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## Unfair Labor Practices

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## UNFAIR LABOR PRACTICES

"When the power of either capital or labor is exerted in such a way as to attack the life of the community, those who seek their private interest at such cost are public enemies and should be dealt with as such."<sup>1</sup>

THE National Labor Relations Act<sup>2</sup> (otherwise known as the Wagner Act) was passed in 1935 in order to eliminate evils thought to exist within the ranks of industry. These evils were employer interference with union activities and frustration of the collective bargaining process. However, no restraint was imposed upon employees or their representatives, and serious transgressions on the part of unions were not a basis for complaint under the Act.<sup>3</sup>

In the years following the passage of the Wagner Act, the labor movement developed considerably in strength, and struggles for power and prestige have occurred among and within unions. There has been an increasing body of thought that evils exist within the ranks of labor which require remedial legislation. The belief that the Wagner Act should bear more equally upon employers and unions led to the enactment of the Labor Management Relations Act, 1947.<sup>4</sup> This Act subjects both employers and unions to orders and penalties for unfair practices and likewise clarifies rights of employers, as well as of employees, in their industrial relations. Protection of the public interest is a paramount concern under the new Act.

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<sup>1</sup> 2 HOLMES-POLLOCK LETTERS 28 (1941).

<sup>2</sup> New Labor Relations Act, 49 STAT. 449 (1935), 29 U. S. C. 151 (1940).

<sup>3</sup> *Fanstill Metallurgical Corp. v. N. L. R. B.*, 306 U. S. 204 (1939).

<sup>4</sup> Labor Management Relations Act, 61 STAT. 136 (1947), 29 U. S. C. A. 141-197 (Supp. 1947).

To prevent passage of the new act, unions held numerous demonstrations protesting such passage. Great advertisements and editorials proclaimed it a "Slave-Labor" law. A presidential veto was overruled by Congress who felt immediate action was necessary. Public opinion polls were taken by Gallup, "Factory Magazine," and Robertson. The consensus of opinion was adverse to the act, but the individual changes made in labor industrial relations were favored by the majority of the persons polled. Knowledge of the act's provisions is necessary to overcome the prejudices concerning it.

## THE BASIS OF UNFAIR LABOR PRACTICES

The Wagner Act, proposing to equalize industrial relations, was acclaimed as the "Magna Carta" of labor. Under section 7, employees were made secure in their rights to bargain collectively and to engage in other concerted activity.<sup>5</sup> These rights have been the foundation for employer unfair labor practices. Section 7 of the Taft-Hartley Act makes the same declaration but goes further and guarantees employees the right to refrain from collective activities.<sup>6</sup> The latter provision is one basis for prosecution of unions for unfair labor practices. Other bases for complaint against unions are specific practices enumerated in section 8(b) which Congress thought were oppressive or without justification.<sup>7</sup>

## EMPLOYER UNFAIR LABOR PRACTICES

Section 8 (a) of the Taft-Hartley Act continues to outlaw the five types of employer unfair labor practices set forth in the Wagner Act. Although only one provision has changed, four out of the five practices have been modified by new provisions under other sections of the law.

1. *Employer Interference, Restraint or Coercion*<sup>8</sup>

Employees have the right to engage in concerted activities, and interference, restraint or coercion by the employer is an unfair labor practice.<sup>9</sup> Threats of discharge or plant shutdown, bribery, and labor espionage (plant operatives reporting on union movements) apparently will continue to constitute a violation of the Act.<sup>10</sup> The Board has held that an employer need not be success-

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<sup>5</sup> Wagner Act, note 2, *supra*, § 157. *Nierotko v. Social Security Board*, 149 F. (2d) 273, 277 (C. C. A. (6th) 1945), *aff'd*, 327 U. S. 358 (1946), *Western Cartridge Co. v. N. L. R. B.*, 139 F. (2d) 855 (C. C. A. 7th, 1944).

<sup>6</sup> The only limitation on the right to refrain from concerted activity is the union security contract under Section 8 (a) (3) wherein if such contract has been voted for by thirty percent of the appropriate unit, an employee must join the union within thirty days after his employment commences.

<sup>7</sup> H. R. REP. No. 510, 80th Cong., 1st Sess. 38-40 (1947).

