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PROBLEMS IN THE ADMINISTRATION OF THE TAFT-HARTLEY ACT: THE NEW AMENDMENTS†

by

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I. INTRODUCTION

EXPERIENCE in the decision-making process causes one to approach a new law with trepidation. The cry of the administrator in the mazes of a new statute might well echo the Persian poet's plaint of eight centuries ago:

> Who did with pitfall and with gin,
> Beset the path I was to wander in.

Sometimes it takes a lot of legislative history to provide the answers to problems of statutory interpretation, if answers can be found at all. This is especially true in the application of an intricate statute to a complex human relationship such as that found in the field of labor-management relations. And the difficulties are equally present where substantial changes are made in a law that has been applied to a complex field for a considerable period. Through hundreds of court and administrative decisions, the terminology of a statute hardens into words of art, which take on the gloss of a highly specialized, though often unspoken, meaning. These meanings usually come from the setting in which the term or phrase appears. Consequently, when the terminology appears in a new setting, it is difficult to tell whether the lawmakers intended to import all the connotations that clustered around the terms in their old location.

In view of all these pitfalls and gins, it would ill-behoove this writer, as one of those who must sit in more or less ultimate judgment of what the amended Taft-Hartley Act means, to undertake now to interpret it, particularly since arguments of opposing counsel have not been heard. So, as Mark Twain was wont to observe, I will pass that.

Suffice it to say that roughly there are six major changes. These may be summarized as: (1) the division of jurisdiction between the

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† From an address delivered at the Southwestern Legal Foundation Institute on Labor Law (1959).

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federal government and the states over cases in industries affecting commerce; (2) extending to replaced economic strikers the right to vote in Board elections; (3) widening the reach of the secondary boycott ban and outlawing "hot cargo" clauses and probably many product and subcontracting restrictions, whether express or implied; (4) permitting unions in the garment-making and building and construction industries to make contracts which place restrictions on subcontracting; (5) the ban on recognition and organizational picketing by uncertified unions except under certain limited conditions; and (6) the provision for prehire contracts along with the 7-day union-shop and the hiring hall agreements in the construction industry.

Whatever may have been the motivation for these changes, one fact emerges from the pattern of the new amendments, *viz.*, that Congress intended not only that labor-management relations problems be resolved, but also that they be resolved promptly. If there is one watchword of congressional intent that can be used to describe the purpose of the new bill, that word is speed. This aim is reflected in almost every facet of the new legislation.

II. The New Amendments

A. *The Eradication of the So-Called No-Man's Land in Labor Relations*

While at first blush this may appear to be nothing more than a clarifying amendment, the fact remains it is much more than that. It removes from the Board the serious concern which arose from the *Guss*[1] decision. This decision had the effect of consigning every case over which the Board would not assert jurisdiction to a no-man's land of indeterminate scope, wherein unions, employees, and employers alike were left without either forum or remedy, save the fickle forum of public opinion and the dubious remedy of self-help.

This new amendment to the law makes it clear that every case shall be heard by a forum and a judicial remedy applied. The amendment has not only had the effect of relieving the Board of its continuing concern over the existence of the no-man's land, but it has also eliminated the continuing practical and political pressures previously exerted upon the members to broaden the Board's jurisdictional standards to include all cases affecting interstate commerce in any degree. For the Board to have undertaken this jurisdictional expansion would have been an essentially futile gesture. For not only

[1] Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1956).

would such a program have added to the already pressing burdens of the Agency, but it also would have extended a promise of relief to those involved in these numerous small cases at a time when the Board's own records showed its inability to provide full statutory service to those over whom it was currently asserting jurisdiction.

Behind the congressional approval of this amendment was a recognition of the fact that a further substantial broadening of the Board's jurisdictional standards by legislation or otherwise might even serve to inundate the Agency and render it completely ineffectual. This action by the Congress reflects the view that not only must the Board act with greater dispatch in the handling of its current caseload, but it also reflects the view that these no-man's land cases will be dealt with more speedily by the several states.

B. *The Repeal of Section 9 (f), (g), and (h)*

While I would be the last to assert that speed was the only consideration involved in the adoption of this amendment, the fact remains that spokesmen for labor and management as well as spokesmen for the NLRB have over the years repeatedly called to the attention of the Congress the considerable amount of time and money expended in the pursuit of the peripheral issues raised by these sections of the old law, a pursuit which contributed virtually nothing to the solution of the basic labor relations problem involved. The costly delays in adjudication which these sections fostered were not overlooked by the Congress, and under the new amendments the Board and its agents are free to direct their resources to the fundamental issues of the case, rather than to the delaying and frustrating legalistic meanderings which these sections all to often invited. Thus, the theme of speed is found at the base of this amendment.

C. *Amendment to Section 3 (b)*

Another significant amendment to the act is contained in section 3(b), which amendment *permits* the Board to delegate to its regional directors the power to decide contested representation cases. This amendment, of course, has one clear objective—the objective of speed. It is a matter of common knowledge that delay in resolving a question of representation is one of the principal factors leading to unfair labor practices, which in turn tend to delay indefinitely the realization of the basic purposes of the act. That Congress is well aware of these facts is reflected in this amendment. This amendment looks toward a decentralized handling of "R" cases in the hope that these decisions will be much more expeditiously announced, thus

avoiding the undesirable and frustrating concomitants which delay engenders.

