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A COMPARATIVE SURVEY OF THE WAGNER ACT AND THE TAFT-HARTLEY BILL

THE purpose of the Labor-Management Relations Act, 1947 (the Taft-Hartley Bill), is declared by Congress to be the promotion of the full flow of commerce, "to prescribe the legitimate rights of both employers and employees in their relations affecting commerce,"¹ to provide procedure for the maintenance of these rights and the rights of individual employees in their relations with labor organizations, and to protect the national interest in industries which are in or affect interstate commerce.²

This declaration is a clear-cut departure from the underlying philosophy of previous legislation, as embodied in the Wagner Act.³ Although the basic purpose of both acts is the protection of the free flow of commerce, the Wagner Act was directed solely to protection of employees and labor organizations,⁴ while the present Act, retaining most of the provisions of the earlier law, undertakes to guarantee, also, the protection of employer-rights and the rights of individual employees to be free from oppression by the unions themselves. This is a fundamental change in legislative attitude, inasmuch as it clearly demonstrates a congressional belief that certain evils have developed as a result of the practices of some unions and their officers. Hence a determined effort is made to place the three parties involved, unions, employers, and employees, on an equal plane.

In order to accomplish this adjustment Congress believed it necessary to make drastic amendments to the Wagner Act⁵ and

¹ Labor-Management Relations Act, 1947, § 1(b), 61 STAT. 136 (1947), 29 U. S. C. A. § 141(b) (Supp. 1947).

² *Ibid.*

³ National Labor Relations Act, 49 STAT. 449 (1935), 29 U. S. C. A. §§ 151-166 (1947).

⁴ *Id.*, § 1.

⁵ LMRA § 101.

to enact many additional provisions. The more important of these additions and changes, their underlying history and causes, Board and court decisions under them, and their possible future effect will be briefly examined here. Because of limited space those sections of the Wagner Act which were re-enacted without change are not discussed, and only passing attention is given to administrative and procedural alterations, since those provisions dealing with substantive effect are thought to be of more general interest.

THE AMENDED NLRB

The Findings and Policy set out by the Amended Act are identical with those contained in the original, with one important addition: it is stated that "certain practices of some labor organizations" have prevented and burdened the free flow of commerce and therefore necessity for the elimination of such practices exists.

Section 2 is devoted to the definition of some essential terms, and several important amendments are made here. A consideration of these changes is necessary because of their effect upon other salient parts of the Act.

Person. This term is now defined to include "labor organizations," which were unmentioned in the original definition. Thus a basis is provided for the issuance of NLRB orders to unions. Such an extension of the term was required because, by Section 10 (c), NLRB orders are to be directed to "persons" who have violated the Act.

Employer. Employer was formerly defined as "any person acting in the interest of an employer." This is changed to read "any person acting as an agent of an employer." The House Committee explains the purpose of this change:

"... to make employers responsible for what people say or do only when it is within the actual or apparent scope of their authority, and thereby make the ordinary rules of agency equally applicable to employers and unions."⁶

⁶ H. R. REP. NO. 245, 80th Cong., 1st Sess., 18 (1937).

The Committee said that this was necessary because formerly the Board

"... frequently 'imputed' to employers anything that anyone connected with an employer, no matter how remotely, said or did, notwithstanding that the employer has not authorized the action and in many cases had even prohibited it. By such ruling the Board was often able to punish employers for things they did not do, did not authorize, and had tried to prevent."⁷

Employee. The new act amends the old definition so as to exclude from the term "employee" those individuals having the status of independent contractor or supervisor, and those working for employers subject to the Railway Labor Act or for any other person not an employer as defined by Section 2 (3). Here the draftsmen sought to establish a legislative intent that the ordinary meanings of words be used and to preclude the use of "new meanings . . . the Labor Board might think up." The House Committee stated:

"Congress . . . intends . . . that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' . . ."⁸

In connection with this statement the Committee cited a case⁹ wherein the Board held that "independent merchants who bought newspapers from the publisher and hired people to sell them . . ."¹⁰ were employees. Here the Congress showed a strong disapproval of the practice of the Supreme Court in relying upon the Board's assumed "expertness" in upholding decisions. This criticism appears repeatedly throughout the reports of both the Senate and House Committees.

Another impact of this amendment is the exclusion of supervisors from the definition of "employee." Supervisory personnel

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *N. L. R. B. v. Hearst Publications, Inc.*, 322 U. S. 111 (1944).

¹⁰ See note 6 *supra* at 18.

are not hereby precluded from joining unions—they are merely removed from the operation of the Act. Employers may now recognize and bargain with, or merely ignore, supervisory unions, as they choose. Since passage of the Taft-Hartley Act the Board and courts have held that supervisors are not employees under the Act¹¹ and that foremen are supervisors and therefore not employees.¹² Supervisory unions had complained of employer refusal to bargain, occurring before passage of the Act. Both the Court and the NLRB held that in cases pending review at the time of amendment the new definition of “employee” governs. Since the complaint concerned nothing more than refusal to bargain, it would not effectuate the policies of the Act to require the employer to take remedial action. Following this authority the Board, on October 14, 1947, in six other almost identical cases, declared supervisory employees outside the coverage of the NLRA as amended and dismissed the complaints.¹³

Under these decisions it seems settled that complaints filed since the passage or effective date of the new Act, complaining of practices occurring prior to those dates, will be decided on the basis of the amended Act. These decisions indicate that both the NLRB and the Courts are adopting a statutory construction calculated to effectuate the policy set forth by Congress in the Taft-Hartley Law.

Supervisor. Section 2 (11) defines “supervisor,” which was not included in the old NLRA. The addition was made because

¹¹ *Eastern Gas & Fuel Associates v. N. L. R. B.*, 162 F. (2d) 864 (C. C. A. 6th, 1947); *Westinghouse Electric Corp., Foremen's Assn. of America*, Chapter No. 215, 75 N. L. R. B., No. 1 (1947).

¹² *Young Spring & Wire Corp. v. N. L. R. B.*, 163 F. (2d) 905 (APP. D. C. 1947).

