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THE SUPREME COURT AND LABOR, 1950-1953*

Russell A. Smith†

DURING its last three terms the United States Supreme Court handed down some 30 decisions in the field of labor law (exclusive of workmen's compensation and cases of little individual importance). The period had its share of important, if not "great," cases. Probably the steel seizure decision of 1952 was the most significant in its general implications, but a number of other decisions were of major consequence in the administration of the federal labor relations and wage-hour legislation.

Certain statistics relating to these cases may be of interest. The distribution, by subdivisions of the field, was as follows:

Federal labor relations laws
  Tart-Hartley Act ....................... 20
  Railway Labor Act ................... 2

Wage-hour legislation .................... 4
Emergency strikes (seizure) ............. 2
Picketing (constitutional issue) ........ 2

Of the 30 decisions, eight were unanimous (on the part of the justices participating), three were 7-1 or 8-1, six were 7-2, twelve were 6-3, and only one was 5-4, which perhaps marks this period

* This article was read before the Section of Labor Relations Law of the American Bar Association at Boston, Massachusetts, on August 24, 1953.
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as one of the more harmonious among the members of the high tribunal as respects labor law issues. The leading dissenter, by far, was Mr. Justice Douglas, who disagreed 14 times. Justices Burton, Clark and Frankfurter, with two, three and four dissents, respectively, were most often in agreement with the decisions, with Justices Reed, Jackson, Black and the Chief Justice following closely. The most prolix and "opinionated" decision of all was in the steel seizure case, where six separate opinions in support of the result, and one dissenting opinion, were filed.

This paper will attempt a review of these decisions. Since the cases involved, for the most part, highly diverse problems, a review of them must necessarily lack a central theme unless the reviewer has been able to detect some evidence of a general tendency or attitude which he considers noteworthy (such, for example, as an evident disposition to enlarge or curtail labor's rights or privileges). Unfortunately, perhaps because I am lacking in the necessary sensitivity, I have nothing to report along this line. On the whole, while critical of some of the decisions, my reaction is that the Court has done an altogether unsensational, but quite judicial, job, meeting each issue as it arose with becoming objectivity, and, granting the validity of recent precedents, forging, on the whole, no new works of judicial lawmaking.

**Emergency Disputes: Governmental Seizure**

Federal seizure of industrial property as a means of averting or stopping a critical strike was brought to the attention of the Court in the *Pee wee Coal Co.* case in 1951 as well as in the later steel seizure case. The former presented the question of the legal consequences of seizure, as between owner and the Government; the latter raised the question of the authority to seize. In each instance, the Court's decision has vitally affected thinking with respect to the problem of so-called "emergency disputes."
United States v. Peewee Coal Co., Inc.,¹ held that a wartime executive seizure of a mining property was a "taking" of such property by the United States, for which the Government became liable under the Fifth Amendment to pay that part of the actual operating loss, incurred during the period of Government possession, attributable to increased payments to labor made to comply with a National War Labor Board directive. All the members of the Court agreed that there was a "taking," and four of the justices, in the majority opinion by Mr. Justice Black, broadly asserted that, by virtue of the seizure, the Government "became the proprietor," thus becoming entitled to any profits and liable for any operating losses. This consequence of proprietorship was regarded as "conceptually distinct from the Government’s obligation to pay fair compensation for property taken," and on a proper record the majority would evidently hold that the entire operating loss, if any, sustained by the business during Government possession could be recovered. The approach of the majority was not in terms of "damages" suffered by the owners due to seizure; so the profit or loss position of the business apart from seizure would be regarded as immaterial. The opinion recognized, but found it unnecessary to solve, the "difficult problems inherent in fixing the value of the use of a going concern" in connection with a temporary taking.

The implications of the majority opinion are very interesting. Apparently the cost to the taxpayers of seizing a losing business or industry would be the operating losses, but in this situation it is hardly likely (though perhaps conceivable) that the Government could be liable for a distinct element of compensation for the "value" of the use. The cost of seizing a profitable business would be the fair value of the use, arrived at on some basis yet to be determined, but this would be offset (from the standpoint of the public treasury) by the profits earned during the period of possession. Thus it would seem possible if not likely that it

¹ 341 U.S. 114 (1951).
would cost the taxpayers more to seize a losing business than a profitable business, which seems anomalous, to say the least, except on the assumption that the seizure had in effect forced the losing enterpriser to stay in business when he would have elected to close down and avoid continuing losses. The view of Mr. Justice Reed, concurring in the result, or of dissenting Justices Burton, Vinson, Clark and Minton, would seem to be much more reasonable, at least for the situation of the losing enterpriser. Mr. Justice Reed would force the government to bear only special increments of loss (of which the increase in labor costs in question was regarded as an instance) incurred “without legal or business necessity so to do.” The dissenters would place the burden on the owners to prove that the seizure had actually harmed them financially, and, if so, by what amount. As Mr. Justice Reed points out, there are various kinds and purposes of “temporary takings,” and seizures in labor dispute situations have not, as a rule, displaced the actual authority of management except to deal with the particular labor relations issues in dispute. As he suggests, it ought to be possible to apply the constitutional requirement of “just compensation” more flexibly than the majority opinion would seem to permit.

The question of Presidential authority to seize, under the powers inherent in his office, was the issue in the Youngstown case. The situation out of which the case arose is familiar and need not be restated here. The decision against the existence of executive power, under the circumstances, was perhaps more important in its delineation and application of constitutional doctrine concerning the division of powers between Congress and the President than for its contribution to labor law, or even to the settlement of the steel dispute. The basic power of the National Government to fashion special procedures, including even seizure, for meeting the problem of critical disputes was not at issue, and was declared to exist.