D. *Priorities in Case Handling*

Another significant amendment, section 10(m), deals with priority of case handling. Under the new law the priority concept of case handling has been greatly expanded. Priority now attaches to all cases involving secondary boycotts, organizational and recognition picketing, hot cargo agreements, and strikes against certifications, as well as to cases involving discrimination against employees by either an employer or a union. Moreover, the mandatory injuction provision has been expanded to encompass cases involving illegal picketing and hot cargo situations. In view of this substantial expansion of the so-called priority system by the Congress, it becomes obvious to even the most casual observer that virtually the entire "C" case field of the act is either directly or indirectly identified with a priority designation. This fact, together with the expedited and decentralized "R" case procedures which the Congress has seen fit to authorize, makes it abundantly clear that speed has become the keystone of the law.

E. *New Section 8(b)(7)*

One of the most vexing problems in the field of labor-management relations is that of picketing by minority unions. This and related problems are dealt with in the new law by section 8(b)(7). Without attempting to assess the effect which the enactment of this new section has upon *Curtiss*,[2] *Alloy*,[3] and related cases, it may be pointed out that once again the Congress was concerned with the need for speed in disposing of cases arising under this section. And in consonance therewith the Congress has directed the Board in appropriate cases to proceed with an election "forthwith," without regard to its normal administrative procedures.

There can be little doubt that the Congress was not only aware of the need for, but insistent upon, the application of speed to the handling of cases of this type.

III. The Practical Effects of the New Legislation

It goes without saying that both the wisdom and the intent of the amendments contained in the new law will be roundly debated for months and even years to come. It goes without saying that we stand

[2] Curtiss Bros. Inc., 119 N.L.R.B. 232 (1957).
[3] Alloy Mfg. Co., 119 N.L.R.B. 307 (1957).

on the threshold of a new era of litigation which will serve ultimately to establish the metes and measures of the new law. And it goes without saying that at least in its early stages the National Labor Relations Board must and will assume the responsibility for interpreting and applying the new act to the labor relations of the country.

Aside from the numerous and complex legal problems which will flow from this new statute, the practicalities and realities of life dictate that the National Labor Relations Board must respond fully to this new mandate of the Congress by coming forward with an aggressive and dynamic administrative program designed to effectuate in fact the realization of this new public policy.

For many years the Agency, responsible for the administration of one of the most important and far-reaching federal statutes, has been either obliged or content to move along on a "make-do" basis, without sufficient resources, whether of money, men, or material to do its job properly. Whether this condition, a condition which has long since become chronic, was born out of the unpopularity of, and resistance to, statutes designed to regulate the field of labor-management relations, I do not know. But the fact remains that over the years the Agency's performance has pleased few, and irritated many. And the further fact remains that in the face of this continued criticism, those immediately responsible for conducting the affairs of the Agency have been loathe to come forward with an administrative and budgetary program based upon the eternal truth that if you want the best you must pay for the best.

The new law which the Congress has written gives legislative recognition to a fact which has been long recognized by many, namely that the matter of labor relations in modern industrial society is a matter of primary magnitude, a matter requiring prompt and bold action, and a matter demanding the best, and nothing but the best, in men, money, and equipment, if this urgent and important area of public policy is to receive the type of administrative direction which it deserves. The purposes of the new act can no more be realized by a second or third-class federal agency than the ills of man can be overcome by a medical profession devoted to voodoo.

Furthermore, it is the author's firm belief that unless the Agency now demonstrates to the Congress and the country that it is both willing and able to meet the requirements of speed and fair adjudication which this law requires, and this dynamic field of human relations demands, the days of the Agency as a regulatory body of our

government are truly numbered. It is no secret that the Board's critics are legion. It is no secret that a number of the amendments contained in the new law arose out of a broad dissatisfaction with the performance of the Agency over the years. And it is no secret that the principal cause of such dissatisfaction has been the inability of the Agency in countless cases to render a decision timely to the problems involved. This type of performance, if now continued, will be fatal to the Agency, and it will, moreover, constitute a disservice to the country.

It is therefore a matter of extreme urgency that those responsible for the administration of this Act come forward with a twentieth century concept of administration, geared to the realities of industrial life, and that those who are active in this field, whether on the side of management or labor, support the Agency in the establishment of such a program before the Congress, before clients, and before the public.

The need for a complete revamping of the Agency was apparent even before the new law was passed. The passage of the new law has served only to make clear beyond question that the need for such revamping can no longer be dealt with as theory. It must be dealt with as fact. In this connection, several matters merit consideration.

First is the matter of caseload. In 1954 the Agency handled 5,965 "C" cases; in 1959 the Agency handled 12,239 "C" cases. Thus, the "C" case load more than doubled in the space of five short years. The "C" case load continues to mount and will beyond question rise dramatically when the provisions of the new law go into effect. The "R" case field has over the same years experienced a substantial, if somewhat less dramatic, upward swing; this field, too, will see a marked upsurge when the provisions of the new Act become effective.