¹³ *Aluminum Co. of America, Foremen's Assn. of America (Independent)* Chapter No. 254, 75 N. L. R. B., No. 3 (1947); *Columbia Steel Co., Foremen and Supervisor's Assn. of Pittsburg, Calif.*, 75 N. L. R. B., No. 4 (1947); *M. P. Maller, Inc., Federal Labor Union Local No. 23,985 (AFL)*, 75 N. L. R. B., No. 5 (1947); *Peoples Life Ins. Co. of Washington, D. C., American Federation of Insurance Supervisors Union No. 23,891 (AFL)*, 75 N. L. R. B. No. 6 (1947); *Tidewater Associated Oil Co., United Petroleum Workers (Unaffiliated)*, 75 N. L. R. B. No. 7 (1947); *White Motor Co., Foremen's Assn. of America (Independent)* Chapter 102, 75 N. L. R. B., No. 8 (1947).

of the exclusion of supervisors from the definition of "employee." A supervisor is defined as follows:

"Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine nature, but requires the use of independent judgment."¹⁴

The Senate Committee was explicit as to the purpose of excluding supervisors. It stated that the Board, after changing its views several times, had finally decided that supervisory employees were subject to the NLRA; that this decision was upheld by the Supreme Court; that a continuation of this policy was folly; that "unless this Congress takes action, management will be deprived of the undivided loyalty of its foreman."¹⁵ As illustration of this "folly" the committee cited *N.L.R.B. v. Jones & Laughlin Steel Corp.*,¹⁶ wherein testimony was given to the effect that after organization of supervisory employees the number of disciplinary slips issued by supervisors in mines had fallen to one-third of their previous volume and the accident rate had doubled. A further declared purpose was termination of

"... the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise."¹⁷

Under this section the NLRB has rendered one decision, in which it held that stewards on ships sailing the Great Lakes, who were in general charge of galley crews and who had authority to hire, discharge, discipline and give work assignments, were supervisors and were excluded from coverage of the new Act.¹⁸

¹⁴ LMRA § 2(11).

¹⁵ SEN. REP. No. 105, 80th Cong., 1st Sess., 3-5 (1947).

¹⁶ 71 N. L. R. B. 1261 (1945).

¹⁷ See note 15 *supra* at 5.

¹⁸ *Kinsman Transit Co., Seafarer's International Union of North America, Great Lakes District (AFL)*, 75 N. L. R. B., No. 16 (1947).

Agency. The new Act states that, in determining whether one person acted as agent for another, the question of whether acts performed were authorized or ratified "shall not be controlling." There was no reference to an agency test in the old NLRA. The purpose of this new provision is to render employers and unions liable for the acts of those persons who ordinarily commit unfair labor practices—supervisory personnel in the case of employers and organizers and union officers in the case of unions. The Congressional purpose here is one of making the ordinary evidence and rules of agency applicable to unions and employers alike.¹⁹

Administration. Section 3 is concerned with administration. It increases the membership of the NLRB from three to five members. Here might be imputed the fine hand of a Republican Congress seeking to make sure that, by adding members sympathetic toward the amended law, the Act would be administered in the manner contemplated by its framers. Section 3 (d) incorporates an important change, for by its terms the Board's general counsel is now selected by the President with the advice and consent of the Senate, instead of being appointed by the Board and subject to its control, as he was under the Wagner Act. The general counsel is now independent and has general supervision of all Board attorneys except trial examiners and the legal assistants of Board members. Another change abolishes the Review Section of the NLRB; the Congress thought that an excess of judicial functions had been delegated to this Section. The Committee stated:

"... the Congressional purpose of having the Act administered by a Board of several members rather than a single administrator has been frustrated.... Congress intended the Board to function like a Court...."²⁰

Provision is made, however, for employment of attorneys as

¹⁹ Conference Report, H. R. REP. No. 510, 80th Cong., 1st Sess., 36 (1947).

²⁰ See note 15 *supra* at 8-10.

assistants to individual Board members in the preparation of orders and decisions.

Section 6 is amended to make the Board subject to the Administrative Procedure Act²¹ in exercising its authority to make, amend, and rescind its rules and regulations.

Rights of Employees. Section 7 of the Wagner Act guaranteed employees the rights of organization and collective bargaining. The amended Act repeats the section and adds a guarantee to individual employees, as distinguished from labor organizations, of the right to "refrain from any or all" activities and organization, except as provided by Section 8 (a) (3) (discussed later). The probable purpose of this language was prevention of union coercion and domination of members.

Employer Unfair Labor Practices. Sections 7 and 8 of the Wagner Act have sometimes been referred to as "Labor's Bill of Rights." The former was declaratory of rights to be protected, while the latter described some of the more important acts of employers which were condemned as unfair labor practices and for which a remedy was provided by the Act.

Section 8 retains all the provisions of the original, makes one change, and adds an entire new group of unfair union practices. In adding these prohibitions Congress is again attempting to equalize the balance between labor and management and to eliminate those factors which it thought had burdened and obstructed commerce in the past.

Section 8 (3) of the Wagner Act is now section 8 (a) (3) of the LMRA. Discrimination by employers against employees in regard to hire or tenure of employment is still prohibited. The declaration that nothing in the Act shall prevent an employer from making union-shop agreements (as distinguished from "closed shop") with representative unions is preserved. Another change comes in the addition of new conditions upon which this right is dependent: the employer may make membership in the

²¹ 60 STAT. 237 (1946), 5 U. S. C. A. 1001 (Supp. 1947).

representative union selected by his employees a condition of tenure, but "permission [to make such a contract] . . . is granted only if, upon the most recent election held under . . . '(Section 9 (e))' . . . a majority of the employees in the bargaining unit in question eligible to vote have authorized the union to make such an agreement."²² Moreover, the employees must be allowed a minimum of thirty days after employment in which to acquire membership in the union. The new matter further commands the employer not to discriminate against employees for failure to secure union membership:

"(A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."²³

An explanation of this change and its provisions is found in the Senate Committee Report²⁴ where findings are made that, in the five years preceding investigation, over 75 percent of all union contracts made contained compulsory unionism features; that many abuses arose because of these features; that these abuses have aroused great public feeling against this type of arrangement; and that 26 states had seen fit either to enact laws or entertain legislative proposals outlawing such contracts. The Congressional Report indicates awareness of the belief held by labor leaders that such a federal law would allow individuals to share in the benefits which labor has won while refusing to pay a share of the cost. It manifests a legislative desire to protect the rights of both parties, but, in addition, it manifests an opinion that past instances of union monopolization of jobs, depriving management of its choice of employees, and the denial of the right

²² See note 15 *supra* at 41.

