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by

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THE title of this paper is broader than its content. At the beginning of the October, 1956, term, close to seventy labor cases were posted on the United States Supreme Court's docket.[1] Many of these have not yet been decided. Of those that have been decided, a number may be set to one side as not within the scope of this paper. The main inquiry of this article will be to ascertain what the Supreme Court has done during the current term concerning the Taft-Hartley Act.[2]

Space considerations impel a further restriction on the subject matter of this paper. The cases on which the Supreme Court has written will be fully discussed. Cases which have been disposed of without opinion will be touched upon only lightly.

PREEMPTION

The liveliest topic in labor law today is that of preemption. To what extent does the Taft-Hartley Act preempt the field of labor law and preclude state agencies and courts from acting? Much has been written on this question, and uncertainties abound.[3] Three decisions handed down on March 25, 1957, demonstrate that the preemption doctrine is expanding rather than contracting.

In *Guss v. Utah Labor Relations Board*[4] petitioner employer was a manufacturer of specialized photographic equipment. In 1953 the United Steelworkers of America requested the National Labor Relations Board (NRLB) to certify it as the collective bargaining representative of the employees. A consent election was won by the

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[1] See compilation in 39 LRRM 19 (November 12, 1956).

[2] 61 STAT. 136 (June 23, 1947), 29 U.S.C. § 141 *et seq.* (1952). The official name of the legislation is "Labor Management Relations Act, 1947." The Act has five Titles, the first of which comprises the amended National Labor Relations Act. The original National Labor Relations Act was passed in 1935 and was popularly known as the Wagner Act. 49 STAT. 449, 29 U.S.C. §§ 151-66 (1946).

[3] The leading cases are Garner v. Teamsters Union, AFL, 346 U. S. 485 (1953); United Constr. Workers v. Laburnum Constr. Corp., 347 U. S. 656 (1954); Weber v. Anheuser-Busch, Inc., 348 U. S. 468 (1955); United Automobile Workers, CIO v. Wisconsin Employment Relations Bd., 351 U. S. 266 (1956).

[4] 77 Sup. Ct. 598.

union, and the NRLB issued its certification. Shortly thereafter the union filed charges of unfair labor practices. In the meantime the Board revised its jurisdictional standards. The Board's regional director refused to issue a complaint on the union's charges because the employer's operations "were predominantly local in character, and it . . . [did] not appear that it would effectuate the policies of the Act to exercise jurisdiction."

The union then filed substantially the same charges with the Utah Labor Relations Board. The employer urged that the State Board was without jurisdiction. The State Board held to the contrary and granted a remedial order. The Utah Supreme Court affirmed. The United States Supreme Court reversed and held the State Board without jurisdiction.

The question before the Supreme Court was "whether Congress, by vesting in the National Labor Relations Board jurisdiction over labor relations matters affecting interstate commerce, has completely displaced state power to deal with such matters where the Board has declined or obviously would decline to exercise its jurisdiction but has not ceded jurisdiction pursuant to the proviso to §10(a) of the National Labor Relations Act."[5] The cited section empowers the Board to prevent unfair labor practices affecting interstate commerce. The power is not affected by any other means of adjustment or prevention,

> Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

Chief Justice Warren delivered the opinion of the Court. He noted that the Wagner and Taft-Hartley Acts were intended by Congress to reach the full extent of its power under the Commerce Clause. But the NRLB had never, from its inception, exercised the full measure of its jurisdiction. For a number of years the Board decided from case to case whether to take jurisdiction. In 1950 and 1954 it announced certain standards governing its exercise of jurisdiction. Unknown was the number of labor disputes in the " 'twi-

[5] *Id.* at 599.

light zone' between exercised federal jurisdiction and unquestioned state jurisdiction."[6]

The proviso to §10(a) was an amendment to the original National Labor Relations Act, adopted in response to *Bethlehem Steel Co. v. New York State Labor Relations Bd.*[7] In that case the New York Labor Relations Board had certified a foremen's union at a time when the NRLB did not recognize units of foremen as appropriate for collective bargaining. The employer's business clearly affected interstate commerce. The Supreme Court held that the NLRB's policy against certifying foremen's units should prevail. This was a case in which the NLRB had dealt with a problem in a particular way, and the state agency was not permitted to deal with it in a different way. The Court had occasion to speak of cases in which the NLRB expressly cedes jurisdiction to a state agency or simply declines jurisdiction "for budgetary or other reasons." Language in the main and concurring opinions threw doubt on whether a state board could act either after a formal cession by the Board or upon a declination of jurisdiction "for budgetary or other reasons."

