a union after a referendum of the employees may be enforced, without violating § 7, against employees who do not tender periodic dues and fees.

[15] Section 8 (a) (1).

[16] Section 8 (b) (1).

[17] This section, although ostensibly incorporated in the statute to protect employer freedom of speech, appears to afford broad immunities to union organizers. Under the Wagner Act conduct, though evidenced in part by speech, could amount, in connection with other circumstances, to coercion within the meaning of the act. If the total activities of an employer restrained or coerced his employees in their free choice, then those employees were entitled to protection. And in determining whether a course of conduct amounted to restraint or coercion, pressure exerted vocally by the employer was no more disregarded than pressure exerted in other ways. NLRB v. Va. Electric & Power Co., 314 U. S. 469, 477 (1941). *Cf.* NLRB v. American Tube Bending Co., 134 F.(2d) 993 (C.C.A. 2d 1943), Owens-Illinois Glass Co. v. NLRB, 123 F.2d 670 (C.C.A. 6th 1941).

The Senate bill stated that the finding of an unfair labor practice was not to be

It seems reasonable to guess that most union organizational activity which falls short of violence, threats of violence, fraud, or threats of reprisal is privileged. Mass picketing, because of the implicit threat of physical harm, is probably an unfair labor practice. On the other hand, peaceful picketing for organizational purposes (except perhaps in the "stranger" picketing situation) probably does not generally, because of the notion that peaceful picketing is a form of speech, violate this section.

Closer questions are posed by threats to increase dues and fees if the employee doesn't join before the union gets bargaining rights, threats to obtain a union shop and get the worker discharged by denying him membership (frequently an effective kind of pressure, even though such discrimination would now be unlawful), and promises of benefit if the worker joins the union.

The above remarks are, of course, speculative. "Restraint" and "coercion" are labels the factual content of which will have to be defined by extensive litigation. Given a tough construction, this section deals very effective blows at trade union attempts to expand jurisdiction (for examples, the organizational drives in the South of both the C.I.O. and A.F of L.). Even given a soft interpretation, the section makes organizational activities more risky than they were heretofore. This is particularly true because, in determining whether or not a union is legally responsible for the specific acts of an organizer, the question of actual authorization or ratification is not controlling.[18]

based upon a statement of views or arguments, either written or oral, if it contained *under all the circumstances* no threat, *express or implied,* of reprisal or force, or offer, *express or implied,* of benefit. SEN. REP. no. 105, 80th Cong., 1st Sess. 35 (1947). (Emphasis supplied.) Deletion of "under all the circumstances" and "express or implied" from the final form of § 8 (c) casts real doubt on the vitality of the "totality of conduct" doctrine. See Cox, *Some Aspects of the Labor Management Relations Act,* 1947, 61 HARV. L. REV. 1, 15-20 (1947).

More important, § 8 (c) appears to preclude the NLRB from considering as evidence of an unfair labor practice remarks which are not coercive, although apparently the Board can consider remarks which are not coercive as evidence of no unfair labor practice. No doubt § 8 (c) gives employers wider latitude in expressing attitudes toward unionism than they enjoyed under the Wagner Act. But the latitude also extends to unions. What, for example, shall the Board do with the statement of a union organizer who said to a nonunion employee who knew that two other nonunion workers had been assaulted in the alley the previous night, "I think you will enjoy your job more if you join up"? Such a remark contains no threat or promises. Is it to be considered as "coercive" *under all the circumstances*? Or is it to be excluded as inadmissible evidence? Or, if admitted, is it important only for purposes of judicial review, that is, the determination of whether the findings of the Board with respect to questions of fact are supported by "substantial evidence on the record considered as a whole"? See § 10 (e).

[18] "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." Section 2 (13).

There was some Congressional feeling that labor organizations should be as neutral with respect to whether or not employees join unions as employers. The deletion of "interfere" seems to indicate (albeit only weakly) that this feeling did not prevail fully [19] Nonetheless, something of an incongruity in federal labor policy has been produced.

Only litigation will determine the degree to which the 80th Congress, by giving the right not to engage in collective bargaining equal status with the right to engage in collective bargaining, contradicted itself. But it seems clear that if Congress still thinks that collective bargaining is in the public interest, it cannot logically be indifferent to whether or not workers join unions.

B. Protection of the Collective Bargaining Relationship

1. By Agreement—Institutional Security for the Union

a. *Limitations.* Probably no aspect of the trade union movement is so controversial as the matter of union security agreements. There is something unpalatable to the majority of Americans about an arrangement whereby membership in an organization is enforced by making the opportunity to earn a livelihood partially contingent upon it. A fortiori, an agreement which makes membership in a trade union essential before obtaining employment, *i.e.*, the closed shop, has relatively little popular support outside union circles.

Nonetheless, trade unionists in their quest for control over the job, have historically sought to obtain some form of institutional security against employer hostility and employee apathy The lack of class-consciousness of the typical American worker (as compared, for example, with the English worker) has created the problem of getting new and/or apathetic employees into the union and keeping them there. The closed shop is an old device for achieving these objectives. But there are others—the union shop, maintenance of membership, preferential hiring. A well-developed institution of seniority rule is sufficient in the railway industry, where the closed shop is outlawed.[20]

[19] Section 8 (a) (1) of the 1947 statute makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of the rights guaranteed in § 7, while § 8 (b) (1) makes it unfair labor practice for a labor organization or its agents "to restrain or coerce" employees in the exercise of those rights.

The words "interfere with" were included in the original draft of § 8 (b) (1), SEN. REP. no. 105, 80th Cong., 1st Sess. 50 (1947), 93 Cong. Rec. 4136 (April 25, 1947). They were deleted largely at the insistence of Senator Ives, *id.* at 4399 (April 30, 1947). Senator Taft stated that their elimination would not make any substantial change in the meaning of the section. *Ibid.* See Cox, *op. cit. supra note* 17, at 30-34.

[20] For an excellent discussion of union security see TONER, THE CLOSED SHOP (1944).

Union security is a natural outgrowth of collective bargaining. Predominant among the industries in which collective bargaining is relatively mature and in which closed shop conditions exist are the building trades, printing, trucking, the maritime industries, coal mining, and clothing manufacture.[21] By and large, with the exception of coal mining and the maritime industries, these have been the organized areas with the highest degree of stability—that is, least number of work stoppages.

That union security should develop hand-in-hand with collective bargaining and that these areas should be relatively stable is not surprising. Once a union has obtained majority support it cannot be expected to refrain from attempting to get control over all jobs in the bargaining unit. Moreover, since the National Labor Relations Act (both the Wagner Act and the 1947 statute) imposes upon the union with majority support the obligation to bargain collectively for all employees, the union feels that it has the right to the support of all the employees.