²³ LMRA § 8(a) (3).

²⁴ See note 15 *supra* at 6-7.

to earn a living to minority groups, have made it imperative that a change of some sort be made. The described changes are designed to secure rights of the individual, at the same time providing a method by which employers desiring to do so may enter into union shop agreements.

A major change may be expected in the Board's treatment of the problem of "dual unionism," a subject which was discussed by NLRB General Counsel Denham at the last annual meeting of the American Bar Association.²⁵ Mr. Denham explained that the old Act merely said that it would not be discriminatory to discharge for failure to maintain union membership under a closed shop or union-security contract. This made it possible for a union having a closed shop contract to perpetuate itself by expelling any member who attempted to switch to another union for the purpose of changing bargaining representatives. The union could request the employer to discharge the expelled member, threatening a strike upon refusal. The employer would be under economic pressure to comply. In 1942 the doctrine of the *Rutland Court* case²⁶ declared discharge by an employer with knowledge that the reason for union expulsion had been "dual unionism" to be an unfair labor practice, for which the employer would be required to reinstate the employee with back pay. This did not defeat the union practice, however, because the only penalty was against the employer. A union could still threaten strikes with impunity and the employer was forced to choose the lesser of two evils and discharge the employee rather than risk the prohibitive cost of a strike. It might then be several months before the employee's case came up before the NLRB. Meanwhile the employee was deprived of his income and, upon adverse decision, the employer was deprived of his property in the amount of back wages due without having received any labor in return, and without fault on his part. The new Act precludes such coercion, pro-

²⁵ N. L. R. B. Release R-4, September 23, 1947.

²⁶ 44 N. L. R. B. 1040 (1942).

protecting both employee and employer from the union. An employer is still liable if guilty of such discriminatory discharge of his own volition, but Section 10 (c) expressly makes a union liable for the amount of back pay if it is the procuring cause of such a discharge.

This amendment is one of the most objectionable features of the Taft-Hartley Act from the viewpoint of labor organizations and their leaders. They complain of deprivation of all control over their membership and of the protection given to those who menace unions internally, such as informers, trouble makers, and even Communists. An answer to this argument is that labor has only itself to blame—without its unfair actions in the past such a provision would not have been felt necessary by Congress.

The status of complaints of unfair labor practices committed before passage of the Taft-Hartley Bill deserves mention at this point. A recent NLRB decision²⁷ held that the Legislative history of the LMRA indicates no congressional intent to absolve employers of liability for unfair practices committed prior to its passage; therefore, the Board still has power to pass on such cases. But in these instances if the union complaining of refusal to bargain has not complied with filing and affidavit requirements of the Act (discussed later) the employer will not be compelled to bargain, since the practical effect would be to certify the union.

Another recent Board decision, under Section 8 (5) of the NLRA, may properly be considered here. The Board held that it would not effectuate the policies of the Act to order employers to bargain with supervisory unions where refusal occurred prior to amendment, since supervisors are excluded from the terms of the LMRA.²⁸ Thus, a section which remains the same in the new Act may be affected by changes in other sections so as to vary its application.

²⁷ Marshall & Bruce Co., Nashville Bindery Workers Union No. 83, International Brotherhood of Bookbinders (AFL), 75 N. L. R. B., No. 13 (1947).

²⁸ See note 11 *supra*.

Union Unfair Labor Practices. Section 8 (b) is entirely new. No similar provisions have ever been contained in any previous federal labor legislation. Here it is declared that six types of acts by unions are unfair labor practices.

First: Restraint or coercion of employees in the exercise of rights guaranteed by Section 7, or of employers in their selection of management representatives for collective bargaining and adjustment of grievances with employees, is made an unfair practice. The Senate Committee said, with respect to the provision:

"We believe that freedom of the individual workman should be protected from duress by the union as well as duress by the employer." (citing instances of union coercion and even physical violence against employees).²⁹

As to coercion of employers, the Committee stated:

"Thus, a union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts in behalf of its members; also, this subsection would not permit a union to dictate who shall represent an employer in settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling of grievances."³⁰

Second: To coerce or attempt to coerce discrimination under union shop agreements for any reasons other than non-payment of dues or fees, which must be uniform to all members of the union, is also declared to be unfair. This lends force to Section 8 (a) (3) by giving the Board power to order unions to cease and desist and to remedy injuries caused by unfair practices thereunder. The main aim is, of course, prevention of discharge because of dual unionism. Under these sections a union may adopt whatever internal rules it may desire and may expel members for reasons which it considers just, but neither it nor the employer can cause a discriminatory discharge for such reasons.

²⁹ See note 15 *supra* at 21.

³⁰ *Ibid.*

After expulsion the employee will still be entitled to his job unless he has given lawful cause for losing it.

Third: It is an unfair practice for a union which is a representative of employees under Section 9 (a) to refuse to bargain collectively with an employer. Here the obligation of unions is raised to the same level as that imposed upon the employer by the Wagner Act. It has been observed that this section is fair and called for, because in the past unions have presumed that they could *demand*, while employers were bound to bargain and make counter-proposals. In many instances unions prepared contracts, presented them to employers, and said, in effect, sign or take the consequences. However, this was seemingly changed by the *Times Publishing* case,³¹ which was decided prior to the 1947 amendment, so that this section codifies the law existing at the time of enactment.