<sup>8</sup> Taft-Hartley Act, Section 8 (a) (1).

<sup>9</sup> *Western Cartridge Co. v. N. L. R. B.*, 139 F. (2d) 855 (C. C. A. 7th, 1944).

<sup>10</sup> *N. L. R. B. v. Mall Tool Co.*, 119 F. (2d) 700 (C. C. A. 7th, 1941) (threats); *Medo*

ful in his interference to have committed an unfair labor practice.<sup>11</sup> The addition to Section 7 affects this provision in that now employers are obliged to avoid reprisal for both anti-union and pro-union activity.

Section 7, as it now stands, casts doubt upon the legality of union cooperation clauses, which are found in many bargaining agreements. These usually state that "the company recognizes the right of a union member to refuse to work with non-members." Possibly, such an agreement will be considered interference with an employee's right to refrain from joining a union. Discharge of a non-union member under such a clause would probably be considered an unfair labor practice.<sup>12</sup>

The most important limitation of the provision by the new Act is the reduction of responsibility of the employer (and labor organizations alike) for persons acting for him. The ordinary rules of agency have been made applicable to determine liability, and only actual or apparent authority will bind an employer.<sup>13</sup>

## 2. *Employer Domination of Unions*

Section 8 (a) (2), using the same language as the Wagner Act, makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." Domination has been defined as sufficient support by an employer to indicate that the union does not actually represent the employees

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Photo Supply Corp. v. N. L. R. B., 321 U. S. 678 (1944) (bribery); Link Belt Co. v. N. L. R. B., 110 F. (d) 506, 511 (C. C. A. 7th, 1940) *rev'd on other grounds* 311 U. S. 584, 600 (1941) (labor espionage).

This proviso is limited by Sections 8 (c) in providing for free speech for an employer in his industrial relationship. A complete discussion of this subject can be found in this issue.

<sup>11</sup> Rapid Roller Co. v. N. L. R. B., 126 F. (2d) 452 (C. C. A. 7th, 1942) *cert. denied*, 317 U. S. 650.

<sup>12</sup> THE NEW LABOR LAW, SPECIAL ANALYTICAL REPORT issued by the BUREAU OF NATIONAL AFFAIRS, 28 (1947) has a full discussion of this subject.

<sup>13</sup> This provision abrogates the rule in *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 80 (1940) that *respondet superior* does not apply in labor cases. Agent is defined in Section 2 (2) and (3) of the new act.

in labor disputes.<sup>14</sup> Financial aid to a union by linking benefits with membership, active solicitation by company officials, discriminatory rules favoring one union, and the use of company facilities by one union have been held sufficient evidence for a finding of company domination.<sup>15</sup>

New provisions of the Act have an additional impact on this section. Sections 9 (c) (2) and 10 (c) require the Board to apply the same rules of decision whether or not the union involved is nationally affiliated. Heretofore, an unaffiliated union which was found to be company-dominated was dis-established as bargaining representative of the employees.<sup>16</sup> But an affiliated union which was the recipient of employer favors was not dis-established; the N.L.R.B. merely ordered the company to cease interfering and recognizing the union as the exclusive bargaining agent. Within sixty days, the union could return for certification.<sup>17</sup> The new provision may have the effect that unaffiliated unions found to be company-dominated will be treated as affiliated unions are and will be allowed on the certification ballot when the effects of the unfair labor practice have been eliminated.

Employers are also limited by the restrictions in Section 302 (a) of Title III making it unlawful for "any employer to pay or deliver . . . any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce."<sup>18</sup> Penalties for violation of this section may be

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<sup>14</sup> *Bethlehem Steel Co. v. N. L. R. B.*, 120 F. (2d) 641 (C. C. A. Dist. Col., 1941).

<sup>15</sup> *N. L. R. B. v. Sun Shipbuilding and Dry Dock Co.*, 135 F. (2d) 15 (C. C. A. 3rd, 1943); *N. L. R. B. v. Stackpole Carbon Co.*, 105 F. (2d) 167 (C. C. A. 3rd, 1939) *cert. denied* 308 U. S. 605 (1939) (Linking benefits); *N. L. R. B. v. Link Belt Co.*, 311 U. S. 584 (1941) (active solicitation); *Hazel Atlas Glass Co. v. N. L. R. B.*, 127 F. (2d) 109 (C. C. A. 4th, 1942) (discriminatory rules); *N. L. R. B. v. Automotive Maintenance Machinery Co.*, 116 F. (2d) 350 (C. C. A. 7th, 1940) *rev'd on other grounds* 315 U. S. 282 (1942) (use of company facilities).