In terms of industrial peace as a desideratum, a union working under some form of union security agreement has a most effective disciplinary control over the employees. Consequently, it is in a better position than it would otherwise be to be responsible for the adherence of the employees to the terms of the collective agreement (for example, a no-strike clause[22]). Moreover, responsibility for, and interest in, stability typically comes from institutions which themselves are secure and therefore feel that they have a stake in the status quo. A union which has protective devices to fend off attempts by employers and other unions to undermine its bargaining position and destroy or weaken its status has that kind of security

Union security was specifically excluded from the operation of the Wagner Act. An employer who discriminated against an employee with regard to hire or tenure of employment in order to discourage or encourage union membership violated Section 8 (3) and committed an unfair labor practice. But an employer who discharged an employee

[21] At the end of 1946, 4,800,000 workers in the United States were covered by closed or union shop agreements with preferential hiring provisions. Workers under union shop agreements without preferential hiring numbered 2,600,000, while 3,600,000 were under maintenance of membership agreements. 64 MONTHLY LAB. REV. 765 (1947).

[22] For example, the International Typographical Union, which is the oldest national union in the United States and has had the closed shop for many years (it has been a law of the international since 1899), on some occasions when a local struck in violation of an agreement not only repudiated the local but moved in and furnished the employer with employees. In some cases the I.T.U. reimbursed publishers for losses suffered by reason of such strikes. TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS, 64, 66.

for failure to belong to or maintain good standing in a union which was undominated by the employer and had been selected by the employees as their collective bargaining representative was protected by a proviso, if the collective agreement contained a union security clause (closed shop or otherwise)

Only one type of union security, an agreement which conditions employment upon union membership thirty or more days after the effective date of the agreement or the date of hiring—whichever is later—is excluded from the operation of the National Labor Relations Act of 1947 In addition, the agreement may be executed only with or by a union which has received authorization from a majority of the employees eligible to vote and may be enforced in only one situation, namely, when the employee has lost or been denied membership for non-tender of the periodic dues and initiation fees uniformly required by the union.[23] This means reasonable fees, since it is elsewhere made an unfair labor practice for a union to exact excessive fees[24] Moreover, not only is an employer who discriminates against an employee in order to discourage or encourage union membership guilty of an unfair labor practice except under the circumstances outlined above,[25] but so is a union or a union agent who causes or attempts to cause the employer to so discriminate.[26]

Either the employer or the union may be held responsible for the illegally discharged employee's back pay, depending upon which is responsible,[27] although the employer is liable in the case of a lawful union shop agreement illegally enforced only if he had reasonable grounds for believing that union membership was denied or terminated for reasons other than non-tender of periodic dues and fees.[28]

[23] Section 8 (a) (3) Provisos.
[24] Section 8 (b) (5).
[25] Section 8 (a) (3).
[26] Section 8 (b) (2).
[27] Section 10 (c) Proviso.
[28] Section 8 (a) (3) Second Proviso.
The determinative factor in deciding whether or not a discharge was effected in order to encourage or discourage union membership is motive. The Board cannot order reinstatement of an individual who was discharged for cause. See § 10 (c) Second Proviso. Expressions of opinion often help to indicate motive. Yet § 8 (c) says that the expression of views or opinions shall not be evidence of an unfair labor practice, if such expression contains no threat of reprisal or force or promise of benefit. Accordingly, proving a violation of the union security prohibitions of the 1947 statute is much more difficult than would otherwise be the case. If an employer discharges a nonunion employee and the Board subsequently issues a complaint charging him with discriminating against the employee in order to encourage union membership, the employer's statement that "union men are preferred here" is apparently not admissible as evidence of motive.
Similarly, § 8 (c) makes proof of other kinds of discrimination difficult. What, for example, can the NLRB do with a case involving the allegedly discriminatory dis-

The obvious effect of this provision is to render all closed shop agreements unenforceable either by unions or employers. Moreover, it has the same impact on union shop contracts unless they are secured by unions after employee authorization obtained through the operation of the referendum machinery set up by the NLRB. Even then the agreement is unenforceable except in those cases where employees have refused to tender dues and fees. In effect, therefore, all a union can hope to get lawfully under the 1947 statute is an agreement which gives it a disciplinary weapon helpful in obtaining dues and fees payments. For this reason, the remark that the statute knocks out the closed shop but leaves the union shop intact is somewhat misleading.[29]

These provisions of the National Labor Relations Act of 1947 are the federal implementation of the "right to work" notion which has produced prohibitive or regulatory statutes and constitutional amendments against union security agreements in a large number of states.[30] Some of these statutes and amendments render unlawful all forms of union security, and the Taft-Hartley Act takes cognizance of states' rights by providing that nothing in the federal law shall authorize the execution of agreements that make union membership a condition of employment in any state or territory where such agreements are prohibited by state or territorial law

In other words, an employer and a union in an industry affecting commerce but located in a state like Arizona, which outlaws all forms of union security, are estopped from enforcing even the particular union shop agreement permitted by the NLRA.[31]

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charge of a union employee where part of the evidence of motive is a simultaneous, but noncoercive, anti-union statement made by the foreman who did the discharging?

When asked by Senator Pepper if, in a case where a man was fired on Thursday and the question was whether he was fired for cause or for union activity, the employer's statement on Monday that he hated labor unions and thought they were a menace to the country would be admissible in evidence as bearing on motive, Senator Taft replied. "It would depend upon the facts. Under the facts generally stated by the Senator, I think that statement would not be evidence of any threat. There would have to be some other circumstance to tie in with the act of the employer. If the act of discharging is illegal and an unfair labor practice, consideration of such a statement would be proper. But it would not be proper to consider as evidence in such a case a speech which in itself contained no threat express or implied." 93 Cong. Rec. 6603-04 (June 5, 1947).

See Watt, *The New Deal Court, Organized Labor, and the Taft-Hartley Act,* 7 LAWYERS GUILD REVIEW 213-214.

[29] There seems to be little doubt that these sections of the statute render unenforceable all types of union security, including maintenance of membership and preferential hiring, except the particular type specifically permitted.

[30] At least twenty-two states now impose limitations on union security. Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Nebraska, New Hampshire, North Carolina, North Dakota, South Dakota, Tennessee, Texas, Virginia, and Wisconsin.

[31] The Arizona Court has upheld the constitutionality of the "Right to Work"

b. *Dual Unionism.* These provisions of the 1947 Act correct an inequity which arose under the Wagner Act in cases of discharge for so-called "dual unionism." The issue of a discharge for "dual unionism" arose when a collective agreement establishing union security was in existence and certain employees, disgruntled with the kind of representation they were getting, campaigned for another union to succeed the current collective bargaining representative (thus the name "dual unionism") After these workers had been expelled by the union for their acts of "disloyalty" and had subsequently been discharged by the employer pursuant to the union security agreement, the employees or the campaigning union complained of a discriminatory discharge.