Fourth: It is an unfair labor practice “. . . to engage in, or to induce or encourage the employees of an employer to engage in . . .” certain types of strikes, secondary boycotts, or jurisdictional disputes. The major practices prohibited are those which attempt to force an employer to cease doing business with other employers or which attempt to force employers to recognize and bargain with unions which have not been certified as employee representatives by the NLRB. Also made unlawful are attempts to force an employer to assign work to one union where he has already assigned it to employees of another, unless the employer, in refusing the union request, is failing to comply with an order or certification of the Board. A proviso states that the right to refrain from crossing picket lines is fully preserved to employees, where the lines are set up in pursuance of a lawful strike.

Fifth: Section 8 (b) (5) makes it unfair for unions with union-shop agreements, as authorized by Section 8 (a) (3), to charge dues or fees which the NLRB finds are excessive or discriminatory. The Board is given power to determine what is and what is

³¹ 72 N. L. R. B., No. 128 (1947).

not excessive under the circumstances. Among the factors to be considered in this determination are the practices and customs of unions in the particular industry and the wages currently paid to the employees affected. General Counsel Denham expressed his understanding that what is excessive or discriminatory will depend on the facts of each case. He stated that there is no fixed criterion by which to judge initiation fees—that the decision will depend upon (1) the industry, (2) the place which the union occupies in the industry, and (3) the value of membership in the particular union to its members. High fees may be reasonable and just in some cases because of a long practice of charging high fees and, or, because of the above three factors.³² Whether or not a particular fee is or is not reasonable is within the discretion of the NLRB, and while the General Counsel's office is now separate and his views are not necessarily those of the Board, it is reasonable to assume that its interpretation will be substantially the same.

Sixth: Section 8 (b) (6), the last of the unfair union practices specifically defined by the Act, will have a most important effect in many fields of industry. It prohibits unions or their agents from causing or attempting to cause employers to deliver, pay, or agree to pay anything of value for services not performed or not to be performed. It is designed to do away with "feather-bedding" practices. The section will probably be construed narrowly, applying to such situations as jurisdictional disputes where a standby crew is imposed upon an employer, or instances such as those where a musician's union has required the hiring of an orchestra while recordings were played on radio broadcasts. Where the extra personnel actually do some work the provision probably will not be applied. The House Report states that the purpose here is substantially the same as that of the Lea Act,³³

³² For a full discussion see N. L. R. B. Release R-4, September 23, 1947.

³³ 60 STAT. 427 (1946), 47 U. S. C. A. 506 (Supp. 1946).

which was aimed at Petrillo's American Federation of Musicians and did not apply to industry generally. The report goes on to say:

"... featherbedding [is a] ... problem which is becoming a more and more serious menace to the productivity of our country and to the manufacture of goods at a cost within the reach of millions of our citizens."³⁴

Although no mention is made of vacation pay, retirement pay, pay for rest periods, and similar arrangements, it seems logical that such payments will not be held to fall under this section, since they are so widely practiced and are approved by both labor and management. Constitutionality of this section seems assured, since the similar and more drastic provision of the Lea Act had been upheld by the Supreme Court.³⁵

Free Speech. Section 8 (c) manifests a clear intent that the right of free speech is not to be infringed by any of the provisions of the Act. It provides:

"... the expressing of any views, argument, or opinion, or the dissemination thereof ... shall not constitute or be evidence of an unfair labor practice under ... this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Collective Bargaining. Section 8 (d) is entirely new. It seeks to emphasize that the duty to bargain collectively is mutual to both labor and management; that an essential part of this duty is good faith; and that when the parties reach an agreement they are then obligated to incorporate it into a written contract on request of the other party. Nevertheless, it is plainly stated that this provision is not to be construed as compelling any party to agree to proposals or make concessions. After concessions and proposals are made and agreements reached, it is required that the parties conduct themselves according to ordinary standards of fair dealing.

The section also imposes obligations where a collective con-

³⁴ See note 6 *supra* at 25.

³⁵ U. S. v. Petrillo, 332 U. S. 1 (1947).

tract is already in effect. The duty to bargain collectively there includes (1) notice of desire to terminate or modify served on the other party at least sixty days before expiration of the contract; (2) an offer to meet and negotiate a new contract; (3) notification of both the Federal Mediation and Conciliation Service and appropriate local agencies within thirty days after giving the notice required by (1), above; (4) continuation in full force of all the terms of the existing contract for the full sixty-day notice period without resort to strike or lockout. There follows a provision that the duties enumerated shall be suspended if a union, which is a party to such a contract, is superseded by the intervening certification of another union by the NLRB, as provided for by the Act. Any employee who strikes in violation of this section loses his status as an employee for the purposes of Sections 8, 9, and 10 of the Act, but regains his status when, and if, he is re-employed. If, in an existing contract, the notice period is longer than sixty days this stipulated period is not suspended; however, violation of it would not be an unfair practice, so long as the sixty-day notice required by the Act is given.²⁶

The opinion has been expressed that the requirement of mutual good faith in collective bargaining is the outstanding feature of the entire 1947 Amendment, and that, if conscientiously followed by all parties, it will be more effective than any other single factor in eliminating industrial friction and strife.

Exclusive Representation. Section 9 (a) is incorporated in the Taft-Hartley Act with some additions. The old version provided that the representative (union) selected by the majority of employees composing any appropriate bargaining unit should be the exclusive representative of all the employees in the unit, with the exception that any employee or group might at any time *present* grievances to the employer. The amendment states that these employees shall have the additional right to have grievances *adjusted* without intervention by the bargaining representative, so

²⁶ See note 15 *supra* at 24.

long as the bargaining representative is given opportunity to be present at the time of adjustment. The Senate Committee was of the opinion that Labor Board decisions had not given full effect to Section 9 (a), and the purpose of this change is to clarify and show that the individual employee's right to present his grievance exists independently of any right which the union may have. The Committee indicated that the employee will not be required, as Board decisions have held, to consult the union at each and every stage of negotiations; he may conduct his business with his employer in private if he so wishes, just so long as the agent of the bargaining representative is allowed to be present at the settlement.