<sup>16</sup> *Brown Co.*, 65 N. L. R. B. 208 (1946); *Tappan Stove Co.*, 66 N. L. R. B. 759 (1944).

<sup>17</sup> *Ohio Valley Bus Co.*, 38 N. L. R. B. 838 (1942); *Stein & Calder*, 46 N. L. R. B. 129 (1942); *Karrow Co.*, 41 N. L. R. B. 1454 (1942).

<sup>18</sup> Section 2 (6) defines commerce as "... trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of

fine or imprisonment, or both. Obviously this provision covers payments in connection with the formation of a company-dominated union.

### 3. *Employer Discrimination*

Section 8 (a) (3) embodies the most substantial change in employer unfair labor practices and has an important impact on both employers and unions. Discrimination against an employee for the purpose of encouraging or discouraging union membership is forbidden. The major change in this provision is the outlawing of the closed shop contract—one which makes union membership a condition of employment.<sup>19</sup> Under the new Act, discrimination is legal only if it is in pursuance of a “union shop” contract. The contract may require membership in a union thirty days after employment if the union is the representative of the employees in the appropriate bargaining unit and has been authorized to enter into such a contract by a majority vote of all employees eligible to participate in the election.<sup>20</sup> Even in this instance, the employer may not discriminate against a non-union employee if membership is not available on the same terms generally applicable to all others<sup>21</sup> or is terminated or denied for any reason other than failure to pay dues or initiation fees.

Although the closed shop is outlawed, as a practical matter it

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Columbia or any Territory, or between points in the same State, but through any other State or any Territory or the District of Columbia or any foreign country.”

<sup>19</sup> According to the Secretary of Labor, over seventy-five percent of the labor contracts made during the last five years contain some form of compulsion. Compulsory membership is so prevalent that great public feeling has developed against it. This is reflected in state legislation in that twelve states have made compulsory membership illegal, while fourteen other states have such proposals now pending. SEN. REP. No. 105, 8th Cong., 1st Sess. 6 (1947). Section 14 (b) specifically allows any state law prohibiting union security agreements to stand without overruling them by the National Labor Act.

<sup>20</sup> The machinery for voting is provided for in Section 9 of the new Act.

<sup>21</sup> The Conference Report suggests that this clause limits rather than forbids a union to discriminate against an employee because of his national origin or racial color. A union remains free to prescribe uniform standards for union membership and may deny membership to any employee who fails to meet these standards. The union may invoke its union-shop contract to have such employee discharged. But the membership standard must be applied indiscriminately to all employees in such class. The New Labor Law, note 12 *supra*, 32.

will survive in several trades. Unions have controlled apprenticeship training in a great many fields, and there is no provision in the new Act placing this type of training on a non-discriminatory basis. Where such a situation exists, no employer could be charged with discrimination if he could not hire non-union employees having the required skill and training necessary for the job.

The "yellow dog" contracts, making employment conditioned on non-membership in a union will continue to be an unfair labor practice,<sup>22</sup> and the Board may order "instatement" with back pay of men discriminatorily refused employment. The congressional intent to outlaw discrimination in hiring is clear, but a very difficult fact question may be presented where the employer asserts that the failure to hire was based on lack of qualifications. Nevertheless, the total effect of Section 8 (a) (3) may be to broaden employer control over employment.<sup>23</sup> The definition of discharge for cause has been expanded to include all persons who engage in and support unfair labor practices as defined in the new Act. An employee participating therein will not be entitled to reinstatement.<sup>24</sup> The burden of proof to show that any discharge was for cause rests on the employer.<sup>25</sup>

#### 4. *Employer Discrimination for Filing Charges or Giving Testimony*

Section 8 (a) (4) provides that it will be an unfair labor practice to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

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<sup>22</sup> *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177 (1941).