Generally the Board, reasoning that—in order to preserve stability in the collective bargaining relationship—an employee who had been committed to representation by one union (through application of the majority principle in an election) ought to be bound to his choice for a reasonable period of time, refused to hold that such discharges were discriminatory, that is, designed to encourage or discourage union membership.[82] In cases arising near the end of the life of the agreement, however, the Board, recognizing that an employee ought to have some power to challenge a union's right to continue as bargaining representative, found the discharges to be discriminatory and ordered the employer to reinstate the employee with back pay, if the employer knew that the incumbent union's motive was to get rid of adherents to a rival union.[83]

By the application of these rules, the employer-union bargaining relationship was protected by holding employees to their election choices for a reasonable period of time, just as political voters are held to their election choices for a given period of time. But a union which was doing a job of representation unsatisfactory to its constituents was estopped from perpetuating itself in office.

Amendment to the Arizona Constitution, which reads "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the state or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization." A state statute provides for injunctive relief and suits for damages for violation of the Amendment and also declares contracts prohibited by it to be illegal and void. American Federation of Labor v. American Sash & Door Co., 189 P.(2d) 912 (Ariz. 1948).
Accord. State v. Whitaker, 45 S.E.(2d) 860 (N.C. 1947) in which the North Carolina Court upheld the state anti-closed shop statute.

[82] Southwestern Portland Cement Co., 65 NLRB 1 (1946).

[83] Rutland Court Owners, Inc., 44 NLRB 587 (1942).

The chief difficulty with the old rules, which was the fault of the statute, not of the Board, was that only employers were ordered to make restitution in the form of back pay This was unfair, since the employer in many of these cases was not in any realistic sense solely responsible for the discharge. He either complied with the union's request or faced a paralyzing strike.[34] The new statute corrects this inequity, permitting the employer to refuse to discharge an employee who has lost his union membership because of "dual unionism" (making it, in fact, unlawful for him to discharge for that reason). And if the union retaliates with a strike, it has committed an unfair labor practice.

The chief quarrel with these provisions of the new law is that they fail to take into account sufficiently the desirability of protecting the stability of an existing collective bargaining relationship. They are designed to permit any employee to shift allegiance and campaign for another union at any time. Both the union and the employer, although both may object to the electioneering, are estopped from prohibiting it without risking charges of an unfair labor practice.

An official change of the collective bargaining representative cannot occur more than once a year,[35] and therefore the "dual unionism" of the employees cannot nominally affect the status of the parties to the relationship (the employer and the union) until at least one year has elapsed (and in the case where a collective agreement is in existence perhaps not for two years[36]). However, there is something anomalous about charging a union on the one hand with the responsibility of abiding by its promises in the collective agreement (Section 301 of the statute makes breach of the collective agreement a cause of action) while on the other hand seriously weakening one of its most effective disciplinary weapons for seeing that those promises are carried out.

The union not only has lost a good deal of its power to stop the employees from freeing themselves from its control as long as they tender dues and fees, but it may not be able to procure their discharge for incompetence, wildcat strikes, unauthorized slowdowns, Communism, or anything else other than non-tender of dues or fees.[37]

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[34] *See* NLRB v. Star Publishing Company, 97 F.(2d) 465 (C.C.A. 9th 1938).
[35] Section 9 (c) (3).
[36] Reed Roller Bit Co., 72 NLRB 927 (1947).
[37] The 1947 Act makes it unlawful for a union to cause the discharge of an employee who has been denied, or expelled from, membership for reasons other than non-tender of dues or fees; but it does not prohibit causing the discharge of a union member. Arguably, then, a union may lawfully cause an employer to discharge a member for incompetence or disloyalty to the union *before* he is expelled, and then, subsequent to

Of course, the employer can discharge for cause (which a wildcat strike presumably would be) without committing an unfair labor practice, but weakening the union's authority over its members (and therefore its status) is hardly the way to make it a "responsible" party to the collective bargaining process. You do not normally make a group reliable by promulgating rules based on the assumption that it is unreliable. Sharply curtailing the use of a union's disciplinary controls over its members, without reference to whether or not there is good cause for their use, is a rule based upon such an assumption. Certainly wildcat striking and labor espionage are as good reasons for disciplining a member as nonpayment of dues.

c. *The Right to Work, the Closed Union, and Union Democracy.* The right to work is a slogan that is more attractive than substantial. No one has the right to work in any realistic sense, that is, in the sense that someone has a duty to give him a job. At best he has only the expectancy of working if employment is available and he can sell his services to the hiring agent, frequently—unless there is a strong union —on the latter's terms.

The basic question is not one of freedom or right, but one of power —power over hiring, tenure, and the terms of the employment relationship. Statutes which, by outlawing or restricting union security, purport to free individual workers from the power of unions in so doing leave them subject to the power of employers. In terms of freedom of employees, it is at least doubtful that they have more freedom when their job status is controlled solely by employers than when it is controlled solely by unions or by employers and unions jointly The doubt is even greater if the union is a democratic one in which the members have a real voice. In modern industrial life the individual freedom with real meaning is not the freedom of the employee to refuse to support a union and thus to remain subject to unilateral bargaining with the employer (frequently an illusory kind of freedom), but the freedom of the employee to choose the union he wants, to exercise some controls and checks over the leadership of that union, and—at periodic times—to campaign to change unions. Not even the drafters of the Labor Management Relations Act suggested that an individual worker

his discharge, effect the expulsion. This device is probably not useful, however, in the case of a "dual-unionist," for the discharge would discourage membership in the campaigning union and encourage membership in the incumbent union, thus falling within the prohibitions of the statute. *See* VAN ARKEL, AN ANALYSIS OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, 31-32 (1947).

has any freedom of contract or bargaining strength in the all too typical situation of job scarcity [38]

To be sure, unions have sometimes used closed shop agreements as instruments of abuse. They have sometimes adopted discriminatory and even exclusionary admission policies. Moreover, there are sufficient examples of unions operated undemocratically to justify some criticism that power over workers has—through the growth of unionism—only been shifted from one group of bosses to another, with little or no industrial democracy in fact.

The problem of the discriminatory refusal by a union which has a union security agreement to admit certain employees to membership, thus causing them to lose their jobs or to be refused employment, has frequently arisen. Negroes, members of other minority groups, and employees who have campaigned for a union which lost an election have been among those refused admission. The NLRB was generally powerless under the Wagner Act to handle the cases involving minority groups and equally impotent in the latter case, unless the employer in signing the agreement with the winning union (which he had favored) knew—and hoped—that it would exclude the campaigners for the losing union. The Board found an employer who discriminated in this kind of situation guilty of an unfair labor practice.[39]

[38] "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce "

"Experience has proved that protection by law of the right of employees to organize and bargain collectively [restores] equality of bargaining power between employers and employees."

Excerpts taken from § 1.

[39] Wallace Corporation v. NLRB, 323 U.S. 248 (1944).