Bargaining Unit. Section 9 (b) gives the Board power to decide what the appropriate bargaining unit shall be in each case—craft, plant, or employer unit, or a subdivision thereof—whichever will most effectively carry out the provisions of the Act. There are, however, several qualifications and limitations placed on this power. No unit shall be appropriate which contains both professional and non-professional employees unless a majority of the professionals in the unit vote *against* separate representation. This, in effect, creates a presumption that professional employees wish to be represented by a separate union of their own. The Board may not decide that any craft unit is inappropriate on the ground of a prior Board decision determining that a different unit was appropriate unless a majority of the members of the craft unit vote against separate representation. No unit shall be appropriate which has as members both guards, employed to enforce rules for the protection or safety of property or persons on the employer's premises, and other categories of employees; and the Board is precluded from certifying as a representative any union which has such a membership or is affiliated, either directly or indirectly, with any organization which admits both guards and other employees.

At congressional hearings representatives of various profes-

sional associations appeared and complained of occasions where the Board had included members of these professions in the same units with production, maintenance, or clerical employees. The testimony showed the interests and problems of professional people to be generally dissimilar to those of other groups covered. Because of the relatively small number of the former, their views are seldom reflected in agreements to which they are subjected when included in units with non-professional personnel. Now professionals may form separate units and make their own agreements. The Board is forbidden to retain these persons in their former units against their will on the basis of previous determinations and must now consider the actual wishes of this important class of employees.³⁷

By separating plant guards from other groups of employees the amendment reverses the position of the Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.*³⁸ Now personnel employed to enforce rules for the protection of an employer's property and the safety of persons on his premises are removed from the influence of organizations composed of the rank and file. It would seem only just that employers be accorded the right of having as their custodians persons who are not constantly finding conflict in their loyalties, being torn between the orders of their union leaders and duty toward employers.

In line with the Act, a Circuit Court of Appeals recently refused to require an employer to bargain with a union which claimed to represent guards and other members employed in different capacities.³⁹ This decision was reached despite a mandate from the Supreme Court directing that the Board order be enforced. The mandate had been issued prior to passage of the Taft-Hartley Act, and the court felt that its decision should be based on the law at the time of rendition, not as the law previously existed.

³⁷ *Id.* at 11, 12.

³⁸ 331 U. S. 416 (1947).

³⁹ *N. L. R. B. v. E. C. Atkins & Co.*, 165 F. (2d) 659 (C. C. A. 7th, 1947).

In another case,⁴⁰ decided by the NLRB, a union which already represented production and maintenance employees petitioned seeking to represent timekeepers and other clerical workers employed in the factory as a part of either a production and maintenance unit, or as a separate unit. The employer protested, attempting to analogize under the plant guard provision that such representation was inappropriate. The Board brushed this contention aside, saying that Congress would have expressly so stated had it intended to include clerical workers in such a special category.

In still another decision the Board held that foremen should be excluded from bargaining units, since they are not "employees" within the meaning of the Act.⁴¹

These cases seem to indicate that this section is being enforced according to its terms.

Procedure for the determination of bargaining representatives is substantially changed by section 9 (c). The Board must direct an election by secret ballot whenever a petition for certification is properly filed by either an employer or a union, if the Board finds that a question affecting commerce exists. No distinction is made because of the identity of the petitioning party, and where a valid election has been held within the preceding twelve months, no new election may be ordered. Employees on strike and not eligible for reinstatement will not be allowed to vote. The twelve month provision does not, however, prevent the Board from permitting consent elections.

These changes were effected because Congress felt that present Board rules discriminated against employers and made collective bargaining a "one-way street."⁴² Once more an intent to clarify the Wagner Act is shown, after a finding that the original was in-

⁴⁰ Art Metal Construction Co., International Assn. of Machinists, 75 N. L. R. B., No. 11 (1947).

⁴¹ Marshall & Bruce Co., Nashville Bindery Workers Union No. 83, International Brotherhood of Bookbinders (AFL), 75 N. L. R. B., No. 13 (1947).

⁴² See note 15 *supra* at 10-11.

adequate to create equality and justice between labor and management. As yet the Board has not construed this portion of the new Act.

Votes on Union Shop. The addition of Section 9 (e) establishes procedure for making union-shop agreements. Upon filing of a petition by a union alleging that thirty percent or more of the employees in a unit wish to authorize a union-shop contract, the Board must conduct an election by secret ballot. Authority given by these employees to make such a contract may be revoked in precisely the same manner that it is granted, upon the filing of a petition. In neither case may an election be held where there has been a valid election within the past twelve months.

Conditions Precedent to Union Rights. Section 9 (f) precludes Board hearings of petitions or complaints submitted by a labor organization unless both the specific union and its national affiliates file certain information with the Secretary of Labor. Included are copies of union constitutions and by-laws, the names, titles, compensation and allowances of principal officers and agents, the manner in which these officials were selected, initiation fees and dues, and a detailed report as to procedure followed in respect to membership, elections, meetings, assessments, fines, authorization for bargaining demands, disbursements, strikes, ratification of contracts, audits, benefit plans, and expulsion of members. In addition, the union must show that it has filed financial statements with the Secretary of Labor and has furnished each of its members with a copy of that statement. A glance at these requirements will show that they are designed to compel union leaders to deal properly with organization funds, secure proper authorization from the membership for bargaining demands, and to protect generally against the possibility of racketeering.

Section 9 (g) requires unions and any organizations of which they are affiliates to file annually with the Secretary information which will bring documents filed originally under the preceding

sub-section up to date. This filing is a condition precedent to enjoyment of the right to petition for representation and to file complaints with the NLRB.