Nor can the case be considered to have settled all aspects of the problem of executive authority, for the clear-cut if oversimplified exposition of the principles of separation of powers contained in Mr. Justice Black's opinion actually represented only the view of himself and Mr. Justice Douglas. To some extent and in varying degree the other members of the Court appear to hold the view that the President possesses inherent power to deal with critical labor disputes, even in peacetime, exercisable to the extent not inconsistent with discernible Congressional will. The key factor motivating the decision was apparently the fact that Congress, in enacting the Taft-Hartley Act, settled upon certain emergency dispute procedures after considering and rejecting others, including seizure and compulsory arbitration. This expression of legislative determination was not to be overridden by executive action.

The two cases, Peewee Coal and Youngstown, must necessarily be influential in the almost continuous struggle to evolve a suitable statutory policy for the handling of emergency disputes. Peewee Coal emphasizes the serious financial repercussions entailed by seizure, both for the Government and for the owners of the property, absent an advance agreement on their solution, and will likely operate as a deterrent to its use. The steel case will prevent the use of seizure at the national level under present conditions, and should likewise serve to deter resort to other strategems (such as, for example, the creation of non-statutory emergency boards to investigate and recommend, as in the steel dispute, itself). At the same time the decision should heighten interest in the subject of statutory treatment of the problem. If, for industries subject to Taft-Hartley, the sole recourse of the executive in critical cases must be to the Title II procedures, we had better be satisfied that these procedures are the best answer we can currently provide.

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3 See the analysis of the opinions in Kauper, The Steel Seizure Case: Congress, the President and the Supreme Court, 51 Mich. L. Rev. 141 (1952). For other interesting discussions of the case see Freund, The Supreme Court, 1951 Term, 66 Harv. L. Rev. 89 (1952); and Petro, The Supreme Court and the Steel Seizure, 3 Labor L.J. 451 (1952).
PICKETING AND THE CONSTITUTION

During the period under review the Court spoke twice on the legislative power to regulate peaceful picketing, and, in so doing, continued the process of dilution of Thornhill v. Alabama.\(^4\) It will be recalled that in the Thornhill case, with only Mr. Justice McReynolds dissenting, the Court in 1940 struck down an Alabama statute, dealing with loitering or picketing, because it encompassed "nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute." The basic premise was that "in the circumstances of our time the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." What happened during the ensuing ten years, in Swing,\(^5\) Meadowmoor,\(^6\) Wohl,\(^7\) Ritter's Cafe,\(^8\) Angelos,\(^9\) Giboney,\(^10\) Gazzam,\(^11\) Hanke\(^12\) and Hughes,\(^13\) is familiar to every labor lawyer.

First to be mentioned, in our present review, is IBEW v. NLRB,\(^14\) decided in 1951, which must be discussed later in another context. Here, in determining whether peaceful construction job-site picketing could be brought under Section 8(b)(4)(A) of the amended NLRA, the Court had to meet the "free speech" question. One short paragraph in the opinion sufficed to dispose

\(^4\) 310 U.S. 88 (1940).
\(^7\) Bakery and Pastry Drivers and Helpers Local 802, Teamsters Union v. Wohl, 315 U.S. 769 (1942).
\(^9\) Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293 (1943).
\(^12\) Teamsters Union, Local 309 v. Hanke, 339 U.S. 470 (1950).
\(^14\) 341 U.S. 694 (1951).
of the matter. The Court, said Mr. Justice Burton, had only recently recognized the constitutional right of the states to proscribe picketing in furtherance of unlawful objectives comparable to the secondary boycott. "There is no reason why Congress may not do likewise."

The Justice had in mind, of course, the 1950 decisions in *Gazzam, Hanke* and *Hughes*, where the Court permitted state regulation of picketing based upon the "objectives" test. Secondary picketing, despite the peculiar nomenclature employed in the Taft-Hartley Act, is scarcely a union "objective." It is a means to the objective. However, one can quite readily agree that if the states may constitutionally prohibit picketing because the union seeks thereby to force the employer to impose unionism on his employees, or to conform to union standards with respect to closing hours or to hire a quota of negro employees, it ought to be open to them, or to Congress, to pass judgment upon the use of picketing when there is an involvement of third persons.

The second case is *Local Union No. 10, United Ass’n of Journeymen Plumbers, etc., AFL v. Graham*,\(^1\) decided in 1953. Here, with Justices Black and Douglas in dissent, a broad injunction against peaceful construction job-site picketing, carried on by building trades unions in protest against the use of non-union labor, was upheld. The injunction had been granted by the Virginia courts on the basis that the picketing sought to accomplish aims and purposes in conflict with the open shop policy contained in Virginia’s "Right to Work" statute. This law outlawed (although not retroactively) all forms of agreement between employers and unions conditioning employment on union membership, and forbade employers to require of their employees union membership or the check-off. The Court’s decision was simply an application of the principle announced in 1950 in the *Gazzam-Hanke-Hughes* trilogy, and foreshadowed by *Giboney* in 1949, that picketing is not such a constitutional right that it may be carried on for purposes deemed, not unreasonably, to be improper. The question

\(^{1}\) 345 U.S. 192 (1953).
whether the union actually demanded the dismissal of non-union labor, or, on the other hand, merely sought to publicize the job as "non-union," was present, but was properly resolved, on the record, against the union. The question whether such a question is material remains open by virtue of the remark in the Graham opinion that "petitioners here engaged in more than the mere publication of the fact that the job was not 100% union" and by the Court's allusion to the fact that the picketing was calculated to, and did, induce union workers to leave the premises, thus adding direct and important economic pressure on the "employer." On the basis of this remark, and the similar suggestion in the Gazzam opinion, union counsel will doubtless continue to be hopeful that peaceful organizational picketing as such, unaccompanied by any immediate demand for recognition or for the execution by the employer of union shop policies, may yet be salvaged as a civil right of union members. I submit, however, that the logic of the recent cases is against this view, and I find some indication that the Court intends to be logical in the recent denial of certiorari in certain Michigan cases presenting the issue.