In the *Guss* case the Court was of the opinion that the proviso to §10(a) was intended to deal with all situations in which the Board declined to exercise jurisdiction which it had. Therefore, the only way in which a state board could assume jurisdiction over an employer in or affecting interstate commerce was by an agreed-upon cession on the part of the NLRB. The cession would be valid only if the state statute and interpretations thereof were consistent with federal law. The Court felt that Congress meant to insure that national labor policy should not be altered even in the predominantly local enterprises to which the proviso applied.

The Court conceded that its decision might create a "vast no-man's land, subject to regulation by no agency or court."[8] But it was believed that Congress intended that uniformity in labor relations law should be promoted. Congress was free to change the situation if it desired.

In *Amalgamated Meat Cutters, AFL v. Fairlawn Meats*[9] plaintiff operated three meat markets in Akron, Ohio. The business affected interstate commerce and was subject to the Taft-Hartley Act. It was assumed that the NLRB would decline to exercise jurisdiction

[6] *Ibid.*
[7] 330 U. S. 767 (1947).
[8] 77 Sup. Ct. at 603.
[9] *Id.* at 604.

over plaintiff's business. Defendant union was unsuccessful in trying to organize plaintiff's employees, but asked plaintiff for collective bargaining privileges and a union shop contract. Plaintiff refused, and the union picketed and brought secondary pressure on plaintiff's suppliers. Plaintiff obtained an injunction in the state court on the ground that the union's picketing was unlawful and contrary to Ohio policy.

The U. S. Supreme Court vacated the judgment and remanded. Citing the *Guss* case, the Court said, "If the proviso to §10(a) ... operates to exclude state labor boards from disputes within the National Board's jurisdiction in the absence of cession agreement, it must also exclude state courts.... The conduct here restrained—an effort by a union not representing a majority of his employees to compel an employer to agree to a union shop contract—is conduct of which the National Act has taken hold.... *Garner v. Teamsters, etc., Union*[10] teaches that in such circumstances a State cannot afford a remedy parallel to that provided by the Act."[11]

The Court stated that the *Amalgamated Meat Cutters* case was an excellent example of why the proviso to §10(a) should be strictly construed in order to achieve uniformity in national policy. It appeared that defendant union charged plaintiff employer with unfair labor practices under the National Labor Relations Act. The state court took no account of the alleged unfair labor practices, and one could not be sure that the decree was consistent with the Act.

In *San Diego Bldg. Trades Council v. Garmon*[12] plaintiffs were a partnership operating two retail lumber yards in San Diego County, California. Defendant unions requested a collective bargaining contract with a union shop provision. Plaintiffs refused on the ground that compliance with the request before the unions had majority support among the employees would be an unfair labor practice. The defendant unions peacefully picketed. Plaintiffs sued for injunction in a California superior court and at the same time filed a petition with the NLRB asking that the question concerning representation be resolved. The latter petition was dismissed. Thereafter the superior court issued an injunction and awarded $1000 damages. The judgment was affirmed in the California Supreme Court. It was ruled that the NLRB's declination of jurisdiction left the state court free to act and that peaceful picketing to

[10] 346 U. S. 485 (1953).
[11] 77 Sup. Ct. at 606.
[12] 77 Sup. Ct. 607.

obtain a union shop in violation of the National Labor Relations Act was contrary to California law.

The U. S. Supreme Court vacated the judgment and remanded on the basis of the *Guss* and *Amalgamated Meat Cutters* decisions. With respect to the award of damages the Court referred to *United Constr. Workers v. Laburnum Constr. Co.*[13] as sustaining a money judgment under state tort law for violent conduct. The Court was uncertain that the California court would have allowed damages if it had known that the injunction would be vacated. Without deciding whether the money judgment could stand, the Court remanded the case for proceedings consistent with the opinion.

Justice Burton wrote a dissenting opinion for all three cases, with Justice Clark concurring. The view was expressed that the proviso to §10(a) merely made clear that the NLRB could enter into cession agreements with state or territorial agencies. The dissenters disagreed that the proviso prevented the states from acting on matters over which the Board, for one reason or another, declined to exercise its full jurisdiction. Where the Board declined (or obviously would decline) jurisdiction, federal power was said to lie "dormant and unexercised," and the states had power to act.