<sup>23</sup> Decisions under the Wagner Act stated that this section did not interfere with an employer's right to select his own employees, but qualified his action in that he could not deny employment only for the purposes of discouraging membership in a union. *Nevada Consolidated Copper Corp. v. N. L. R. B.*, 122 F. (2d) 587, 595 (C. C. A. 10th, 1941) *rev'd on other grounds*, 316 U. S. 105 (1941). For many practical purposes, such decisions do result in interference with the employer's normal right. This provision of the act states that under a union security contract, the employee need not join the union until the "thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later."

<sup>24</sup> 93 CONG. REC. 6600 (1947).

<sup>25</sup> *Id.* at 6678.

Discharge or demotion is prohibited, and employees will be entitled to reinstatement if either occurs.<sup>26</sup> There is no corresponding union unfair labor practice, but unions may not discriminate in their membership policies or by unreasonable initiation fees.<sup>27</sup>

### 5. *Refusal to Bargain*

Section 8 (a) (5) makes it an unfair labor practice for an employer to refuse to bargain with a union which represents the majority of the employees in an appropriate unit. Conversely, Section (b) (3) makes it an unfair labor practice for a union to refuse to bargain collectively with an employer. The N.L.R.B. will probably apply the same standard to each one. Collective bargaining is defined as

“... performance of the mutual obligation of the employer and the representative of his employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.”<sup>28</sup>

The language of the Taft-Hartley Act indicates that the pre-existing law requiring good faith in all negotiations between labor and management will remain in force. Recognition of the other party's representatives, the duty to meet and confer, and the duty to incorporate any agreement reached into writing are still important factors with respect to the duty to bargain collectively.<sup>29</sup> Bargaining includes all discussions regarding wages, hours and other

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<sup>26</sup> *Viking Pump Co. v. N. L. R. B.*, 113 F. (2d) 759 (C. C. A. 8th, 1940) *cert. denied*, 312 U. S. 680 (1941) (discharge); *Dixie Motor Coach Corp. v. N. L. R. B.*, 128 F. (2d) 201, 204 (C. C. A. 5th, 1942) (demotion).

<sup>27</sup> Section 8 (b) (2) provides against discriminatory membership policies or forcing an employer to discriminate in violation of Section 8 (a) (3). Section 8 (b) (5) prohibits unreasonable initiation fees.

<sup>28</sup> Section 8 (d).

<sup>29</sup> *Montgomery Ward & Co. v. N. L. R. B.*, 133 F. (2d) 676, 683 (C. C. A. 9th, 1943). The N. L. R. B. consistently has measured the good faith in bargaining by a company's willingness to make a written contract and has been upheld by the Supreme Court. Note, 30 *ILL. L. REV.* 884 (1936). *H. J. Heinz Co. v. N. L. R. B.*, 311 U. S. 514 (1941).

conditions of employment.<sup>30</sup> An arbitrary stand by either party would be bargaining in bad faith and would constitute an unfair labor practice, but mere failure to concede a bargaining point would not be considered as such.<sup>31</sup>

A union's refusal to agree to a clause imposing union liability (no-strike clause) for breach of contract may call into question the good faith of the union in its collective bargaining. Unions fear the consequences in that they may now be held responsible for the acts of their agents, or the employer may sue the union for breach of the agreement.<sup>32</sup>

Once a contract has been signed, either party desiring to modify or terminate the agreement must follow the procedure provided in Section 8 (d):

1. Sixty days' notice must be served on the other party concerning the modification or termination;
2. An offer to meet and negotiate a new contract must be made;
3. If no agreement is reached within thirty days, the Mediation and Conciliation Service and any state agency must be notified;
4. The contract must be continued for a sixty days' "cooling-off" period.

A proviso states that this procedure need not be followed where the contracting union is superseded by the Board's certification of

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<sup>30</sup> Limitation on closed shop, union shop, preferential hiring have already been discussed. Collective bargaining with respect to health and welfare funds is limited by provisions of Title III, Section 302 (c) providing that employers cannot check off any funds of the employee without written permission of the employee. Provisions providing for super-seniority, extra pay, bonuses and the like will probably constitute discrimination.

<sup>31</sup> *Westinghouse Air Brake Co. v. N. L. R. B.*, 120 F. (2d) 1004 (C. C. A. 3rd, 1941).