16 As Mr. Justice Douglas pointed out in his dissenting opinion, the Union official denied that he made any demand for the discharge of any non-union labor or for the cancellation of any existing sub-contract with non-union subcontractors, and testified that the Union's purpose was to inform union men that non-union employees were being used on the job. However, the quoted testimony of the business agent shows that he was seeking the general observance of the policy of using subcontractors who employed union labor, and the finding of the existence of an illegal purpose is easily seen to be justified if it can be assumed that the "union" subcontractors who were available for the work employed union labor as a matter of deliberate policy, and not fortuitously.

17 The two cases were Postma v. Teamsters Union, Local Union No. 406, 334 Mich. 347, 54 N.W. 2d 681 (1952), cert. denied, April 6, 1953, and Way Baking Company v. Teamsters Union, Local No. 164, 56 N.W. 2d 357 (Mich. 1953), cert. denied, May 18, 1953. In each the record would scarcely support a finding that the union had made a specific request that the non-union plaintiff force its employees to join the union. In each an injunction against organizational picketing was affirmed. In Postma the Michigan Supreme Court found that the union's objective was "to force Postma's employees to become members of the union." In Way Baking Company the Court found that "the defendants were undertaking by their picketing activities [part of which consisted of secondary picketing of customers] to so injure the business of plaintiff, and to bring about such a loss of commissions on the part of plaintiff's driver salesmen, as to compel plaintiff to insist that said employees join the union, and likewise to force said employees to do so for their own protection." If the latter constituted a finding that the union was attempting to coerce the employer into pressuring its employees into the union, it was
It is now, of course, obvious that the Supreme Court has found room, despite Thornhill, for the application to picketing of the venerable, if sometimes maligned, common law and legislative ends-means test. One may wonder, in retrospect, why the Court in 1940 elected to use the "free speech" analysis as a means of circumscribing regulatory action. That which, in the Thornhill opinion of Justice Murphy was regarded as the most practicable and effective means of publicizing a labor dispute now is said to contain but an "element" or "ingredient" of "communication," and to embody "inherent" "compulsive features" which make it subject to regulation. The communication aspect of picketing appears to have been so subordinated that the civil rights and "substantive due process" constitutional tests have become fairly indistinguishable, and thus negligible, in their impact. As in the case of the problem of emergency disputes, the influence of this current attitude of the Court is to force attention upon the totality of policy considerations which should, in balance, determine the extent and nature of the legal privilege to picket.

The possible legal distinction between pure organizational picketing, and picketing to compel the employer to force unionization upon his employees, presents nice questions of fact. For some of the more interesting recent cases on the problem see Blue Boar Cafeteria Company, Incorporated v. Hotel & Restaurant Employees & Bartenders Int'l Union, Local No. 181, 254 S.W. 2d 335 (Ky. App. 1952); Pappas v. Local Joint Executive Board of Philadelphia, 374 Pa. 34, 96 A. 2d 915 (1953); and Wisconsin Employment Relations Board v. Retail Clerks Int'l Union, Local No. 526, 264 Wis. 189, 58 N.W. 2d 655 (1953).

It could be contended, despite the obvious general slant of Mr. Justice Murphy's opinion, that the Thornhill case did not actually decide that picketing is a constitutionally protected form of publication. The case came up on a record showing the application of the statute to picketing; however, the Court purported to hold that the statute was invalid on its face, without regard, therefore, to the specific application, and in doing so pointed out that "in sum, whatever the means used to publicize the facts of a labor dispute, whether by printed sign, by pamphlet, by word of mouth or otherwise, all such activity without exception is within the inclusive prohibition of the statute so long as it occurs in the vicinity of the scene of the dispute." Without regard to the specific problem of picketing, the particular decision was justified on the basis that the statute prohibited even the traditional forms of publication at or near the scene of a labor relations dispute.