The dissent pointed out that the proviso to §10(a) was so restricted that no cession agreement had been made under it. Hence there was an "extensive no-man's land" within which no federal or state agency or court could deal with labor controversies. It was hard to believe that "Congress, *sub silentio,* intended to take such a step backward in the field of labor relations."[14] The dissenting justices thought it likely that Congress intended the states to work out their own labor-management solutions where the NLRB chose not to exercise its jurisdiction.

This writer has a preference for the views expressed by the dissenters. It is easy to say that if the prevailing view is wrong, Congress has the power to correct the error. As a practical matter, however, a change in a federal statute, even the addition or deletion of a few words, is a formidable undertaking. Much can be said for putting this burden on those who advocate broad preemption by the Taft-Hartley Act. One may presume that the states continue to have jurisdiction over matters they have dealt with for decades. If they are to be precluded from acting on such matters, one would expect a clear statement of Congressional intent.

It is true that the proviso to §10(a) gives rise to an implication

[13] 347 U. S. 656 (1954).
[14] 77 Sup. Ct. at 611.

that cession agreements are the only way in which states can be empowered to act on disputes in or affecting interstate commerce. On the other hand, there is good reason to believe that Congress had no notion of precluding state action so completely as has come to pass under the premption decisions.[15] The uniformity of law consideration mentioned by the majority of the Court seems hollow. The effect of these decisions is that no procedure, administrative or judicial, is available to resolve controversies affecting interstate commerce. This is absence of law, not uniformity of law. Perhaps the situation is more favorable to unions than to employers, since many states are prone to impose restrictions on union activities. But it is to be remembered that the constitutional guaranty of free speech still affords a considerable measure of protection to union activities. Also, the preemption doctrine cuts two ways. In the *Guss* case a *union* was prevented from securing relief from unfair labor practices.

Doubt is to be expressed that calamitous consequences would follow if the states were permitted to act where the NLRB chooses not to exercise its jurisdiction. Advantages might well accrue from learning how different states solve their labor problems. This approach would have regard for one of the great attributes of the federal-state system.

In summary, the present status of the preemption doctrine seems to be this: With respect to peaceful union activities, directed toward organization and collective bargaining, state courts and administrative agencies are precluded from acting if the complaining employer is in or affects interstate commerce. The same may be said as to employer unfair labor practices which do not descend to the level of force, fraud or trespass. With respect to gross forms of intimidation and trespass, the states may afford either judicial or administrative remedies.

A footnote to the preemption doctrine is to be found in *Benz v. Compania Naviera Hidalgo*.[16] In this case the Supreme Court held that the Taft-Hartley Act had no application to a vessel owned by a foreign corporation and manned by nationals of countries other than the United States. Three unions in Portland, Oregon, successively picketed the vessel in behalf of the crew. In consequence

[15] See Petro, *Labor Relations Law*, 32 N.Y.U.L. REV. 267, 269 (1957); Petro, *Participation by the States in the Enforcement and Development of National Labor Policy*, 28 NOTRE DAME LAW. 1, 38-41 (1952); *cf.* Cox and Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211, 224, 226-31 (1950); Smith, *The Taft-Hartley Act and State Jurisdiction over Labor Relations*, 46 MICH. L. REV. 593, 606-13 (1948).

[16] 77 Sup. Ct. 699 (1957).

the ship was detained in Portland for many weeks. Injunction was issued by a federal district court against each union on the basis of Oregon law. The specific ground was that the purpose of the picketing was a breach of contract: to secure more favorable terms and conditions of employment than had been agreed to when the vessel began its voyage. The ship sailed after the last injunction was granted, and thereafter the three injunctions were vacated as moot. However, judgment for damages was secured against the principal representatives of the unions. The U. S. Supreme Court affirmed the judgment and rejected defendants' argument that the Taft-Hartley Act precluded the granting of a remedy under state law. The Court was of the opinion that Congress did not intend to subject foreign ships with foreign crews to the Taft-Hartley Act. The danger of international discord and retaliative action was adverted to as supporting the Court's ruling. The Court said, "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed."[17]

Lockout as an Answer to Whipsaw Strikes

At common law the lockout is regarded as the employer's counterpart of the employees' right to strike. Under the Wagner and Taft-Hartley Acts the right to lock out employees has gone into eclipse. Definitely, the right to lock out may not be exercised with the same freedom as the right to strike. When collective bargaining goes slowly, an employer may not lock out his employees except in unusual circumstances. To do so is to interfere with the employees' right to engage in concerted activities and in collective bargaining. The exceptional circumstances in which a lockout is permitted have been restricted to those in which an employer fairly anticipates a strike and will suffer special, excessive losses by failing to curtail his operations.