A recent Board decision on the effect of Sections 9 (f), (g), and (h) is of importance.⁴³ The Board granted the petition of Local No. 1215, International Brotherhood of Electrical Workers, for certification, the union having complied with filing and affidavit requirements. Its affiliate, the AFL, had failed to comply with these requirements. The Board held that Sections 9 (f) and (g) do not apply to parent organizations such as the AFL and the CIO in cases of this type. Congress “. . . is deemed to have used words in the sense in which they are understood by those who daily deal with the subject.”⁴⁴ The Board concluded that the AFL and CIO are not “national or international labor organizations” as those words are understood in the usage of writers on the subject of labor. As another ground the decision stated that to hold otherwise would not be the most practical means of effectuating the policies of the Act. The Board said that the purpose of Section 9 (h) is to eliminate Communist influence from the labor movement and that if the CIO and the AFL were required to comply with these three Sections, 9 (f), (g), and (h), the refusal of one officer of the parent would prevent any of the unions making up these federations from using the facilities of the Act. The effect of such a result would be to remove the incentive which the Act gives to the subordinate unions to eliminate Communists, and the Board felt that this would be playing directly into Communist hands. The members stated: “We cannot believe that Congress intended any such paradoxical result.”⁴⁵ This was a four to one decision, Member Gray dissenting on the ground that the AFL and CIO obviously come within the terms “national or

⁴³ Northern Virginia Broadcasters, Inc., Radio Station WARL, Local Union No. 1215, International Brotherhood of Electrical Workers (AFL), 75 N. L. R. B., No. 2, 1 C. C. H. LAB. LAW. SERV. ¶ 6257 (1947).

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

international labor organizations" and that the majority of the Board departed from its judicial function in considering the question in terms of the most practical approach to ridding the labor movement of Communists.

While the majority decision may be the most practical method of making the rights granted under the Act available to unions more quickly, there may be much merit in the dissent. It might very well be that Congress intended that such rights be denied to all subordinate unions until the parent complied and that compliance be compelled through pressure on the AFL and CIO from within. It seems clear that these two networks themselves will have no right to the facilities of the Act without compliance, even in the light of the Board's interpretation here.⁴⁶

In a case wherein an employer was found to have refused to bargain with the complaining union prior to the passage of the LMRA, the Board ruled unanimously that it still had power to afford a remedy to the union for the unfair practice, notwithstanding union failure, since passage, to comply with filing and affidavit requirements. However, the Board ruled also, by a three to two decision, that the exercise of this power was within its discretion and that it would not effectuate the basic policy of Congress to require the employer to bargain, since the Board would not have the power to certify the union. An order was issued directing the employer to bargain, contingent upon the union's compliance with Section 9 (f), (g), and (h) within thirty days.⁴⁷

Affidavits. Section 9 (h) prohibits, in the same manner as subsections (f) and (g), the processing of petitions for election, petitions for union-shop referendums, or complaints of unfair labor practices unless the union has filed, either contemporaneously or within the past twelve months, non-Communist affidavits executed by each officer or both the petitioning union and any national or

⁴⁶ N. L. R. B. Release R-4, September 23, 1947.

⁴⁷ Marshall & Bruce Co., Nashville Bindery Workers Union No. 83, International Brotherhood of Bookbinders (AFL), 75 N. L. R. B., No. 13 (1947).

international affiliate.⁴⁸ False affidavits are subject to penalty as prescribed by Section 35 (a) of the United States Criminal Code. Affidavits must be renewed in the same manner as the matters described under subsections (f) and (g).

Prevention of Unfair Practices. Section 10 deals with methods of enforcement of the Act and prescribes the rules of evidence to be used by both the Board and courts.

Section 10 (a) of the Wagner Act gave the NLRB exclusive jurisdiction for the prevention of unfair labor practices. The Board is now empowered to delegate such jurisdiction to any state or territorial agency except where the applicable section of state law conflicts with corresponding portions of this Act or where the dispute concerns certain important basic industries and is not "predominantly local in character." As a result, a host of minor disputes may be removed to local agencies, and the Board's load may be so lightened that it may investigate important matters more thoroughly and expeditiously.

Complaints-Hearings-Evidence-Limitations. Section 10 (b) formerly provided for issuance of complaints by the Board, service on offenders, hearings, amendments, and evidence. This is continued with one change and one addition.

A six-months period of limitation is prescribed beyond which no charge of unfair practice may be filed. This provision will prevent many dilatory filings, but still will be possible for the Board to hear complaints which involve what it considers continuing violations. However, in such a case, damages would be limited to those incurred subsequent to a time six months prior to filing of the charge and service on the violator. Thus, illegally discharged employees cannot be awarded back pay for long periods, as they have been in the past.

Under the Wagner Act the rules of evidence were not controlling. The law now requires that the rules applied in district courts of the United States be applied as far as practicable. The House

⁴⁸ Oil Workers International Union v. Elliot, 73 F. Supp. 942 (N. D. Tex. 1947).

Committee declared that Supreme Court decisions⁴⁹ "... by making the Board in effect its own Supreme Court as far as findings of fact are concerned, renders the courts all but powerless to correct the Board's abuses." The Committee found that under the old law "... anything more than a 'modicum', a 'scintilla' of evidence" was enough. The Committee went on to say:

"... this resulted in what the courts have described as 'shocking injustices' in the Board's rulings, 'asinine reasoning by the Board, findings 'overwhelmingly opposed by the evidence',... 'remarkable discrimination' on the part of the Board.... The Board's expertness is largely theoretic.... Requiring the Board to rest its rulings upon facts, not inferences, conjectures, backgrounds, imponderables, and assumed expertness will correct abuses under the Act."⁵⁰

Since legal rules of evidence are to be applied only so far as practicable, Board procedure may not be changed very greatly. But this change, in connection with other changes in Section 10, will probably have considerable effect on the extent to which Board decisions may be judicially reviewed.

On August 21, 1947, NLRB field officers were directed to dismiss all unfair labor practice charges unless the charging party produced within seventy-two hours both (1) sufficient evidence to establish a prima facie case and (2) the witnesses whose testimony would be relied on to establish the alleged violations. Exceptions were made where witnesses were located a substantial distance from the regional office.⁵¹ Such requirements will undoubtedly do much to speed up the processing of complaints and discourage the filing of those which are not well founded.