18 See, for example, the opinion in the Hughes case.
Like many if not most other observers, I have tended to regard as sound the Court’s more recent emphasis, for constitutional purposes, upon the coercive aspects of picketing. Yet I have the uncomfortable feeling that we have not fully thought through or seen the implications of this approach. That which makes peaceful picketing possibly objectionable, hence actionable, is not the picketing itself, provided it is peaceful, but the responses of others (employees of the picketed employer or of other employers, or, for example, customers) to the picket line. The Court seems even today to assume that the unions have a constitutional right to use the ordinary media of communication (radio, press, pamphlets, etc.) to advertise the existence of a dispute; yet it is obvious that, depending upon the sympathies and mores of the community, such publicity may result in responses of the kind elicited by picketing. Will the Court ultimately, then, be driven to conclude that these non-picketing means of publicizing a union aim or complaint may be enjoined if the objective is reasonably deemed to be improper? But would this not, indeed, be going too far, for are we not constrained to say, with Justice Murphy, that “free discussion concerning the conditions in industry, and the causes of labor disputes,” is “indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society?” Subject to limitations deriving, perhaps, from the law of slander and libel, may unions any more than, for example, business firms, properly be denied the opportunity of stating their case, and, by way of illustration, asserting that a given establishment is non-union or has non-union work standards? Or is this begging the very question? But if so, what is the question? If the unions have a constitutional right to the use of the ordinary media of publicity, regardless of the extent of the community reaction against the publicized employer, how can picketing be condemned? Does the answer lie in conspiracy and combination theory, perhaps by analogy to trade restraint law?
Suppose we were to make the instigating union, and all persons in combination with it (other trade unionists, consumers, suppliers, etc.) subject to restraint when the existence of the combination is proved (and perhaps ease the burden of proof by the use of trade restraint doctrines of parallelism of action, etc.), but hold publicizing by a union constitutionally privileged if the combination is not proved. This would require a return to thinking more like that expressed in the *Giboney* case, which was originally interpreted by the Section's Committee on State Legislation as justifying a differentiation between "signal" and "publicity" picketing. The problem, and it is serious, perhaps even insoluble, lies in the practical difficulty of drawing the suggested line. But the implications of a refusal to draw such a line are also serious. We seem to be faced with the alternatives either of minimizing the publication aspect and emphasizing the economic effects of picketing and using a combination-conspiracy legal analysis, or, on the other hand, revitalizing the publication-communication "free speech" analysis and with it accepting the consequence that some forms of economic pressure are constitutionally privileged.

**Taft-Hartley Decisions**

The bulk of the Court's labor law decisions during the period under review have been concerned with problems arising in the administration of the Taft-Hartley Act. This was to be anticipated in view of the broad regulatory scope of the statute and the numerous, inevitable questions of interpretation which would arise. No doubt the process of judicial clarification and implementation has only nicely started. On the whole the decisions to date reveal that the Court is disposed to give fair and full effect to the amendments of 1947. There is no evidence of any tendency to emasculate.

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20 See the October, 1949, report of the Committee. In the Committee's 1949-1950 report it was conceded that the earlier differentiation was no longer tenable; the Committee saw in the 1950 decisions a clear indication that the Court's attitude toward picketing had shifted. ("Picketing can no longer be equated to free speech.")
Judicial Review. With implications which extend far beyond the confines of labor legislation, the Court in the *Universal Camera*\(^{21}\) and *Pittsburgh Steamship*\(^{22}\) cases equated the standard of proof required of the NLRB by the Act of 1947 with that exacted generally by the Administrative Procedure Act of 1946,\(^{23}\) and held that “courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past.” The Court was concerned with the effect of the new statutory language indicating that the Board’s findings of fact are to be conclusive if supported by substantial evidence “on the record considered as a whole,” and, specifically, with the question of the weight to be given a trial examiner’s findings which have not been accepted by the Board. The Court of Appeals, Second Circuit, speaking through Judge Learned Hand, had held that the court’s review function had not been broadened, but only more definitely expressed and that a court may not, as a practical matter, “consider the Board’s reversal [of an examiner] as a factor in the court’s own decision.” In disagreeing, the Supreme Court said that an examiner’s conclusions should be accorded “the relevance that they reasonably command.” On the remand the court of appeals, although it had professed its inability to deal with the subtleties involved, re-examined the record as a whole, and this time held the Board’s findings not adequately supported.

Mr. Justice Frankfurter’s opinion in *Universal Camera*, which in its interpretative and expositive parts represented the views of the entire bench, expressed some warranted skepticism of attempts, by means of nuances of statutory language, to control judicial reaction to agency findings. More important than the language added to the Act in 1947, as the Court evidently believed, was its history, especially the general background of criticism of the

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\(^{23}\) 60 STAT. 237; 5 U. S. C. 1946 ed. § 1001 et seq.
fact-finding processes of the Wagner Act Board and, most impor-
tant of all, the work of the dissenters on the famed Attorney Gen-
eral’s committee on administrative procedure in urging upon
Congress the adoption of a broader rule than the “substantial
evidence” rule as recommended by the majority. To use a term
borrowed from Mr. Justice Frankfurter, the Court thus prolifer-
ated a Congressional purpose to require greater judicial respon-
sibility than theretofore with respect to NLRB fact-finding
processes.

The impact of the statutory change and of the decisions are
likely to be evanescent. For a time, while the legislative history
and the decisions are near at hand, one may expect to find the
courts of appeal more receptive than before 1947 to attacks on
the Board’s conclusions of fact, and the Board, itself, particularly
astute to handle fact questions carefully. In the long run it will
doubtless be found, to use the language of the Justice, that “the
ultimate reliance for the fair operation of any standard is a
judiciary of high competence and character and the constant play
of an informed professional critique upon its work.”

The tangible, immediate effect of these decisions has doubtless
been to strengthen the position of the trial examiners in our ad-
ministrative hierarchy, and this is good. Hearing officers clearly
are in the best position to appraise the evidence, and, provided
they are competent, their findings on purely fact questions should
generally command respect. They are still, however, stepchildren
of the law, for they are neither judges nor are they even the
equivalent of masters in chancery.

Collective Bargaining: The Right to Bargain for the Right of
Co.\textsuperscript{24} the Court approved a decision of the Court of Appeals, Fifth
Circuit,\textsuperscript{25} setting aside that portion of a Board order requiring

\textsuperscript{24} 343 U. S. 395 (1952).
\textsuperscript{25} 187 F. 2d 307 (1951).
the Company to cease and desist from refusing to bargain collectively "by insisting as a condition of agreement, that the said Union agree to a provision whereby the Respondent reserves to itself the right to take unilateral action with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment." Throughout the bargaining, the Company had urged upon the Union that it agree to the inclusion in the contract of a "prerogative clause" which would have reserved to the Company the right to finality of decision, free from arbitration but subject to the grievance machinery, of selection of employees, promotions, discipline and discharge, and the determination of work schedules. This proposal countered a Union demand for arbitration as the terminal point of the contract grievance procedure, and the employer stuck by its guns, as did the Union, over a bargaining period of about eight months, prior to the Board hearing.