The so-called "whipsaw strike" tactic is another circumstance which now privileges an employer to lock out his employees. In *NLRB v. Truck Drivers Local 449, International Brotherhood of Teamsters, AFL*,[18] eight employers in the linen supply business comprised the Linen and Credit Exchange. For 13 years the Exchange and the union bargained on a multi-employer basis and negotiated successive collective bargaining agreements. Sixty days

[17] *Id.* at 704.
[18] 77 Sup. Ct. 643 (1957).

before the expiration of such an agreement on April 30, 1953, the union gave notice of its desire to negotiate changes.

Bargaining began before April 30 and carried on past that date. On May 26 the union struck and picketed one of the employers. The next day the other employers laid off their truck drivers. The union was notified that this action was taken because of the strike and that the laid-off drivers would be recalled when the strike and picketing were ended. Negotiations on the contract continued, and a week later agreement was reached. The strike then ended, and the laid-off truck drivers were recalled.

The union filed charges against the seven employers, alleging that the layoff was a lockout interfering with the employees' rights guaranteed under §§ 8(a)(1) and (3) of the Taft-Hartley Act. A complaint issued, and a trial examiner found the employers guilty of unfair labor practices. The NLRB overruled the trial examiner, making "the more reasonable inference . . . that, although not specifically announced by the Union, the strike against the one employer necessarily carried with it an implied threat of future action against any or all of the other members of the Association," with the "calculated purpose" of causing "successive and individual employer capitulations."[19] In the absence of proof of anti-union motivation, the employers' action was "defensive and privileged in nature rather than retaliatory and unlawful."[20]

The Court of Appeals for the Second Circuit reversed the Board, stating that a "temporary lockout of employees on a 'mere threat of or in anticipation of, a strike,' could be justified only if there were unusual economic hardship."[21] Because no such economic justification appeared, the lockout was held an interference with the right of employees to engage in concerted activities.

The U. S. Supreme Court reversed the Court of Appeals and affirmed the NLRB. The opinion was written by Justice Brennan for a unanimous Court. Observation was made that the term "lockout" is used in several places in the Taft-Hartley Act. The indication was that in some circumstances the employer may use this economic weapon. Put to one side were cases in which the lockout was used aggressively to frustrate organizational efforts, to undermine or destroy bargaining representation, or to evade the duty to bargain collectively.

The Court considered the status of multi-employer bargaining

[19] *Id.* at 645.
[20] *Ibid.*
[21] 231 F.2d 110, 113 (1956).

units under the Taft-Hartley Act and noted their wide incidence throughout the United States. Some four million employees were said to be governed by collective bargaining agreements signed by unions and thousands of employer associations. The "compelling conclusion" for the Court was that Congress intended that the Board should continue to have discretion to certify multi-employer bargaining units. This conclusion was stated in answer to the Court of Appeals' argument that multi-employer units had not been sanctioned by Congress and that the employers in the instant case had no valid interest to preserve the integrity of such a unit.

The Supreme Court was of the opinion that small employers had an interest "in preserving multi-employer bargaining as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from non-uniform contractual terms,"[22] The NLRB had discretion to decide that employers might use self-help in the form of a lockout to preserve the integrity of a multi-employer bargaining unit and to meet a strike called against one of them.

Right to Strike after Due Notice of Desire to Re-Open Contract

NLRB v. Lion Oil Co.[23] decided an important question concerning the right of a union to strike after giving 60 days' notice of reopening the terms of a collective bargaining contract. Respondent company and the Oil Workers International Union entered into contract on October 2, 1950. The contract could be terminated at yearly intervals, provided notice of desire to amend was given 60 days before October 23. If agreement was not reached during the 60-day period, either party could terminate the contract on 60 days' notice.