The Board has indicated that it has "grave doubt whether a union which discriminatorily denies membership to employees on the basis of race may nevertheless bargain as the exclusive representative in an appropriate unit composed in part of members of the excluded race If such a representative should enter into a contract requiring membership in the union as a condition of employment, the contract, if legal, might have the effect of subjecting those in the excluded group, who are properly part of the bargaining unit, to loss of employment solely on the basis of an arbitrary and discriminatory denial to them of the privilege of union membership. In these circumstances, the validity under the proviso of Section 8 (3) of the Act of such a contract would be open to serious question." Bethlehem-Alameda Shipyard, Inc., 53 NLRB 999, 1016 (1943).

For federal judicial treatment of this question under the Railway Labor Act, see Steele v. Louisville & N. Ry., 323 U.S. 192 (1944) and Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944). The Court held that a union which is the exclusive bargaining agent for firemen cannot, in negotiating terms and conditions of employment, discriminate against Negro firemen, even though they are not eligible for union membership.

For state judicial treatment of the same question, see James v. Marinship Corp. 25 Cal. (2d) 721, 155 P.(2d) 329 (1944). The California Court enjoined the enforcement of a closed shop contract held by a union which excluded Negroes from membership. *See also* Betts v. Easley, 161 Kan. 459, 169 P.(2d) 831 (1946).

The new National Labor Relations Act offers a partial solution to the problem of the closed union by simply weakening the collective strength of the group. Thus it is illegal for the labor organization with the permitted union shop agreement to prevent the employment of a Negro, for example, by denying him admission to the union on purely discriminatory grounds. The union can keep a Negro out. See Section 8 (b) (1) But it cannot deprive him of employment for that reason.

The undemocratic union is theoretically indefensible, but the correct therapeutic is to get at the abuses rather than weaken or destroy an institution (union security) which not only is often free of abuses but frequently is a useful device for establishing industrial stability Moreover, as against the desire to exalt individual rights in the union is the hard fact that the leaders of the organization must retain some control over the members if they are to function effectively as collective bargainers.

The objective is to ensure that the individual union members have some democratic controls over their leadership without at the same time destroying the effectiveness of that leadership. Or, to put this another way, the objective is to have unions which are institutionally strong but in which the ultimate source of power and control is the membership.

The new NLRA appears to be designed, not to promote individual worker freedom by ensuring to them democratic rights within the institutional framework of strong unions, but to promote individual worker freedom simply by weakening unions institutionally (which is another way of saying that workers are "freer" when they are less under the control of unions and more under the control of employers—a conclusion that is hard to support with data)

A recent amendment to the Massachusetts State Labor Relations Act is a more intelligent approach to the problem because it strikes at the abuses rather than at the institution. That law forbids an employer to discharge or otherwise discriminate against an employee for nonmembership in a labor union having a union security agreement with the employer, unless the labor union certifies that the employee was deprived of membership as a result of a bona fide occupational disqualification or the administration of discipline. The act sets up a procedure whereby the employee can appeal to the State Labor Relations Commission for a determination of whether or not his suspension, expulsion, or exclusion from the union was lawful. Expulsion is un-

lawful under the statute if (1) imposed by the union in violation of its constitution and by-laws, or (2) imposed without a fair trial, including an adequate hearing, or (3) imposed when the offense committed by the employee did not warrant expulsion. Refusal to admit to full membership is unlawful if it was based on race, creed, color, or sex.[40]

The 1947 statute indicates some concern about the internal operations of unions by requiring union compliance with two conditions other than filing a non-Communist affidavit precedent to acquiring rights before the NLRB.[41] First, the local union and the national or international of which it is an affiliate must file with the Secretary of Labor copies of their constitution and by-laws and a report showing (1) name and address, (2) the three principal officers and all officers who received more than $5,000 the previous year in salary and allowances, the procedure for choosing them, and the amount of their salary and allowances, (3) the amount of initiation fees and regular fees and dues, (4) the qualifications for membership, and (5) data relevant to elections, meetings, discipline, contract ratification, strike authoriza-

[40] Mass. Acts 1947, c. 657, amending MASS. GEN. LAWS A 1932 c. 150. *See also* 65 MONTHLY LAB. REV. 280 (1947).

[41] § 9 (h) requires each local union officer and each officer of the national or international of which it is an affiliate to submit an affidavit to the NLRB showing that he is not a member of the Communist Party or any organization that teaches the overthrow of the government of the United States by force or illegal methods. The sanction imposed upon unions which fail to comply with this requirement (and § 9 (f) and (g), discussed in the text) is loss of status before the Board. Briefly, this means that a noncomplying union cannot successfully file charges of an unfair labor practice, petition for a representation election, be certified as a bargaining representative, or petition for a union shop referendum.

There has been considerable union reluctance to comply with the affidavit requirement. In part this attitude is explained by the "I've-stopped-beating-my-wife" character of the requirement, but more importantly it is the expression of a feeling on the part of some powerful and well-entrenched unions that they can protect themselves by self-help against employer unfair labor practices, that they are well enough established so that representation questions will not arise, and the procedure necessary in order to get a union shop is more trouble than the union shop is worth. Moreover, individual employees who are members of a noncomplying union can successfully charge employers with all of the unfair labor practices except a refusal to bargain. As of February 29, 1948, 140 international and national unions had complied (seventy-eight of the A. F of L.'s one hundred and five internationals, twenty-seven of the C.I.O.'s forty-one nationals or internationals, and thirty-five unaffiliated organizations, *e.g.*, the International Association of Machinists). As of the same date 4,307 local unions, less than ten per cent of the locals in the country, had met the requirement. Report of Joint Committee on Labor-Management Relations, SEN. REP. No. 986, 80th Cong. 2nd Sess. 10 (1948). This degree of noncompliance has seriously complicated and impeded the operation of the NLRB.

Nonetheless, Communists are losing influence in American unions. But this is due, probably not to § 9 (h) of the NLRA, but to the conservatism, pragmatism, and realism of the American trade union movement, which by and large is committed to a free enterprise, capitalistic economy, and to collective bargaining as both an institution and a technique for resolving labor-management disputes without major alteration of any of the basic institutional arrangement of our society. *See* Taft, *Attempts to "Radicalize" the Labor Movement,* 1 IND. AND LAB. REL. REV. 580 (1948).

tion, and other methods of operation. In addition, these reports must be kept up to date annually

Second, the local union and the national or international of which it is an affiliate must file with the Secretary of Labor a financial report showing (1) receipts and the sources thereof, (2) assets and liabilities at the end of the last fiscal year, (3) disbursements during the last fiscal year, and (4) the purposes for which such disbursements were made. The union must keep these reports up to date and distribute them annually to its members "in the form and manner prescribed."