Preponderance of Evidence Test. Section 10 (c) of the 1935 Act authorized the Board to issue cease and desist orders and require affirmative remedial action if, "upon all the testimony," it concluded that the person complained of had been guilty of an unfair practice. The Board is now required to find "upon the

⁴⁹ Such as *Consolidated Edison v. N. L. R. B.*, 307 U. S. 197 (1938).

⁵⁰ See note 6 *supra* at 40-41.

⁵¹ N. L. R. B. Release R-6246, August 21, 1947.

right in certain cases, and declared that nothing in the Act shall be construed to affect the limitations or qualifications on the right to strike.

Supervisors and State Closed-Shop Laws. Section 14 is new. Subsection (a) states that nothing in the Act shall prevent supervisors from joining or remaining members of unions, but declares that no employer may be compelled to bargain collectively with supervisors under either *state, local, or federal laws*.

Section 14 (b) declares that nothing in the Act shall be construed as authorizing union-shop agreements in states or territories which have laws prohibiting such contracts. It is made clear that, although federal law permits union shops, such arrangements may be outlawed by the legislature of any state or territory.

THE LMRA, 1947

The foregoing changes in the NLRB, 1935, are all accomplished by Title I of the LMRA. The remaining titles of the new Act supplement Title I, and a comparison of the two laws is not complete without an examination of these titles. Only the outstanding features of the remainder of the Act will be discussed.

Mediation and Conciliation. Because some of our legislators considered that the old Conciliation Service, which functioned under the Department of Labor, had been an "advocate of the labor side of controversies,"⁵⁴ this agency was abolished. Section 203 creates an entirely new and independent agency, the Federal Mediation and Conciliation Service, which is not in any way subject to the authority of the Secretary of Labor. It is headed by a director, appointed by the President, who has broad powers as to administration and organization. Nowhere in the Act are means afforded by which this service may be forced upon parties against their will, and in no way can parties be forced to submit to arbitration. The agency is merely an available government facility to assist disputants in the voluntary settlement of their differences.

National Labor-Management Panel. The value of the old Labor-

⁵⁴ This statement was made in Senate debate on these sections.

Jurisdictional Disputes. Section 10 (k) gives the Board cognizance of disputes arising under Section 8 (b) (4) (D) (jurisdictional disputes), unless the strike is settled between the parties within ten days after issuance of a complaint. This, in effect, provides for compulsory arbitration in such cases, although the law is not couched in such terms. Board powers here are not to be limited by any provision of the Norris-LaGuardia Act.⁵³

Mandatory Injunctions. By Section 10 (1), where a charge is filed under Section 8 (b) (A), (B), (C), or, in some cases, (D), and where the investigating officer of the NLRB has reasonable cause to believe that such charge is true, it is mandatory that such officer apply to the appropriate district court for injunctive relief. This section seems to authorize both injunctions and temporary restraining orders; however, it provides that court orders are to be limited to five days duration, in which time notice shall be served on the union involved. At the expiration of the five day period a hearing is to be held and, where it appears to the court that substantial irreparable injury will otherwise result, an injunction may be issued. Since notice is a necessary prerequisite to a temporary injunction, it seems that only restraining orders may be issued under the procedure outlined by the Act.

Complaints of these unfair practices are given priority over all proceedings not of this type. This seems designed to prevent the injustices caused in the past by unwieldly Board procedures and to give precedence to those practices considered most burdensome and dangerous to the free flow of commerce. It is to be noted that this provision is carefully qualified so as to protect employers from irreparable injury and at the same time prevent misuse of such orders to the detriment of labor.

Right to Strike. The Wagner Act unqualifiedly declared that none of its provisions should in any way diminish or interfere with the right to strike. The amendment (Section 13) makes an exception of the new provisions which specifically prohibit the

⁵³ 47 STAT. 70 (1932), 29 U. S. C. A. §§ 101-115 (1947).

10 (f) grant to United States district and circuit courts jurisdiction to review NLRB decisions and to make such decrees as they find just, either enforcing, modifying, or setting aside final Board orders. Review may be had on a petition for enforcement by the Board or on a petition by "any person aggrieved" as the result of a final Board order.

These sections were contained in the Wagner Act, and they provided that "... the findings of the Board as to facts, *if supported by the evidence*, [shall] be . . . conclusive." This provision now reads: "... the findings of the Board . . . *if supported by substantial evidence on the record considered as a whole* shall be conclusive." (Italics supplied). The change is intended, in connection with Sections 10 (b) and 10 (c), to eliminate the abuses considered under those sections. An avenue is opened here for more court reversals of Board decisions based on controverted questions of fact. A duty is placed upon the courts to determine whether the Board has properly weighed the evidence and observed the other two provisions. While it is impossible to predict the actual effect which these three changes will have upon future litigation, there is much room for modification of existing law.

Temporary Relief. Under the Wagner Act the Board could not apply to the courts for temporary injunctions or restraining orders until it had issued a final order. Because substantial injury was caused at times by lengthy hearings and investigation, the Taft-Hartley Act, by Section 10 (j), empowers the NLRB to seek interim relief in district courts at the time the complaint of an unfair practice is filed. General Counsel Denham understands congressional intent here to be that injunctions be requested only in cases of emergency, where loss, damage, or jeopardy to the safety or welfare of a large segment of the *public* will result if equitable relief is not obtained. He has stated further that the Act does not protect private rights unless they are incidental to protection of the public at large.⁵²

⁵² N. L. R. B. Release R-4, September 23, 1947.

preponderance of the testimony" that such violation was committed. This is a change emphasizing that the Board is a quasi-judicial body. Section 10 (b) will prevent the introduction of much evidence, not admissible in courts of law or equity, which has hitherto been allowed by the Board. Section 10 (c) will require the Board to set forth the evidence upon which it relies in reaching conclusions and the reasons which persuade it to rely upon certain testimony and disbelieve or consider inapplicable other evidence and testimony. The Board must now weigh the evidence—the procedure followed by courts in making decisions. Such decisions should be more fair and just than some rendered in the past and should command an increased respect for the Board.