On August 24, 1951, the union served proper written notice on the company of its desire to modify the contract. Negotiations continued over a period of several months. The union voted to strike on February 14, 1952, but the strike was postponed three times and did not take place until April 30, 1952. At no time did the union give notice of termination of the contract.

On August 3, 1952, a new contract was executed, and the strikers returned to work. The union filed charges of unfair labor practices based on certain actions of the company during the strike. The company contended that the strike was a violation of §8(d)(4)

[22] 77 Sup. Ct. at 648.
[23] 77 Sup. Ct. 330 (1957).

of the National Labor Relations Act, depriving the strikers of employee status and rights under the Act. The NLRB ruled that after the 60-day notice expired, the Act was complied with and the employees were free to strike. Accordingly, a cease and desist order issued, along with an award of back pay. The Court of Appeals for the Eighth Circuit set aside the Board's order on the ground that the collective bargaining contract continued in effect and that the right to strike did not arise until the contract was terminated by 60 days' notice.[24] The Supreme Court reversed and affirmed the Board's order.

The first sentence of Section 8(d) defines the duty of employers and unions to bargain collectively. A lengthy proviso follows:

> *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification; . . . and
>
> (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.
>
> . . . [A]nd the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute . . . .

The Supreme Court stated that the sole question presented by writ of certiorari was:

> Whether the requirement of this Section is satisfied where a contract provides for negotiation and adoption of modifications at an intermediate date during its term, and a strike in support of modification demands occurs after the date on which such modifications may become effective—and after the 60-day notice period has elapsed—but prior to the terminal date of the contract.[25]

[24] 221 F.2d 231 (1955).
[25] 77 Sup. Ct. at 332.

Comment was made that a decided trend had developed among employers and unions to enter into contracts of longer duration than formerly and to provide for reopening during the contract term. Hence the question before the Court was of considerable significance.

The Court noted the use of the words, "termination," "modification" and "expiration" in the proviso to §8(d). Notice of desired modification "would typically be served in advance of the date when the contract by its own terms was subject to modification," while notice of desired termination "would ordinarily precede the date when the contract would come to an end by its own terms or would be automatically renewed in the absence of notice to terminate."[26] The conclusion was that the expression, "expiration date," in §§8(d)(1) and (4) encompassed both situations. Support for this interpretation was found in the next to the last sentence of the proviso, relieving either party to a contract from discussing or agreeing "to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." The implication of this declaration was that there is a duty to bargain over modifications when the contract contemplates such bargaining. The Court said it would be anomalous for Congress to recognize "such a duty and at the same time deprive the Union of the threat strike which, together with 'the occasional strike itself, is the force depended upon to facilitate arriving at satisfactory agreements.' "[27] The Court also observed that the Joint Committee on Labor Management Relations, made up of members of the Congress which passed the Taft-Hartley Act, reached the conclusion that after the statutory notice of desired modification is given, a union has the right to strike.[28]

Since the union called the strike long after the 60-day notice of request for modification was given, it had a right to strike, even though no notice of termination of the contract was given. The Court brushed aside the company's argument that the contract was violated. The agreement contained no expressed waiver of the right to strike, and waiver was not to be inferred. *NLRB v. Sands Mfg. Co.*,[29] was distinguished as a case in which employees struck in violation of a contract which did not contain any reopening

[26] *Id.* at 335.
[27] *Ibid.*
[28] Citing S. REP. No. 986, Pt. 3, 80th Cong., 2d Sess. 62 (1948).
[29] 306 U. S. 332 (1939).

clause. Here the employees could be discharged. In the instant case the Court did not believe "that the two-phase provision for terminating this contract . . . [meant] that it was not within the contemplation of the parties that economic weapons might be used to support demands for modification before the notice to terminate was given."[30]

Justices Frankfurter and Harlan concurred for the main part but dissented from the Court's passing on the employer's defense of breach of contract. They felt that the case should be remanded to the court of appeals to determine if an agreement not to strike should be implied and whether respondent company had continued to regard the strikers as employees.

The Court's interpretation of the proviso to §8(d) is to be commended. It makes common sense that the parties understand that when a reopening of a collective bargaining contract occurs, they assume the positions they occupy when a new contract is negotiated. There is ambiguity in the proviso to §8(d), but the language may fairly be read to recognize that the right to strike revives after the statutory notice is given or after the reopening date, whichever is later.