<sup>32</sup> Section 2 (13) (agency) and Section 301 (suits against unions). *Typographical union* announced that they would not sign a contract, but Robert Denham, General Counsel of the N. L. R. B., ruled that a refusal to sign a contract was a refusal to bargain. John L. Lewis claims his miners will not contract to work, but will promise that if they do work, the wages will be at a declared rate. Other methods formulated to evade violations are provisions in the contract for liquidated damages, promises not to sue, or if suit is brought, the defendant will be the local division only of an international union. Any clause granting closed shop will probably be illegal per se even though no action has been taken pursuant to them. *Dallas Morning News*, March 11, 1948, sec. 2, p. 3, col. 7-8. Cf. *National Licorice Co. v. N. L. R. B.*, 209 U. S. 350, 360 (1940).

another union. If an employer violates this provision by locking out employees, he will be guilty of an unfair labor practice. Employees striking during this period will lose their employee status and will be entitled neither to reinstatement nor back pay. If it is union action, the union will be liable in damages.<sup>33</sup>

Another provision of 8 (d) states that the duty to bargain

“... 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.”

The General Counsel of the N.L.R.B. believes that recognition and adherence to the provisions requiring collective bargaining in good faith can be the “medium for a greater degree of industrial peace, than any other provision in the Act.”<sup>34</sup>

#### UNION UNFAIR LABOR PRACTICES

The Taft-Hartley Act made a material change in industrial relationships in that unions are made responsible for certain defined unfair labor practices. The Senate Committee was of the opinion that there is “no reason whatever why unions should not be subject to the same rules as employers.”<sup>35</sup>

##### 1. *Restraint or Coercion by a Union*

Section 8 (b) (1) declares it an unfair labor practice for unions to restrain or coerce employees in the exercise of the rights guaranteed in section 7. The purpose of these sections is to protect the individual workman from duress by a union as well as by the employer. Senator Taft would include as violations of this section coercion of the following types: (1) threats to raise union initia-

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<sup>33</sup> Section 301.

<sup>34</sup> 1 C. C. H. LAB. LAW SERV. No. 8460, N. L. R. B. Release R-4, September 23, 1947. Section 8 (b). Also Section 301 (e) states that “for the purposes of this section, in determining whether any person is acting as an ‘agent’ of another person so as to make such person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.” See note 13 *supra*.

<sup>35</sup> SEN. REP. NO. 105, 80th Cong., 1st Sess. 50 (1947).

tion fees if the employee refuses to join within a limited time; (2) threats to obtain a closed shop contract and order the employee fired; (3) threats of assault upon an employee or his family if he refuses to join; (4) actual violence to prevent an employee from working; (5) preventing employees from entering or leaving plants by mass picketing or other violence.<sup>36</sup>

Restraint and coercion are prohibited, but a proviso limits the unfair labor practice so that the right of a labor organization to prescribe its own rules regarding membership is not impaired. Section 8 (b) (1) does not prohibit "interference" as does Section 8 (a) (1). Congress felt that the use of the word "interfere" or "interference" might be interpreted to preclude normal organizing practice.<sup>37</sup> One might infer that employer restraint and coercion will be the same as union restraint and coercion. But the two probably will not be held parallel because the economic compulsion between an employer and his employees differs in kind from that of a union and its prospective members.

Another provision states that the right of an employer to select his representatives for the purposes of collective bargaining or the adjustment of grievances shall not be impaired. The purpose of this proviso is to make it illegal for a union

"...to coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members... or to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances."<sup>38</sup>

## 2. Union Discrimination

Section 8 (b) (2) makes a union guilty of an unfair labor practice where it causes an employer to discriminate against an employee in violation of Section 3 (a) (3) or where it discriminates

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<sup>36</sup> THE NEW LABOR LAW, note 12 *supra*, 36.

<sup>37</sup> 93 CONG. REC. 4568 (1947).