These provisions are inadequate to meet the problem. First, they do not vest any rights in union members. They extend no guarantees. They simply provide for registration and distribution of financial reports by unions which desire rights before the NLRB. Second, the minority of unions which are undemocratically operated and are in greatest need of internal reform are, generally speaking, those which least need the protection of the Board and which have, therefore, the last reason to comply with the provisions. Third, all a union has to do in order to meet the registration provision is to tell the Secretary of Labor how undemocratic it is. There is nothing in the statute that enables the government, employers, or employees to do anything about a union which elects its officers for life or about union officers who have the power to expel members arbitrarily [42]

The union shop has been authorized in all but a few of the elections held under the referendum provisions.[43] For example, in December of 1947, 521 union shop elections were held, and in 518 of them the union shop was authorized. And 90 per cent of those employees eligible to vote cast valid ballots, 93 per cent of the valid votes being pro-union shop. As of February 1, 1948, 1,661 union shop elections had been held, and the union had been successful in 1,643 of them.[44]

These results do not square with the arguments advanced by the

[42] Section 9 (f) (g). Many unions are, of course, operated very democratically. And the assertion that collective bargaining has merely resulted in the transfer of arbitrary power over workers from one set of bosses to another undoubtedly is an overstatement—usually made by persons basically hostile to unions as a poorly disguised but palatably formulated attack on their existence or, at least, on their effective operation. But undemocratic unions do exist, and the argument that internal union affairs are of no concern to outsiders has been destroyed by the legislative promotion of union growth and development, which has vastly increased the scope of union power.

See the suggestions *in re* democracy in trade unions made by the American Civil Liberties Union and set out in summary in TELLER, A LABOR POLICY FOR AMERICA, 67-72 (1945). *See also* Pierson, *The Government of Trade Unions,* 1 IND. AND REL. REV. 593 (1948).

[43] See §§ 9 (e) (1), 9 (e) (2), 8 (a) (3) (ii).

[44] Report of Joint Committee on Labor-Management Relations. SEN. REP. no. 986, 80th Cong., 2nd Sess. 24 (1948).

sponsors of the Labor Management Relations Act that restrictions on union security were necessary because the average American worker was opposed to any form of compulsory union membership.[45]

2. By Law

Consistent with the policy of promoting both the establishment and maintenance of collective bargaining relationships is the rule that those relationships should be protected against assaults by unions as well as by employers. This protection means the imposition of legal restraints on the self-help activities of unions when they are designed to force the destruction of a particular collective bargaining relationship which involves a "legitimate" union and has been established by reference to the wishes of the employees.[46] The National Labor Relations Act of 1947, unlike the Wagner Act, takes some steps in this direction.

a. *Representation Disputes.* When two or more unions presented representation claims under the Wagner Act and one of them was certified or accorded Board recognition at the regional level, the employer had the duty to bargain collectively with it.[47] Yet if the union that lost in the representation proceedings, even though it had been soundly defeated in an election, decided to strike and/or picket in protest over its loss, it could generally do so with immunity from the remedy of injunction in a federal court because of the Norris-LaGuardia Act.[48]

If the union was a powerful one or could get support from other unions, the employer was placed in an intolerable position. For example, if the striking union was the Teamsters or the Teamsters respected the picket line (as in the *Swenson* case), the employer either had to commit an unfair labor practice or reconcile himself to going out of business.

The NLRB held that the striking employees had committed an unlawful act in this situation[49] and consequently had lost any rights to reinstatement or back pay, but this ruling was insufficient to protect the employer against a powerful union.

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[45] Minority Views of Joint Committee on Labor-Management Relations. SEN. REP. no. 986 (Part 2) 80th Cong., 2nd Sess. 10 (1948).

[46] A "legitimate" union, as the term is used here, means one that is not assisted or dominated by an employer.

[47] Section 8 (5).

[48] State courts operating under "Baby Norris-LaGuardia Acts" have generally been intolerant of picketing by a minority union in this situation. For an example, see Swenson v. Seattle Central Labor Council, 27 Wn.(2d) 193, 177 P.(2d) 873 (1947).

[49] Thompson Products, Inc., 72 NLRB 886 (1947).

This inequity is corrected in part by Section 8 (b) (4) (C) of the 1947 statute which makes it an unfair labor practice for a labor organization to induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to refuse to perform services where an object is to force or require any employer to recognize or bargain with one union when another union has been certified.[50]

Moreover, the injured employer is given an opportunity to obtain reasonably expeditious preliminary injunctive relief by Section 10 (1), irrespective of the limitations of the Norris-LaGuardia Act. Whenever a labor organization is charged with a violation of Section 8 (b) (4) (C), the preliminary investigation is to be made "forthwith and given priority over all other cases except cases of a like character." In addition, whenever the NLRB officer to whom the matter has been referred has "reasonable cause to believe" that a complaint should be issued, he *must,* on behalf of the Board, petition the appropriate federal district court for injunctive relief pending final adjudication by the Board. The court has jurisdiction to grant such relief as it deems "just and proper," notwithstanding any other provision of law.[51]

b. *Jurisdictional Work Disputes.* A labor organization commits an unfair labor practice under the 1947 statute if it induces or encourages the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to refuse to perform services where an object is to force or require any employer to assign particular work tasks to the employees of one union rather than to the employees of another union, unless the employer is failing to conform to a Board order determining the bargaining representative for the employees.[52]

This section refers to the classical jurisdictional dispute, *i.e.,* a fight

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[50] As in the case of all conduct prescribed by § 8 (b) (4), a labor organization that commits this unfair labor practice is open to an action for damages. Section 303 (a) (3). *See also* § 303 (a) (1), (2), and (4).

[51] Petitioning for injuctive relief if there is reasonable cause to believe that a complaint should be issued is mandatory not only in cases of violations of § 8 (b) (4) (C), but also in cases involving § 8 (b) (4) (A) and (B). See § 10 (1). In addition, the General Counsel has the *power,* after a complaint has been issued, to petition for relief in all unfair labor practice cases. See § 10 (j). The Norris-LaGuardia Act is not applicable in any of these instances. Thus the policy of depriving a federal court of jurisdiction to issue injunctive relief in cases arising out of a labor dispute to prohibit persons from striking, picketing, or causing striking or picketing—regardless of objective, legality, or who asked for the relief (Wilson & Co. v. Birl, 105 F.2d 948 (C.C.A. 3rd 1939), *but see* United States v. United Mine Workers of America, 330 U.S. 258 (1947)—is terminated. However, the Norris-LaGuardia Act continues to apply when an employer seeks injunctive relief in the federal courts.

[52] Section 8 (b) (4) (D).

between two or more unions over who is to have control of certain work. The other kind of jurisdictional dispute, treated in Section 8 (b) (4) (C) and discussed above, is the quarrel between two or more unions over which is to have control of certain workers, *i.e.*, which is to be their collective bargaining representative. The latter dispute is resolved by resort to the well-established procedure of elections; the former dispute is now also resolved by the Board.