Second is the matter of Agency performance. Over the years the Board's performance has left much to be desired. Periodically, the Agency has tinkered with its procedures in an attempt to improve performance, but generally speaking these tinkering jobs have not resulted in anything approaching an effective cure for its chronic ills. Last year, more or less at the urging of the Congress, the Board undertook to establish certain time targets for each significant step in case handling. But up to this writing performance has not approached promise. The Agency, even under the old law, is still taking far too long to decide its cases.

Third is the effect of some elements of the new act.

1. The Eradication of the No-Man's Land.—In order to avoid du-

plication of suits, with their resultant confusion and uncertainty, it is essential that some procedure be established to settle questions of jurisdiction at the threshold. To meet this need the Board will undoubtedly be required to establish some procedure for the rendering of advisory opinions or declaratory judgments in this important field. This procedure will, at least at the outset, require the expenditure of additional funds and manpower not presently required.

2. The Repeal of Section 9 (f), (g), and (h).—In the short time since this section became effective, it has bcome apparent that those labor organizations which for one reason or another never complied with these provisions will not be reluctant to avail themselves of the use of the Board's services, both in the "R" and "C" case fields. This will necessarily add to the already staggering caseload of the Agency.

3. The Delegation of "R" Cases to the Regional Offices.—While the impact of this section will be governed by the extent of the delegation which the Board sees fit to make, the fact remains that any delegation of this class of cases will introduce to the regions an entirely new activity, the rendition of judicial decisions. If the regions are to be reasonably equipped to handle this activity, the regional office staffs must be expanded and a general training program must be instituted to equip personnel to operate effectively in this field.

4. The New Priorities System.—The expanded list of priority cases, if properly dealt with, will likewise dictate an increase in the size of the staff required in the field. If proper investigation is going to precede the determination of whether to dismiss a charge or issue a complaint, the additional staff required will be substantial. The mere setting of automatic, ritualistic target dates is no adequate substitute for full and mature investigation. In any effective administrative program only cases with merit should be tried and only cases without merit should be dismissed. Otherwise, the trying of baseless charges and the dismissal of meritorious charges can only serve to bring the Agency into disrepute at the outset. If both priority handling and sound investigation are to be realized, there must be staff on hand to do the job.

It might be added that had the priorities of the 1959 amendments been in effect during last year, there would have been no less than 10,000 cases that would have been entitled to priority. This was 82 percent of the unfair practice cases and nearly half of all cases filed.

5. New Section 8(b)(7).—While it is true that the full impact of the cases arising under this section may be a matter of some conjec-

ture, every indication is that their number will be substantial. This, together with the special handling which the Congress decreed for this type of case, can only mean a further increase in staff if the job is to be done properly.

IV. Conclusion

The Agency's performance, even under the old law, has not met expectations, particularly once a complaint has issued, and the case has moved to the so-called Board's side of the Agency. The new law, in addition to adding substantially to the already oppressive caseload of the Agency, will by its recurrent accent on speed require a rate of performance not heretofore even approached by the Agency.

In the light of these facts some elementary conclusions are obvious:

1. The Agency's staff in every division and every office must be markedly increased and in many instances re-trained. This is true of legal assistants, field examiners, field attorneys, enforcement attorneys, clericals, and trial examiners, indeed, of every type and character of personnel.

2. The Agency itself must from the top down develop an attitude, not of desperation, but of urgency.

3. The Agency must reconcile itself to the fact that if the goals of the new act are to be realized, it must give up its nickel-nursing attitude and face the fact that it will cost more to process a case properly in 1961 than it did in 1954.

4. The Agency must be prepared to put enough troops, both staff and line, both professional and clerical, into the field to meet its obligations fully.

5. The Agency must be prepared to abandon its tired acceptance of a second-class status among the regulatory bodies of government. The Congress has repeatedly recognized that this is a program of vital importance to the country. In the last few years the Congress has been increasingly concerned with the performance of the Agency and has evidenced every interest in improving that performance. It is time for the Agency to lay before the Congress a program sufficient to meet the demands of the Agency and the dictates of the law.

Now even if all this be done, and even if all concerned give their utmost to the task before us, it is by no means a foregone conclusion that the program will succeed. For, as stated before, the five men who sit at the top of the ever-broadening pyramid of an ever-expanding caseload, find themselves confronted with a task of superhuman dimensions.

It may well be that if any semblance of proper judicial procedure is to be maintained, and if delegation is not to border upon abandonment of responsibility, the present system must be changed. It may very well be that those who advocate a system of regional boards, or a system of industrial boards, or a system of labor courts may yet prevail. But I for one would prefer to see that result come about, if indeed it must come about, as a result of the sheer magnitude and complexity of the problems involved. I do not propose to see it come about through inertia or indifference. I propose to see it come about only after it has been impartially demonstrated that an Agency fully geared, fully equipped, fully manned, and fully financed, fell before the task. It is incumbent upon all that it be given that fair test.