<sup>38</sup> SEN. REP. NO. 105, 80th Cong., 1st Sess. 21 (1947). This provision is limited by the free speech doctrine, Section 8 (c).

against an employee for any reason other than the failure to pay dues or initiation fees uniformly required of its members. Unions are free to adopt whatever membership provisions they desire, but they may not rely upon action taken pursuant to those provisions in effecting the discharge of, or other job discrimination against, an employee except as permitted by the statute. The N.L.R.B. can order the reinstatement (with or without pay) of any employee unlawfully discharged under this section.<sup>39</sup>

Under the statute, union discrimination differs in its nature from employer discrimination. The latter consists in refusing, terminating or modifying an employment relation for proscribed reasons. The former consists in causing the employer to discriminate. The Act permits a union to discriminate in its membership policies but forbids it to cause an employer to discriminate against persons already affected by these policies. The House Report<sup>40</sup> stated:

“... the conference agreement does not contemplate availability of membership on the same terms as those applicable to all members, nor does it disturb arrangements in the nature of those approved by the Board in *Larus & Brothers Co. v. N. L. R. B.*”<sup>41</sup>

In the above quoted case, the union organized separate locals for Negroes to prevent them from voting to decide union affairs.<sup>42</sup>

One intent of this section is clear—the outlawing of union efforts to procure the discharge of a non-union member in the absence of a union-shop contract. Where a union-shop contract has properly been entered into, the question arises whether a union may request discharge of a member before his expulsion. The Act allows a union full freedom in governing its internal affairs, and it would seem that a request or strike for such discharge is legal

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<sup>39</sup> Section 10 (c).

<sup>40</sup> 93 CONG. REC. 6463 (1947).

<sup>41</sup> 62 N. L. R. B. 1075 (1945).

<sup>42</sup> See note 29 *supra*. Union rules precluding strikebreakers, racial qualifications, or professionally unqualified persons would not constitute discrimination. But a union must be careful not to violate Sections 8 (b) (5) prohibiting excessive initiation fees.

if the member has failed to pay reasonable and uniform dues and fees.<sup>43</sup>

Another highly significant feature of this section is that, together with Section 8 (a) (3), it eliminates dual unionism as a valid cause of discharge. Dual unionism occurs where a union member joins or supports a competing union. The General Counsel for the N.L.R.B. has stated:

“... the employer who discharged an employee whom he knew had been expelled from the closed shop union for dual unionism, was guilty of an unfair labor practice and required to reinstate the employee with back pay. . . . In every case, knowledge by the employer of the circumstances was essential. In section 8 (a) (3) as it is presently written however, such a discharge may be made at the instance of a union only when there exists a union shop contract, and then only for failure to pay dues and assessments.”<sup>44</sup>

This effect of the act is most obnoxious to organized labor. Complaint is made that a union loses all control over its membership and that protection is extended to those who menace the union as troublemakers and informers.

### 3. *Union Refusal to Bargain*

Section 8 (b) (3) requires unions to bargain collectively and has been discussed in connection with Section 8 (a) (5). Decisions by the N.L.R.B. just before the passage of the Taft-Hartley Act held:

“... although the Wagner Act imposed no affirmative duty to bargain upon labor organizations, a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found.”<sup>45</sup>

These rulings indicated that the Board was lessening the burden on the employer to bargain collectively where a union was ada-

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<sup>43</sup> N. L. R. B. Release R-4, Sept. 23, 1947, see note 34 *supra*.

<sup>44</sup> *Ibid.* This doctrine was applied in the Matter of Rutland Court Owners, 44 N. L. R. B. 587 (1942).

<sup>45</sup> *Ibid.*

mant. The new section definitely outlaws the "sign it or else" approach of many sections. However, Section 8 (d) states that it "does not compel either party to agree to a proposal or require the making of a concession." The reason that unions sometimes appear adamant and unyielding is that they are compelled to seek uniform wages and working conditions. Frequently they are bound in their contracts by the so called "most favored nation" clause, agreeing to give no better terms to competing employers. Employers have recognized the advantage of this aspect of union policy, since cut-throat competition based on differing labor costs is eliminated.