If the Carpenters' Union strikes a plant because the employer has awarded the work of dismantling certain machinery to the Machinists' Union and the employer files a charge, the Board has the duty to hear and determine the dispute—unless the two unions adjust it or agree upon methods for adjustment within ten days after the charge has been served. If the unions reach an adjustment, the charge is dropped.[53] If they do not, the hearing is held and an order certifying the union entitled to jurisdiction is issued. If the parties comply with the certification, the unfair labor practice charge is dismissed. If they do not, a complaint and a notice of hearing is issued, and a full-blown complaint case is initiated.

Perhaps the basic defect in this section of the statute is the fact that no provision is established for the resolution of a jurisdictional work dispute until some kind of self-help technique is utilized by one of the unions. There is no procedure for resolving the matter before resort to a strike or a boycott.

However, the provision has produced at least one encouraging result. An agreement—the impetus for which was furnished by the General Counsel—establishing a peaceful procedure for deciding jurisdictional work disputes has been consummated in the building trades. The arrangement calls for a National Joint Board composed of an impartial chairman and two representatives from labor and two from management to make binding decisions in these disputes. The procedure has the advantage of providing for settlement by experts in the industry rather than by an already overburdened governmental agency, and it envisages settlement before, rather than after, a work stoppage.[54]

c. *Decertification.* Under the Wagner Act employees could challenge the status of an established bargaining agent if they could show substantial support for a rival union. Under Section 9 (c) (1) (A) (ii) of the new act, employees can challenge the position of the union by

[53] Section 10 (k).
[54] 1 C.C.H. Lab. Law Serv. ¶8468 (1948).

showing substantial employee support[55] for getting rid of it and returning to a nonunion situation.

This section represents an important change in policy and like, although to a lesser extent, the inclusion in Section 7 of the employees' right to "refrain from any or all of such [union] activities" indicates the contradictory aspects of the statute. If there is a public interest in the establishment and maintenance of collective bargaining, as Section 1 says there is, then it seems somewhat anomalous to permit the termination of one collective bargaining relationship without replacing it with another.

Decertification proceedings are limited, however, not only by the rule that a representation election cannot be held more than once a year,[56] but also by the apparent retention of the Board's Wagner Act policy of refusing to initiate proceedings if there is outstanding a collective agreement of reasonable duration (not more than two years) [57]

3. By Self-Help (Protection of Union Standards—Industry-Wide)

Employers who pay union wages are generally, assuming that nonunion wages are lower, at a disadvantage if they must compete in the products market with employers who pay nonunion wages. Either the union wage scale has to be reduced, or the employer has to find ways to offset the disadvantage of his higher labor costs, or the nonunion plants have to be organized. Historically trade unions have fought perhaps their hardest legal battles in attempting to persuade courts that their legitimate economic interests extend throughout the entire industry in which they are organized. A situation duplicated many times is the one in which the union is organized in several plants in an industry and finds it necessary, in order to protect its wage and hour standards in the organized plants, to exert economic pressures against the unorganized plants which have, because of lower labor costs, a competitive advantage in the products market.

The Norris-LaGuardia Act gave recognition to this broad concept of economic interest as justifying the intentional infliction of harm by making it clear that a union is involved in a labor dispute and thus immunized from a federal injunction if it is organized in the industry in which the dispute occurred, even though it has no members in the

[55] Thirty per cent support, according to NLRB Rules and Regs., Series 5, § 202.17 (1947).
[56] Section 9 (c) (3).
[57] SEN. REP. no. 105, 80th Cong., 1st Sess. 25 (1947).

particular plant against which it is directing economic pressure.[58] Some states and some state courts followed this lead.[59] And the Wagner Act was not to be construed "so as to interfere with or impede or diminish in any way the right to strike."[60] As already indicated, the new NLRA shifts sharply from this policy

a. *Secondary Boycotts.* Section 8 (b) (4) (A) makes it an unfair labor practice for a labor union to induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to refuse to perform services where an object is to force or require any employer or other person to cease handling, using, or dealing in the products of another person or doing business with him.

Consumer aspects of a boycott pressure are not, because of the phrase "in the course of their employment," prohibited. Thus it is an unfair labor practice for the Carpenters and Joiners to induce carpenters in New Orleans to refuse to handle prefabricated housing materials, the objective being to force contractors to stop dealing with the manufacturers of such materials. But it is not an unfair labor practice for the Carpenters' Union to picket a clothing merchant who has hired a nonunion contractor to build his house, in order to induce his customers to cease buying clothing from him, the ultimate objective being to coerce the clothing merchant into hiring a union contractor. However, if other employees, *e.g.*, the Teamsters, respect the picket line in the course of their employment, the activity will fall within Section 8 (b) (4) (A) [61]

[58] 47 Stat. 70 and 73 (1932), 29 U.S.C. 104, 113 (1940). For examples of "stranger pressures held nonenjoinable, *see* Lauf v. Shinner & Co., 303 U.S. 323 (1938), New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552, 304 U. S. 542 (1938). For an example of a consumer boycott pressure held nonenjoinable, see Wilson & Co. v. Birl, 105 F.2d 948 (C.C.A. 3rd 1939). *Compare* Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921) *with* United States v. Hutcheson, 312 U. S. 219 (1941) as to changing judicial notions of the scope of a union's legitimate self-interest and the concept of "labor dispute."

[59] For a broad state court interpretation of "labor dispute," see Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E.(2d) 910 (1937).

[60] Section 13.

[61] Respecting a picket line is privileged in one situation by a proviso of § 8 (b) (4) (D). Refusing to cross is not an unfair labor practice if the union which established the picket line is certified and the union employees are engaged in an authorized (not "wildcat") strike against the plant. Any neutral, *e.g.*, a consumer or a union employee who does not work in the struck plant, can respect the picket line with impunity, even though the picketing or the striking has an unlawful objective. However, if an unlawful objective is involved, any union which has employee-members in the plant and directs them to refuse to cross may become involved in a complaint proceeding. If the union is not certified or recognized or the strike is unauthorized, unions that induce their members to respect the picket line, if by respecting it they are refusing in the course of their employment to handle goods or perform services, may similarly become involved.

b. *Stranger Pressures.* Section 8 (b) (4) (B) makes it an unfair labor practice for a labor union to induce or encourage the employees of any employer to engage in a concerted refusal in the course of their employment to refuse to perform services where an object is to force or require any *other* (italics supplied) employer to recognize or bargain with a union that has not been certified as the employees' collective bargaining representative.

This provision does not make unlawful the strike to gain recognition as the bargaining agent. For example, it is lawful for Union X to induce its employee-members to strike to force their employer to recognize Union X as the bargaining representative.[62]

However, if Union X has no employee-members in the plant, but does have members in competing plants, and—in order to protect the union wage scale in the competing plants—it puts a picket line around the nonunion plant, it may have committed an unfair labor practice. If other union members, *e.g.*, the Teamsters, respect that picket line, Union X will have induced them to refuse to perform services in the course of their employment in order to force an employer (who is not their own because they have no members employed there) to recognize or bargain with it.