What the decision means, then, is that an employer may in collective bargaining do what the employer here did, although what the Court says is that an employer may in good faith bargain for a contract provision of the kind here proposed.26 Thus, the case was decided as though the Board had ordered the employer not to bargain for such a contract provision, although this was not the language of the order, and it could have been contended, on the basis of the findings of the examiner, that the order was predicated either on the adamant attitude of the Company with respect

26 The court of appeals took the view that, on the record, the Company, in insisting upon the prerogative clause, was not any less in good faith than the union was in resisting its inclusion. The Supreme Court interpreted this as in effect a finding that the Company bargained in good faith for the management clause. (See the last paragraph of the opinion.) The evidence relied upon by the court of appeals in making this finding — if it was a finding — is not indicated in its opinion, nor does Chief Justice Vinson's majority opinion indicate why the finding was "accepted," except that it does cite, as evidence of good faith, the fact that the Company's proposal countered the Union's demand for "unlimited arbitration." The opinion also implies that good faith might be shown on the basis of support for the proposal by "the traditions of bargaining in the particular industry."
to its proposal or, as the dissenting justices argued, on the conclusion that the Company sought to avoid, either then or during the contract term, any bargaining on the matters covered by the proposed provision. The difference between "insisting on" and "bargaining for" a given proposal became too subtle for the lawyers and for a majority of the justices.

In its general aspect, the decision appears to be an admonition

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27 The trial examiner, while holding that the Company "had a right to insist upon the inclusion of the 'prerogative' clause in any contract," found that the Company entered the negotiations with a "predetermined" and "inflexible" resolution not to reach agreement with the Union on terms which would in any way enhance the Union's position, but, instead, intended to discredit the Union. The Company's "inflexible position" as to the prerogative clause was regarded as part of the relevant evidence. The Board's short opinion seemed primarily to emphasize this same idea, in referring to "Respondent's inflexible position" (89 N.L.R.B. 185), in its conclusion that "Respondent's concepts concerning its management prerogatives so pervaded the negotiations that every effort by the Union to bypass this issue and proceed with other matters was met with frustration" (id. at p. 186), and in its depiction of the situation as one in which the Company demanded or insisted on the prerogative clause "as a condition to agreement" (id. at p. 187). On the other hand, the Board also stated, in reference to that part of Section 8(d) which provides that neither party is required to make a concession, "But this does not mean that any party may thereby preclude agreement by maintaining a position which is inconsistent with the bargaining rights of the other party" (ibid.). This indicates at least some confusion as to the precise theory of the Board's decision.

28 The Board's petition for a writ of certiorari, and its brief in the Supreme Court, exhibited confusion as to the issue involved. In the petition and in brief the question was stated to be "whether the employer violated section 8(a) (5) of the Act by refusing to enter into any contract with a union unless the union agreed to include therein a clause waiving the statutory right to bargain about certain terms or conditions of employment." In the Company's reply to the petition this statement of the issue was described as "both inaccurate and inept." Instead, said counsel for respondent, "It seems to us that the questions presented are: ONE, whether or not Clause III of the existing contract is in and of itself unlawful; and TWO, whether or not Respondent has violated the Labor-Management Relations Act by the manner in which it sought the inclusion of such clause in such contract...." The Board's brief left its basic approach in doubt. The Board may have believed that the respondent's fault lay in its adamant attitude and inflexibility in bargaining, or in its very assertion of the proposition that it should determine unilaterally and finally certain matters within the collective bargaining area. This statement appears in the brief (pp. 18-19):

"...While an employer may lawfully propose that the union waive a portion of its bargaining rights, and offer economic concessions that he is free under the Act to withhold as an inducement to obtain the union's assent, he may not lawfully even compel discussion, much less compel assent, to such a proposal, either by refusing to recognize the union's right to bargain about the issue in dispute, or by conditioning the continuation of negotiations or the execution of a contract upon it."

Meaning what?
to the Board to moderate its close scrutiny of the play and byplay of collective bargaining negotiations in the application of the “good faith” standard. The Court’s general attitude seems justified from the pre-enactment history of Section 8(d), which suggests that Congress contemplated a less pervasive use of the test.\(^{29}\) On general policy grounds, also, the Court’s reaction seems sound. Certainly, where bargaining is carried on between parties who are experienced, and where the record gives no reason to doubt the employer’s acceptance of the institution of bargaining or the status of the union, it is difficult to understand how any great social need is served by making available to either party, as an additional bargaining weapon, the threat of an ex post facto Board repudiation of the other party’s proposals or arguments, or, as in the instant case, a decision the effect of which is to force one party formally to withhold a proposal for a management clause rather than simply to refuse to accept the union’s own proposal. Experienced and knowledgeable parties will and should take care of themselves at the bargaining table without having the government looking over their shoulders. Where the parties are inexperienced with each other, or there is an unsavory record on either side, there is some justification for attempting to steer the bargaining process in order to help “educate” the parties or to help preserve the union’s position. Even in this situation, however, the difficulties