#### 4. *Secondary Boycotts and Jurisdictional Strikes*<sup>46</sup>

Section 8 (b) (4) makes it an unfair labor practice for a union, or its agents, to induce or encourage employees of any employer to strike or refuse to handle any materials if one object is:

(1) to force any employer or self-employed person to join a labor or employer organization;

(2) to force any employer or any other person to cease dealing in the products of another producer or to do business with him;<sup>47</sup>

(3) to force any other employer to recognize or bargain with a labor organization not certified by the Board;

(4) to force any employer to recognize or bargain with a union when another union has been certified;

(5) to force any employer to assign to employees of one class work belonging to another class, unless the employer is failing to conform to an order of the N.L.R.B. determining the representative for the employees performing such work. These provisions are of broad scope in prohibiting pressure upon an employer to join particular organizations, in forbidding all forms of secondary boycott, and in making unlawful strike and secondary

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<sup>46</sup> A complete discussion of this problem can be found in Gilly, *Jurisdictional Disputes* included in this issue.

<sup>47</sup> This portion of Section 8 (b) (4) has been held constitutional in *Lebaron v. Printing Specialties & Paper Convertors Union*, 75 F. Supp. 678 (S. D. Calif. 1948).

boycott in jurisdictional disputes or where conducted by a minority union for collective bargaining rights.<sup>48</sup> Apparently Congress felt that these types of activities were in great need of abatement because Section 10 (1) makes it mandatory for the Board to seek a temporary restraining order. Section 303 supplements this section by providing that any person whose property or business is injured by these activities may sue for damages in the federal district court.

#### 5. *Excessive or Discriminatory Initiation Fees*

Section 8 (b) (5) must be considered in connection with Sections 8 (a) and 8 (b) (2). Where a union-shop agreement has properly been entered into, a union may not require of new employee-members a fee which is excessive or discriminatory. The tests which the Board will use to determine discrimination will be the customs and practices in the particular industry, the wages currently paid the employees and other relevant factors. It has been stated that there is no fixed yardstick to determine the reasonableness of union fees without an intimate knowledge of all the pertinent facts.<sup>49</sup> This section allows a broad field of discretion to correct abuses and also to maintain the established and justifiable customs in an industry.

#### 6. *Exactions for Work Not Performed*

Section 8 (b) (6) outlaws "featherbedding" only to the extent that a union causes an employer to pay money or other thing of value in the nature of an exaction, for services which are not performed or not to be performed. This provision from the Lea Act,<sup>50</sup>

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<sup>48</sup> N. L. R. B. Release R-4, Sept. 23, 1947, see note 34 *supra*. But the Court has pointed out that under this section, the party complaining of the secondary boycott must be a separate and distinct entity, in no way intimately or inextricably united with the offending employer as to be an ally in order to obtain relief under this section. *Douds v. Metropolitan Federation of Architects*, 75 F. Supp. 672 (S. D. N. Y. 1948).

<sup>49</sup> *Ibid.*

<sup>50</sup> 60 STAT. 80 (1946), 47 U. S. C. 506 (Supp. 1946). Congress felt that to attempt to add further provisions of the Lea Act would not be wise in that it would be impossible for the courts to determine the exact number of men required for particular jobs in the hundreds of industries and all kinds of functions.

aimed at the activities of J. C. Petrillo in the broadcasting industry, is the only one which Congress felt could be applied to labor as a whole. The use of the words "in the nature of an exaction" makes it clear that what is prohibited is extortion by a labor organization in lieu of providing services which an employer does not want. The validity of vacations with pay, rest periods, and wages paid for time spent waiting for machine repairs or materials has not been disturbed. A strike to obtain these well-established industrial practices will not constitute a violation of this section.<sup>51</sup> The following has been stated on the subject of featherbedding:

"... The gist of this section is that the payment is made for services 'which are not performed or not to be performed.' Thus when the Teamsters halted trucks at the mouth of Holland Tunnel and required the driver to put a member of the Teamster's Union on the seat in order to qualify to deliver the load in New York City, and to pay him for a full day's wages for taking the ride, I don't doubt that the owner of the truck called it featherbedding, but I have great doubt that it could ever be brought within the terms of this section of the statute. On the other hand, if the driver accepted the option which was often tendered to him of paying him the money, but waiving the privilege of having his helper ride with him, we have a situation where there were no services performed or to be performed and probably a violation."<sup>52</sup>

#### PREVENTION OF UNFAIR LABOR PRACTICES

As remedy for the wrongs set forth in Sections 7 and 8, the Taft-Hartley Act in Section 10 (a) grants power to the Board to prevent any persons<sup>53</sup> from engaging in any unfair labor practice affecting commerce.<sup>54</sup> After a complaint is issued, a definite procedure by the Board is followed. This procedure has been streamlined in order to bring such charges into the light and to remedy them as rapidly as possible.