Reinstatement and Back Pay. Section 10 embodies another of the equalizing provisions of the Act. Section 10 (e) provides that where a Board order directs reinstatement and back pay, either the employer or the union, whichever is responsible for the discrimination, shall be required to pay the wronged individual. This section is directly related to Section 8 (b) (2), which prohibits unions from coercing discriminatory discharges. Section 10 (c) furnishes a basis for remedy of all violations of Section 8 (b).

Orders and Exceptions. Another change requires the Board to apply the same regulations and rules of decision with respect to violations of Sections 8 (a) (1) and 8 (a) (2), regardless of whether or not the union concerned is affiliated with a national or international organization. The exact effect of this change is not clear. Under the Wagner Act the NLRB treated company-dominated unions differently from company-formed (but independent) unions. The former were disestablished as bargaining representatives, while a less drastic remedy was applied to the latter. The new Act may compel equal treatment of both types of organizations.

Judicial Review—Substantial Evidence. Sections 10 (e) and

Management Committee is recognized by the formation of a new panel of twelve men. All are to be chosen by the President, six each from the outstanding leaders in the fields of management and of labor. Their function is to advise the Director of the Mediation and Conciliation Service, at his request.

National Emergencies. Sections 206-210 are an innovation in their treatment of industrial disputes. They are designed to protect the public from industry-wide strikes affecting interstate commerce. Whenever the President is of the opinion that a strike or threatened strike or lockout affecting an entire industry (or substantial part thereof) will endanger the national health or safety, he may appoint a board of inquiry. It shall have the power to conduct hearings anywhere in the United States and to compel the appearance of witnesses and the production of evidence. The Board shall make a report to the President, which he shall make public, and which shall include a statement of the facts and each party's position, but shall not contain any recommendations. Upon receipt the President may direct the Attorney General to petition the appropriate district court for an injunction. Federal district courts are granted jurisdiction to issue such injunctions, notwithstanding any provisions of the Judicial Code, if they find that a threatened or actual strike or lockout will imperil national health or safety if allowed to continue.

Upon issuance of any injunction the President must reconvene his board of inquiry which shall, at the end of a sixty-day period (unless settlement is effected sooner), make a report similar to their original one but containing, in addition, a statement of the progress which has been made. This report shall also be made public. After the end of the sixty-day period it is mandatory that the NLRB, within fifteen days, conduct a secret ballot election among the employees involved to determine their acceptance or rejection of the employer's last offer of settlement. Results of this election must be certified to the Attorney General within

five days, who *must* thereupon move that the court dissolve the injunction. The granting of such motion is mandatory.

These provisions furnish a means by which a major strike or lockout may be prevented for a period of nearly five months. The sections just discussed cover eighty days, and motion for injunction could be brought by the Attorney General just at the end of the sixty-day strike notice period required under union contracts by Section 8 (d) of the amended NLRA. The constitutionality of this provision was questioned in congressional debate and will almost certainly be litigated. Senator Taft admitted the existence of such question but believed that the courts would uphold the law as valid. In view of the extent to which federal power over interstate commerce has been upheld in the past, it would seem that the Supreme Court should find no difficulty in holding this section constitutional.

Suits By and Against Unions. In Section 301 Congress removes many of the difficulties which have prevented suits against unions. A union may now either sue or be sued as a legal entity. Jurisdiction is conferred upon the district court having jurisdiction of the parties, and service may be perfected upon the proper officer or agent of the union in his capacity as such. This removed an almost insurmountable difficulty previously existing in states where service was required on each and every union member. Both employers and unions are now bound by the acts of their agents.

Employer Support—Check-Off. Section 302 makes illegal voluntary or coerced support of unions by employers. "Check-off" of union dues is now allowed only where each employee has executed and delivered a written assignment to the employer, authorizing check-off deductions. In addition, very stringent conditions are placed upon employer contributions to, and union administration of, employee trust funds.

Unlawful Strikes and Boycotts—Damages. Section 303 (a) makes it unlawful for unions to engage in or encourage any of the

strikes or boycotts declared illegal by Section 8 (b) (4). Unions are made liable for damages and costs incurred as a result of their violations of the sections. A California superior court has upheld the constitutionality of Section 303.⁵⁵

Political Contributions and Expenditures by labor organizations are outlawed by Section 304, which amends Section 313 of the Federal Corrupt Practices Act.⁵⁶

Congressional Investigation of Labor Problems is provided for by Title IV. A Congressional "Joint Committee on Labor Management Relations" is created which is to study, among others, enumerated subjects of broad scope and make a report to Congress not later than March 15, 1948. A final report must be rendered not later than January 2, 1949. This shows Congress' recognition that the present law has room for improvement and that it will not solve all the problems which may arise. The reports of this committee should provide a basis for future intelligent legislation and amendment of the present Act.

Title V defines the terms "industry affecting commerce" and "strike," and adopts most of the definitions of the amended NLRA.

CONCLUSION

In recapitulation, what has Congress done? After years of upheaval, during which few days passed without mention of a labor dispute in the nation's press, and after the force of public opinion brought itself to bear in the last congressional elections, our lawmakers were brought to the realization that an earnest effort to find a remedy must be made. The changes discussed above were the result.

Whether the Act is good or bad is not to be pondered here. These laws are not expected to afford a complete cure for our labor troubles, but they are believed to be well designed to take

⁵⁵ *Ensher, Alexander & Barsom v. Fresh Fruit & Vegetable Workers Union* (Calif. Super. Ct., Fresno Co.), 13 C. C. H. LAB. CAS. No. 64,051 (1947).

⁵⁶ 43 STAT. 1070 (1925), 2 U. S. C. A. §§ 241-256 (Supp. 1947).

us a long way down that path. A method has been set up by which Congress may keep step with labor developments under the Act. When a provision seems deficient, too stringent, or to be operating wrongfully or in an impractical manner, the new Labor Committee may suggest a remedy, which Congress may use to correct its laws. If the parties concerned follow the spirit of the Act, deal in good faith, and respect the rights of others, the new National Labor Relations Act and the other portions of the Taft-Hartley Act may well be a tremendous step leading to permanent industrial peace.

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