This provision arguably, therefore, hits at "stranger" picketing and revitalizes a test of legality which reached its height in *Duplex Printing Press Company v. Deering,*[63] and its nadir in the Norris-LaGuardia Act,[64] namely, are the pickets and the picketed employer in a proximate employer-employee relationship?

Clearly Section 8 (b) (4) (B) makes unlawful the union technique of refusing to handle goods in order to force the employees of the producer of those goods to join the union and to force the producer to recognize the union as the bargaining agent.

D. The Duty to Bargain

Achievement of recognition and effective operation as a collective bargainer is the primary objective of a union. Historically, resistance

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[62] Inasmuch as procedures are available for the peaceful resolution of recognition and representation questions, a theoretical case for making unlawful the use of self-help to solve such problems can be made. The case breaks down, however, because determined employer opposition, plus the slowness of the procedure, can result in the destruction of the position of the union before the Board gets around to settling the question.

[63] 254 U. S. 443 (1921).

[64] *Op Cit. supra* note 58. The Norris-LaGuardia Act makes "stranger" picketing nonenjoinable by a federal court if the picketing union has employee-members in the industry in which the dispute arose. A labor dispute may exist "regardless of whether or not the disputants stand in the proximate relation of employer and employee."

to the process has come from employers. Accordingly, the Wagner Act —in line with the policy of encouraging the establishment of collective bargaining relationships and their effective operation—imposed the duty on an employer in an industry affecting commerce to bargain collectively with the representative of his employees.[65] Since it was considered incongruous to require an organization to perform the function which is its primary reason for existence, no such duty was imposed on labor unions.

However, there is a difference between seeking recognition and status as a bargaining agent and performing the function of bargaining. And union refusals to bargain have occurred. For example, in the case of the *Times Publishing Company*[66] the NLRB held that the Typographers had failed to bargain. As a consequence, since the employer's good faith could not be tested, a complaint charging him with a refusal to bargain could not be sustained. This ruling in effect made a union's refusal to bargain collectively an unlawful act, with the sanction (necessarily negative) being denial of a right under the Wagner Act.

The 1947 statute not only carries over from the Wagner Act the employer's duty to bargain,[67] but adds the obligation of a union, provided it is the representative of his employees, to bargain with the employer.[68] Thus the duty is equated, with the same sanction applicable to both parties, that is, an affirmative order to bargain.

This change in policy seems entirely defensible. If collective bargaining is to be our national labor policy, there is no reason why both parties should not have the legal duty to carry it out. Admittedly collective bargaining is essentially a private matter and cannot automatically be achieved by legislative fiat, and admittedly most of the resistance has come from employers. But these do not seem to be sufficient reasons for imposing the duty on one party and not on the other, particularly when union refusals to bargain have occurred.

Collective bargaining is defined by the act to mean (1) meeting at reasonable times, (2) conferring in good faith with respect to (a) wages, hours, and conditions of employment, (b) negotiation of an agreement, and (c) questions arising under an agreement, and (3) execution of a written contract incorporating the agreement reached—if requested by the other party But neither party is compelled to agree

[65] Section 8 (5).
[66] 72 NLRB 676 (1947).
[67] Section 8 (a) (5).
[68] Section 8 (b) (3).

to a proposal or to make a concession.[69] This is substantially a codification of the meaning of the phrase as worked out by the Board under the Wagner Act.

Two important changes are made, however. In the first place, individual employees or groups can now present grievances to the employer and get them adjusted, without the intervention of the union which is the collective bargaining representative if (1) the adjustment is not inconsistent with the collective agreement then in effect and (2) the union has had an opportunity to be present at the adjustment.[70] This is an important alteration. The Board held under the Wagner Act that, although individual employees are entitled themselves to *present* grievances to their employer, the union which is the exclusive bargaining agent has the right to be present and *negotiate* them.[71]

The difficulty with this change on its face is its failure to recognize the interest the union, which is the exclusive bargaining agent, has in the day-by-day interpretation and application of contract terms, a process which is involved in the settlement of grievances. One of the questions, for example, which will arise is: Do precedents worked out by the employer and his individual employees bind the union in its grievance-processing?

In the second place, a precise procedure for a certain kind of collective bargaining—to wit, bargaining over an agreement which one party wants to amend or terminate—is established.[72] The general purpose of the requirement is to ensure, each time an agreement is renegotiated, that the parties bargain for at least sixty days without a work stoppage. The employer (or the union) must give notice of the desire to terminate or modify sixty days before the expiration date of the agreement. The party desiring termination or modification must also offer to meet and confer with the other party If no agreement is reached in thirty days, that party must notify the Federal Mediation and Conciliation Service and the state mediation service, if any, of the existence of a dispute. The party must also continue the contract in full force and effect, without resort to strike or lockout, for a period of at

[69] Section 8 (d).
[70] Section 9 (a).
[71] Hughes Tool Co., 56 NLRB 981 (1944), *modified and enforced,* 147 F.(2d) 69 (C.C.A. 5th 1945).
But the Supreme Court has held, in a case arising under the Railway Labor Act, that individual employees with a grievance are not bound by a settlement negotiated by the union in a proceeding to which they were not personally made parties, unless they clearly authorized, or assented to, settlement by the union in their behalf. Elgin, Joliet & Eastern Ry. v. Burley, 325 U. S. 711 (1945).
[72] Section 8 (d). Proviso.

least sixty days after the notice is given. Neither party has, however, the duty to discuss modification of an agreement if such modification is to become effective before the agreement can by its own terms properly be reopened.

Violation of any of these duties by either party is an unfair labor practice. Moreover, any employee who engages in a strike during the sixty-day period loses his status as an employee. It is not clear whether or not this penalty is imposed on employees in cases where the employer's unfair labor practice caused the strike. But clearly it is imposed on economic strikers who otherwise would be entitled to reinstatement at the end of the strike, if they had not been replaced, and who in any case would retain their status as employees as a protection against discrimination in rehiring.[73]

Since most unions and employers bargain sixty or more days before resorting to self-help, it seems unlikely that this cooling-off period will have any significant effect in reducing work stoppages, although it may encourage employers and unions to engage in pre-negotiation conferences prior to adversary bargaining and hence work in that direction.

E. Emphasis of the Statute

Whereas the Wagner Act was rigged in favor of unions, the National Labor Relations Act of 1947 carries the opposite bias. It is clearly pro-employer.