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<sup>51</sup> 93 CONG. REC. 6603 (1947).

<sup>52</sup> N. L. R. B. Release R-4, Sept. 23, 1947, see note 34 *supra*.

<sup>53</sup> Person is defined in Section 2 (1) so as to include labor organizations.

<sup>54</sup> Affecting commerce is defined in Section 2 (7) as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

Jurisdictional disputes under 8 (b) (4) A, B, and C are handled specially under section 10 (1), which provides that when a violation occurs, the charge shall be investigated immediately, and if there is reasonable cause to believe such charge is true, the Regional Director shall petition the District Court for appropriate injunctive relief.<sup>55</sup> If the jurisdictional dispute is over work assignments, the parties involved may submit satisfactory evidence to the Board within ten days after notice of the complaint that the dispute has been voluntarily settled and the charge will be dismissed.<sup>56</sup>

An important change in the Act is the limitation of time within which a complaint for unfair labor practice may be instituted. Section 10 (b) provides that no complaint shall issue based on an unfair labor practice occurring more than six months prior to the filing of the charge with the Board and service on the opposing party. Under Section 10 (c), a preponderance of the testimony is necessary for a finding that a party (employer or union) is guilty of any unfair labor practice. On review of the Board's order in the federal court the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole is conclusive.<sup>57</sup>

Another important provision of the new Act is the allowance of injunctions against labor unions without regard to the limitations imposed by the Norris-LaGuardia Act.<sup>58</sup> The injunction barrier has been broken in that where any unfair labor practice has been charged and a complaint issued, the Board may secure injunctions

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<sup>55</sup> Section 10 (1). Injunctions have been granted in *Douds v. International Brotherhood of Teamsters*, 75 F. Supp. 414 (N. D. N. Y. 1941); *Dixie Motor Coach Corp. v. Amalgamated Association of Motor Coach Employees of America*, 74 F. Supp. 952 (W. D. Ark. 1948). Injunctions were denied on the grounds of no immediate irreparable injury was present in *Douds v. Wine Liquor and Distillery Workers Union*, 75 F. Supp. 447 (1947).

<sup>56</sup> Section 10 (k).

<sup>57</sup> Section 10 (f). In *Sandy Hill Iron and Brass Works v. N. L. R. B.* \_\_\_ F. (2d) \_\_\_. (C. C. A. 2d, 1947), 3 C. C. H. LAB. LAW SERV. No. 64,098, the court found that discrimination determined by the number of discharges of employees was not based on substantial evidence as required by the new Act.

<sup>58</sup> 47 STAT. 70 (1932), 29 U. S. C. 105-115 (1940).

against the continuance of the practice during the adjudication of the case.<sup>59</sup>

Section 10 (e) provides for enforcement of the Board's order on petition to the appropriate circuit court of appeals or district court. After the court issues its decree, the Board investigates the matter of compliance and if violation occurs, the General Counsel of the Board may ask the court to hold the respondent in contempt of court and heavy penalties of fine, imprisonment or both may follow.

#### CONCLUSION

The conclusions drawn in the preceding pages are necessarily tentative, since it will be several years before the principles and ramifications of the new Act can be fully explored and determined. A large area of speculation exists with respect to the form and substance of the Board orders against unions for unfair labor practices. No one can be quite sure as to the sanctions which will be laid upon unions to compel them to abide by the prohibitions and policy of the Taft-Hartley Act.

Unions have threatened to "by-pass" the new National Labor Relations Act, but the success of such action is highly doubtful. Boycotting the National Labor Relations Board would, in many instances leave a union in an inferior position in its relations with an employer. The superior economic power of the latter might well drive the union from the scene. It seems safe to assert that unions will continue to make use of the procedures offered under the Act. The substantial core of the Wagner Act has survived, and the benefits of the Taft-Hartley Act are not to be rejected because rights of individuals and employers are given fuller recognition.

*Amylee Travis.*

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<sup>59</sup> N. L. R. B. Release R-4, Sept. 23, 1947, see note 34 *supra*.