\(^{29}\) H. R. Rep. 3020, 80th Congress, 1st Session (1947), set forth a list of specific, objective standards in its proposed definition of the term “collective bargaining,” which would have precluded any inquiry into the substance of bargaining proposals or arguments in support thereof (or the lack of them). The Conference Committee elected to take instead, on the matter here relevant, the substance of the Senate bill (S. 1126), but said: “...the Senate amendment, while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had, to a very substantial extent, the same effect as the House bill in this regard, since it rejected, as a factor in determining good faith, the test of making a concession and thus prevented the Board from determining the merits of the positions of the parties....” There has always been a serious question whether the Board’s concept of its function in policing collective bargaining was one contemplated by Congress when it enacted the Wagner Act. See Smith, The Evolution of the “Duty to Bargain” Concept in American Law, 39 Mich. L. Rev. 1065 (1941). As pointed out by Cox and Dunlop, however, “it was perhaps inevitable that the process of administrative and judicial interpretation should take the NLRB and courts beyond the stage of recognition into the conference room”. Cox and Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harv. L. Rev. 389, 390 (1950).
and risks of error inherent in attempting to apply the good faith standard suggest that the Board should withhold judgment unless the evidence is so clear as to be beyond reasonable doubt.

Collective Bargaining: Scope of Authority of Union in Negotiating Seniority Agreements. Ford Motor Co. v. Huffman,\textsuperscript{30} decided in 1953, dealt in an important way with the scope of a bargaining agent's authority in negotiating changes in seniority which adversely affect certain classes of employees. The Court held that it was within the competence of the Union to agree to give veterans credit for pre-employment military service as well as the credit required by statute for post-employment military service, even though this meant a change in the relative seniority status of other employees. Thus, prior military service, like union officership,\textsuperscript{31} was regarded as a factor relevant to the distribution of job security and promotional privileges among workers. The decision is of interest both because it leaves open a wide range of discretion to bargainers about the highly complex subject of seniority, but also, looking in the other direction, because the Court nevertheless considers the doctrine of the Steele\textsuperscript{32} case to be applicable to Taft-Hartley as well as Railway Labor Act employers and unions and as going beyond the problem of race discrimination. On both points the decision was sound.

Union Collective Action: Section 8 (b) (4) (A). Four decisions were handed down in 1951 on the meaning of the so-called "secondary boycott" provisions of the amended NRLA. Each case involved "primary" picketing having "secondary" aspects, or "secondary" picketing having "primary" aspects, and in each instance the union's objective was organizational. In one (Rice Milling\textsuperscript{33}) the union had picketed a rice mill with the object of obtaining recognition, and in so doing had induced two truck

\textsuperscript{30} 345 U. S. 681.
\textsuperscript{31} See Aeronautical Industrial District Lodge 727 v. Campbell, 337 U. S. 521 (1949).
\textsuperscript{33} NLRB v. International Rice Milling Co., Inc., 341 U. S. 665.
drivers employed by a customer of the mill to refuse to cross the picket line for an order of goods. In two cases (Denver34 and IBEW35) the union or unions had picketed construction job sites in protest against the use of non-union subcontractors, as a result of which union mechanics had refused to work. In the fourth case (Carpenters & Joiners36) the union had called a strike of carpenters at a construction project because the contractor had contracted with a non-union department store for the installation of wall and floor coverings. Agreeing with the Board, the union conduct in Rice Milling was held not to be covered by Section 8(b)(4)(A), but in the other three cases the statutory provision was held to be applicable. The Court, incidentally, laid the foundation jurisdictionally for a sweeping application of the NLRA to the building construction industry, including even very small operators.

These cases, on the whole, indicate that Section 8(b)(4)(A) is to be given very broad scope. For one thing, it is now authoritatively determined that picketing is covered when it induces concerted action by employees and where one of its objects is to interrupt business relations between two employers. In so deciding the Court brushed aside the apparent hurdle of Section 8(c) on the basis that the general must yield to the specific, and on the further ground that if an inducement to boycott must, to be covered, involve a threat of reprisal or promise of benefit, there would be little need for 8(b)(4)(A) in view of the prohibition of "restraint and coercion" contained in 8(b)(1)(A). These arguments are not fully convincing. Certainly, secondary picketing which, in context, does not amount simply to a "signal" to affiliated unionists to strike could be held to be privileged by 8(c) without making the secondary boycott provision redundant. To put an obvious case, 8(b)(4)(A) would still be needed to cover

36 Local 74, United Brotherhood of Carpenters & Joiners of America, AFL v. NLRB, 341 U. S. 707.
the situation where the primary union, either with or without a primary or secondary picket line, addresses a specific request (e.g., by mail or telephone) to another union asking that union to "help" by instructing its members to cease working for their employers to the extent that such employers are having business relations with the primary employer. As regards the question of whether Congress actually contemplated covering picketing having secondary effects, the answer is not by any means clear. It is probably true that 8(c) was written into the act primarily with the thought that ordinary forms of publication, particularly when used by employers, were to be given more protection than in the past. On the other hand, at the time when the Eightieth Congress was deliberating, peaceful publicity picketing was still regarded as a constitutional right. This was before Giboney, and the two secondary picketing cases which had been decided in 1942, Wohl and Ritter, would have led one fairly to the conclusion that 8(b)(4)(A) could not stand up, as applied to peaceful secondary picketing. As of 1951, of course, this was no longer true. The constitutional barrier having been dropped, the Court, perhaps realistically, dropped the statutory barrier also.