Employers can commit five unfair labor practices.[74] Labor organizations can commit nine or eleven,[75] depending upon whether or not Sections 8 (b) (1)[76] and 8 (b) (4) (A)[77] are considered to contain one or two unfair labor practices each. Four or five union unfair labor practices (depending upon the evaluation of Section 8 (b) (4) (A))

[73] NLRB v. Mackay Radio & Tel. Co., 304 U. S. 333 (1938). Cox, *op. cit. supra* note 17, at 281, points out another effect of this provision. "Unless the union happens to retain the support of a majority of the nonstrikers, the employer is excused from continuing the bargaining which ordinarily offers the best hope of terminating a strike; and, so far as the strikers are concerned, he may employ labor spies, discriminate against union men, and engage in other acts of interference and coercion aimed at destroying the union. This would convert the contest into a struggle for group survival and increase the bitterness and strife."

[74] Sections 8 (a) (1), (2), (3), (4), and (5).

[75] Sections 8 (b) (1), (2), (3), (4), (A) (B) (C) (D), (5), and (6).

[76] It shall be an unfair labor practice for a labor organization or its agent "to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7 or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

[77] It shall be an unfair labor practice for a union or its agents to induce or encourage a strike or a boycott to force "any employer or self-employed person to join any labor or employer organization" or to force "any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."

are also grounds for a damage suit.[78] No employer unfair labor practice is grounds for a lawsuit. Three or four union unfair labor practices (again depending upon the count of Section 8 (b) (4) (A)) carry a number one priority before the NLRB[79] and one carries a number two priority[80] No employer unfair labor practice carries such priorities. Lastly, the Board *must* seek preliminary injunctive relief if there is reasonable cause to believe that a union has violated Section 8 (b) (4) (A), (B), or (C) and that a complaint should be issued.[81] The Board *can, but need not,* seek injunctive relief in the case of the five employer unfair labor practices *after a complaint has been issued.*[82]

In light of the work-load of the NLRB, a priority is a most important matter. For several years the Board has been falling behind its docket at a progressive rate. At the end of the fiscal year 1944, 2602 cases were pending; at the end of 1935, 3244, at the end of 1946, 4605.[83] As of August 22, 1947 (when the new NLRA became effective) the Board had a backlog of 3,933 cases awaiting decision. During the rest of August and all of September, 621 new cases were filed at the regional level, during October, 967 cases; during November, 1,380 cases; during December, 2,069, and during January, 3,008. These figures included unfair labor practice charges and petitions for both representation and union shop elections.[84] Moreover, the Board estimates that in the fiscal year from July, 1948, through June, 1949, it will receive about 60,000 cases, an average of 5,000 per month.[85]

The significance of priorities is obvious in light of this large case load and is demnostrated by the fact that although as of January 31, 1948, 1,316 charges had been filed against employers as against 355 filed against unions,[86] more complaints had been issued against unions.

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[78] Section 303 (a) (1), (2), (3), and (4).
[79] Section 10 (l).
[80] NLRB Rules and Regs. Series 5 §§ 203.74, 202.30 (1947).
[81] Section 10 (l).
[82] Section 10 (j).
[83] Bethlehem Steel Co. v. N. Y. State Labor Rel. Board, 330 U. S. 767, 783 (1947).
[84] Report of Joint Committee on Labor-Management Relations, *op. cit. supra* note 44, at 6. There is some dispute as to how well the Board is holding its ground. "So far the Board has been able to dispose of more cases each month than it has received during such month. It has not, however, been able to appreciably reduce its backlog." *Id,* at 9. *But cf.* Minority Report of Joint Committee on Labor Management Relations, *op. cit. supra note* 45, at 10. "Between August 22, 1947, and February 29, 1948, the NLRB's backlog of cases rose from 3,933 to 9,500, the largest in the Board's history."
[85] Minority Report of Joint Committee on Labor-Management Relations, *op. cit. supra* note 45, at 11.
[86] Report of the Joint Committee on Labor Management Relations, *op. cit. supra* note 44, at 24. However, the figure of 1,316 is somewhat misleading. In a number of instances parallel charges were filed by different individual employees against the same employer. Consequently, the figure 1,316 probably represents about 950 actual cases.

During the first six months under the Act as of February 29, 1948, twenty-four complaints were issued against unions and eighteen against employers.[87]

The statistics concerning injunctive relief are also revealing. During the first six months of the statute's operation, thirteen petitions for injunctions were filed, one against an employer and twelve against unions. Of the thirteen petitions, two (one against an employer and one against a union) were sought at agency discretion. The other eleven, all against unions, were sought under the mandatory provisions of the Act.[88]

III. CONCLUSIONS

The differences between the Wagner Act and the National Labor Relations Act of 1947 lie primarily in means and assumptions, not in objectives. The 1947 statute sets out the same public policy objectives which were contained in the Wagner Act. The only difference between Section I of the Wagner Act and Section 1 of the new NLRA is that the latter recognizes that certain kinds of union, as well as employer, conduct causes labor disputes and industrial unrest which burdens and obstructs commerce to the impairment of the public interest in the free flow of such commerce.

The 1947 Act appears to weaken the possibility of achieving the economic objectives set out in Section 1 in the following major particulars:

1. Assumes that it is a matter of public indifference whether or not collective bargaining exists in a particular plant or industry

2. Weakens the power of unions to protect their institutional life against employer hostility by making attacks on all forms of union security

3. Apparently fails to protect the exclusiveness of the union's position as the collective bargaining agent.

4. Weakens the power of unions to control the employees for whose adherence to the collective agreement they are responsible by attacking all forms of union security

5. Reduces the degree of stability in collective bargaining relationships by weakening the power of both parties (the employer and the union) to protect the relationship against destructive attacks made on it by individual employees or other unions.

[87] Minority Report of Joint Committee on Labor-Management Relations, *op. cit. supra* note 45, at 14.
[88] *Id.*, at 18.

6. Makes inroads into the collective bargaining process itself by prohibiting certain contract terms (chiefly through the limitation on union security)

7 Prohibits a union in many situations from attempting to extend its organizational jurisdiction, even though such an extension is necessary in order to protect the economic position of the organized employees and their employer.

8. Gives unions a secondary status before the NLRB, while giving employers a primary status, apparently on the assumption that unions have been chiefly responsible for the failures of collective bargaining in the last twelve years—the result being to impede to some extent the performance of the Board's function of protecting and extending collective bargaining relationships by channeling its limited resources into other areas.

The new labor law is consistent with the achievement of the objectives in the following respects:

1. By striking at the closed union and at excessive and discriminatory membership dues and fees makes it clearer that unions with a strong collective bargaining position must represent *all* employees.

2. By outlawing a union's coercive attempts to force an employer to violate a certification either by refusing to bargain collectively or by discriminating against the members of the certified union places employers in a better position to carry out their statutory duties.

3. By imposing on unions the duty to bargain collectively protects employers against the "take-it-or-leave-it" position taken by some powerful unions.

4. By placing some premium on the filing of financial reports and the registration of facts concerning the internal operations of unions takes a step toward protecting individual union members.

5. By making unlawful work stoppages resulting from jurisdictional work disputes and setting up some machinery to handle those disputes encourages some craft unions to agree to procedures for the settlement of such matters privately and peaceably