Union Expenditures in Connection with Federal Elections

In *United States v. International Union, UAW-CIO*,[31] an indictment was brought against the union for using general treasury funds to pay for television broadcasts advocating the selection of certain persons to be candidates for representatives and senator to the Congress of the United States. The federal district court dismissed the indictment on the ground that it did not state an offense under the Federal Corrupt Practices Act.[32] On direct appeal the Supreme Court reversed and remanded the case for trial.

The statute in question prohibits any corporation or labor organization from making "a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for . . . ." Fines and imprisonment are provided for violation of the statute. Justice Frankfurter, speaking for the Court, held that the expenditure alleged came within the language of the statute. His opinion reviews the movement for reform, which began in the '90's, and

[30] 77 Sup. Ct. at 336.
[31] 77 Sup. Ct. 529 (1957).
[32] 62 Stat. 723 (1948), amended 63 Stat. 90 (1949), 18 U.S.C. § 610 (1952).

notes that it was first directed against corporations and in recent years has been directed at unions. Justice Frankfurter is unanswerable in his argument and conclusion that Congress intended in the Corrupt Practices Act to reach expenditures of the type charged in the instant indictment.

The Court refused to rule on claims by the union that the statute abridged freedom of speech and of the press and the right peaceably to assemble and to petition, as well as other constitutional rights. Justice Frankfurter stated the familiar arguments against deciding constitutional questions unnecessarily. The questions came to the Court "unillumined by the consideration of a single judge." Adjudication on the merits was necessary to provide a "concrete actual setting that sharpens the deliberative process especially demanded for constitutional decision."

Justice Douglas wrote a vigorous dissent, in which the Chief Justice and Justice Black concurred. The dissenting justices were of the opinion that labor unions and corporations have a constitutional right of free speech which encompasses the right to expend funds in expressing preferences for public office. Apparently they agreed that outright contributions could be prohibited. If minority groups within unions or corporations are to be protected from expenditures with which they are out of favor, specific legislation, according to the dissent, should be passed rather than destroy the right of the majority to exercise the right of free speech. One may question whether the dissent makes a sound distinction between contributions and expenditures in urging that one and not the other is subject to legislative prohibition.

Effect of False Non-Communist Affidavits on Union's Compliance Status

May the NLRB conduct a hearing on the veracity of a non-Communist affidavit and, on a finding of falsity, withhold the benefits of the Taft-Hartley Act from the affiant's union? This question was answered in the negative in *Leedom v. International Union of Mine, Mill & Smelter Workers.*[33] A complaint of unfair labor practice was made against the Precision Scientific Company. During the hearing before the NLRB examiner the company challenged the non-Communist affidavits filed by a union officer. At first the Board refused to consider the challenge, but later a hearing was held. Findings were made that a particular affidavit was false

[33] 77 Sup. Ct. 154 (1956).

and that the union knew it was false but continued to re-elect the affiant as an officer. The NLRB entered an order that the union was not in compliance with §9(h) of the National Labor Relations Act and that it should be barred from procedures under the Act.

The union sought injunction against the decompliance order in a federal district court. Injunction was denied, but the Court of Appeals for the District of Columbia reversed.[34] On certiorari the Supreme Court affirmed the Court of Appeals.

Justice Douglas delivered the opinion for a unanimous Court. Section 9(h) states, "The provisions of section 35A of the Criminal Code shall be applicable in respect to . . . [non-Communist] affidavits." The Court was of the view that the only remedy for a false affidavit was criminal prosecution under the section cited.

Justice Douglas wrote that § 9(h) is intended to provide an incentive for unions to rid themselves of Communist leadership and to elect officers who can file true affidavits. Filing of the affidavits is the key making available to a union the benefits of the Taft-Hartley Act. The legislative history of the Act was reviewed and the conclusion reached that Congress did not intend for the NLRB to try the truth or falsity of the affidavits. For the NLRB to assume this duty would be to produce all manner of delays in complaint and representation proceedings. Justice Douglas took pains to say that the facts in the instant case were extreme and that they should not be allowed to cause adoption of an interpretation that would do great harm to unions that unknowingly elect officers who make false affidavits or where there is conflict in the evidence as to whether an officer swore falsely. The penalty, under the statute, was to be assessed against the officer, not the union.