The broad scope given to 8(b)(4)(A) by these decisions is evident also from the mode of analysis used by the Court. The

37 For references to important parts of the legislative history see Smith, Cases and Materials on Labor Law (2d ed. 1953) 342-344. The committee reports referred to "strikes" and "boycotts", and "attempts to induce" such action, but not to picketing," at least by name. Of course, as the Court points out, picketing can easily (and in some circumstances very properly) be considered to be an "attempt" to induce strike or other forms of concerted action.


40 It will be recalled that in the Wohl case a New York injunction against secondary picketing was reversed, while in the Ritter's Cafe case a Texas injunction was sustained. However, the basis for the latter decision was the lack of "nexus" between the secondary and primary business establishments. The inference is that, as the Court then viewed the matter, a "secondary boycott" statute drawn so broadly that it encompassed even secondary picketing of employers having a normal business relationship with the primary employer would have been invalid. Clearly, 8(b)(4)(A) was so drawn.
cases, with the possible exception of *Rice Milling*, were decided on the basis of a careful, technical comparison of the elements of union conduct involved with the necessary ingredients of illegality under the statute. While the Court in the *Denver* case alluded to the very frequent use of the term “secondary boycott” in the pre-enactment materials, it did not attempt to decide whether the union’s conduct would have been regarded as a secondary boycott, or as illegal, at common law. Rather, the questions were simply (1) whether the union induced or encouraged concerted action of the kind described in the Act, and (2) if so, whether one of the objects thereof was to interrupt business relations between two employers. Thus, the fact that in a very real sense the construction job site picketing was “primary,” not “secondary,” was considered to be of no importance in view of the key fact that two or more employers (the general contractor and the sub-contractors) were involved and were intended to be affected. This is the point on which Justices Douglas and Reed dissented. The cases received precisely the same analysis and treatment as would picketing by a union of a construction project which is using lumber emanating from a non-union mill, although the result is to deny the union any effective opportunity for protest picketing in the one case while leaving it available, at the premises of the primary employer, in the other. Congress wrote a broad provision into the Act, however, without limitations or refinements, except in one meaningless or at least highly ambiguous proviso, and the results in these cases are justified by the language used. They leave in serious doubt the attempts in some quarters to differentiate between “good” and “bad” secondary boycotts, and the Board’s attempt to distinguish “primary” from “secondary”

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See, for example, Judge Rifkind’s decision in *Douds v. Metropolitan Federation of Architects, Engineers, Chemists & Technicians, Local 231*, 75 F. Supp. 672 (S. D. N. Y. 1948).
Left in some considerable uncertainty by these cases is the status of primary organizational or recognition picketing. Under \textit{Rice Milling}, 8(b)(4)(A) will not be applicable simply on the basis that picketers have, incidentally, sought to persuade (or even force) a few employees of a customer of the primary employer not to cross the picket line. But the Court did not immunize this conduct on the broad basis that it was simply primary picketing. The rationale was that the picketing was neither intended to, nor did it, result in \textit{concerted} action by the employees of the secondary employer, within the meaning of the Act. That the picketing occurred geographically at the premises of the primary employer was regarded as "significant although not necessarily conclusive," and it was pointed out that "there were no inducements or encouragements applied elsewhere than on the picket line." Actually, the decision of the truckers to respect the picket line was as much "concerted," in the sense of being mutually arrived at, as was the decision of the carpenters to walk off the job in the \textit{IBEW} case. Possibly the factor of controlling significance, in the Court’s view, was the point that the picketing union was not shown to have contemplated any specific reaction by any other union; or by other unionized workers. If so, primary picketing may yet be held covered by 8(b)(4)(A) in highly organized, union-conscious communities. There is also the distinct possibility that primary collective action may be reached, regardless of objective sought, under 8(b)(1)(A) on the theory that it restrains or coerces employees. If Congress does not intend this result, now is the time to make this clear by suitable amendatory provisions.

\textbf{Union Collective Action: Section 8(b)(6).} The importance of the pre-LMRA explanatory and expository Congressional remarks

of the late Senator Robert A. Taft, as the most influential proponent of the Act, can hardly be more forcefully illustrated than in the Court's reliance upon them in its two 1953 decisions interpreting Section 8(b) (6), the so-called "anti-featherbedding" provision. The result was that the International Typographical Union's insistence upon retention of the practice of setting "bogus" type in the newspaper publishing industry (i.e., setting type not needed or to be used), and the American Federation of Musician's rule forbidding local appearances of traveling bands unless local orchestras are also employed, are not illegal under the Act despite their obvious "made work" characteristics. The technical reason is that under Section 8(b) (6) an essential element of the offense, said to have been lacking in these cases, is that there be payments made or solicited for services which are not in fact performed or to be performed. Clearly, however, the Court could have said, with dissenters Douglas, Clark and Vinson, that services which are not wanted, or at least are neither wanted nor in fact used in any real sense, are not services "performed." But to the majority Senator Taft had indicated positively that Congress had deliberately selected the gingerly approach to this problem, at least for the time being, and thus had sought to reach only the "fairly clear case, easy to determine," by making it unlawful "for a union to accept money for people who do not work." The printers and the musicians in question worked; it was as simple as that.