Amalgamated Meat Cutters, AFL-CIO v. NLRB[35] goes a step beyond the *Smelter Workers* case. There the officer making the affidavit was convicted of perjury and was re-elected by the union. Nevertheless, the union was held not barred from filing charges of unfair labor practices against an employer. The NLRB had no power to issue a decompliance order, the only sanction being criminal prosecution of the officer who swore falsely.

This writer agrees that it would be unwise and impractical to clutter up complaint and petition proceedings with a hearing and trial of challenges of non-Communist affidavits. The statute certainly permits the interpretation adopted by the Court. Perhaps a distinction might have been made with respect to affidavits of con-

[34] 226 F.2d 780 (1955).
[35] 77 Sup. Ct. 159 (1956).

victed officers who are re-elected. But the distinction would have to be based on a conviction that is final, and, ordinarily, the challenged affidavit would be different from that on which the conviction was founded. Proof that an affidavit is false would not establish automatically that a later affidavit is false. It would be a rare case in which the conviction of an officer becomes final at a time when his false affidavit is still outstanding, he is re-elected and his union desires to initiate a complaint or petition proceeding.

Duty of Employer to Furnish Information as Part of Duty to Bargain Collectively

NLRB v. F. W. Woolworth Co.[36] was a per curiam decision upholding the Board's order that the employer should comply with a union's request for a list of employees, their hours and wages during the week preceding the date on which the collective bargaining contract of the parties was entered into. The NLRB was said to have "acted within its allowable discretion in finding that under the circumstances of this case failure to furnish the wage information constituted an unfair labor practice." The Court cited *NLRB v. Truitt Mfg. Co.*,[37] in which an employer was required to give information substantiating its claim of inability to pay a wage increase requested by the collective bargaining agent of the employees. On the same day certiorari was denied in *Taylor Forge & Pipes Works v. NLRB*,[38] wherein an employer was required to furnish information concerning its "point ratings" in fixing hourly wages for different classifications. Earlier, the writ was denied in *Item Co. v. NLRB*,[39] wherein an employer was required to furnish information as to merit increases even though its contract with the collective bargaining representative left the ratings within the employer's control.

These several cases demonstrate that the duty of an employer to bargain collectively encompasses a broad duty to furnish information in order that the employees' representative may carry out its functions properly. The representative has a right to information, not readily available to it from other sources, which will enable it to bargain understandingly and to police the administration of the current contract.

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[36] 77 Sup. Ct. 261 (1956), *rev'g* 235 F.2d 319 (9th Cir. 1956).

[37] 351 U. S. 149 (1956).

[38] 77 Sup. Ct. 265 (1956). The Board's order was enforced in 234 F.2d 227 (7th Cir. 1956).

[39] 77 Sup. Ct. 217 (1956). The Board's order was enforced in 220 F.2d 956 (5th Cir. 1955).

CONCLUSION

The writer has dealt with a disjointed subject matter.[40] The blame, however, lies with the U. S. Supreme Court. Its decisions have treated diverse problems. Of course, circumstances and accident determine the procession of cases to the Supreme Court, and no one expects a unitary development of law under the Taft-Hartley Act during each term of the Court. What is expected is a thorough and judicious resolution of the particular cases that come before the Court. This writer is of no mind to say that the Court has not performed according to this expectation, even though disagreement with a particular decision (or decisions) is expressed.

[40] After the present paper was prepared, Office Employees Int'l Union, AFL-CIO v. NLRB, 77 Sup. Ct. 798 (1957), was decided. In this case charges of unfair labor practices were brought against a group of Teamster unions. The Court had no difficulty in holding that the Teamster unions were acting as an "employer" within the definition of § 2(2) of the Taft-Hartley Act. The main question was whether the Board could, "by the application of general standards of classification, refuse to assert any jurisdiction over labor unions as a class when they act as employers." The Board had declined to take jurisdiction, saying that labor organizations "are institutions unto themselves within the framework of this country's economic scheme" and that the reasons for exempting non-profit employers should govern. The Court held that "such an arbitrary blanket exclusion of union employers as a class is beyond the power of the Board." The Court stated that up until this case the Board had never recognized "a blanket rule of exclusion over all non-profit employers;" that it was unrealistic to put labor unions in the same class with other non-profit employers; and that Congress did not intend to allow the Board such a broad power of exclusion.

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