At the time of the enactment of the LMRA, as Mr. Justice Burton pointed out for the Court, and as Senator Taft stressed, an experiment was in process with the much broader provisions of the Lea Act, and certain constitutional problems in relation to


44 60 STAT. 89, 47 U. S. C. 1946 ed. § 506, enacted April 16, 1946. The Act makes it a criminal offense "by the use or express or implied threat of the use of force, violence, intimidation, or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel or constrain a licensee" to take action of the kinds specified, which include: "to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services."
this type of legislation remained to be resolved.\textsuperscript{46} Congress had no
desire to see its new legislation entangled in these difficulties. Of
still greater significance, however, in the selection of the narrow
language used in 8(b)(6), was probably the point, to quote the
Senator (as did Mr. Justice Burton), that the Senate conferees, in
rejecting the Lea Act provisions which had been incorporated in
the House bill, "felt that it was impracticable to give to a board
or a court the power to say that so many men are all right, and
so many men are too many," and thus to necessitate, in many cases,
"a determination of facts" which "would be almost impossible."
The practical difficulties envisioned in these remarks would not
have been present in the \textit{American Newspaper} and \textit{Gamble}
cases, but is clear that they would be serious problems in others, since
employers and workers may and frequently do entertain differ-
ent views concerning the number of workers needed in connection
with some operation, and just how many are needed can only be
resolved (unless one accepts the notion of complete management
prerogative in this area) by reference to some determination of
work standards, about which reasonable men can and often do
disagree.

Featherbedding, to the extent it is practiced, and meaning by
that term a system of paying for services neither performed nor,
by any reasonable standard, needed, seems to be a patent form
of economic waste. There is, therefore, an obvious plausibility
about any attempt to prohibit the practice. In writing the Lea Act
and Section 8(b)(6) into the federal statute law Congress was
not exactly pioneering, as shown by such common law decisions
as \textit{Opera on Tour, Inc. v. Weber}.\textsuperscript{46} What we seem to have done,
however, is to prohibit union collective action looking toward
certain kinds of featherbedding, not the actual practice, itself, to
the extent that the employer is a willing participant. If it is the
economic waste which is objectionable, it might seem obvious

\textsuperscript{46} The statute was upheld in \textit{United States v. Petrillo}, 332 U. S. 1 (1947).
\textsuperscript{46} 285 N. Y. 348, 34 N. E. 2d 349 (1941).
that arrangements voluntarily undertaken and executed by employers as well as those resisted should be subject to legal attack, just as in dealing with the issue of union security we have placed restraints upon both employers and unions. Perhaps the failure to open employer pay arrangements voluntarily assumed to legal scrutiny is in deference to our entirely proper general reluctance to start along this path of governmental interference. If, however, we elect not to condemn (legally) the employer’s own act, it is not quite clear why we should condemn the union’s attempt to produce the act, unless we do so only when, and on the sole basis, as in the Lea Act, that, it is supported by coercive pressure. It should be borne in mind that we are dealing here, basically, with the method of allocation of the working force, and our usual premise is that this is a problem for managers to work out with their workers, and as between each other, subject to the laws of competition, and within the framework of social security legislation, employment services, training programs, etc.

Federal-State Relations. The Amalgamated Association case, decided in 1951, carried the structure of federal control, based on the architecture of supersedure, another level higher. In this decision it was held that Wisconsin could not enforce her statute, providing for the compulsory settlement of public utility labor disputes, to utilities subject to the Taft-Hartley Act, because Congress had guaranteed the right to strike, except as limited in the Act, thus suspending state power to substitute arbitration for strike action. The argument that the Taft-Hartley emergency procedures are applicable only in national emergencies, thus leaving local emergencies without federal attention or solution, and, as it were, inviting local handling, was rejected by noting that the Wisconsin statute was not limited either to emergency or to “local” situations. In addition, and of even greater significance, the Court used this very point as a basis for inferring Congressional intent

47 Amalgam’d Assn. of Street, Electric Railway & Motor Coach Employees of America, Div. 998 v. Wisconsin Employment Relations Board, 340 U. S. 383.
that only as provided in the federal act, were emergencies to be
given any special treatment. This decision, I submit, is seriously
questionable.

It is one thing to infer from Congressional deliberation and
selection an intention to exclude other federal procedures with
respect to essentially federal emergency problems, as in the steel
seizure case; it is quite another thing to conclude that Congress
thereby made its policies exclusive of state action with respect to
essentially local emergency problems. In the entire line of super-
sedure cases, of which Hill v. Florida,48 while not the first case,
was the most significant of the "early" decisions, there has been
too much of question begging, too little regard for the fact that,
like it or not, we still have a federal system, and too ready an
assumption that complete conformity of policy is essential.

Congress has not spoken explicitly of its intentions with respect
to state action, except in Sections 10(a) and 14 of the amended
NLRA, and only in the latter Section and with respect to the
limited areas of union security and bargaining rights for super-
visory employees has it made itself clear. Nevertheless, the guar-
anties, so-called, of Section 7, including the "right to strike," have
been read as though they were absolutes, and as though they
explicitly warranted protection against state action, when the fact
is that they were fashioned against a background of employer
anti-unionism which, at least primarily, they were designed to
curb. Even with respect to employer action, the Court, itself, in
cases like Fansteel49 and Sands,50 has shown that these guaranties
are not, and cannot be, absolutes, and the Court's holding in the
Briggs & Stratton51 case shows that the rationale can be found
to support some kinds of state regulation.

48 325 U. S. 538 (1945).
51 Int'l Union, UAW-AFL v. Wisconsin Employment Relations Board, 336 U. S. 245
(1949).
It would be reasonable to make the controlling question in these federal-state cases an inquiry into the kind, degree and implications of the attempted state limitation on the putative "federal" right, having due regard not only for the full effectuation of the basic policies of the federal law, but also, despite the expanded area of federal jurisdiction under the modern concept of the commerce power, for the place of state and local governments in our structure and the practical limits of centralism. The argument for one uniform, comprehensive labor relations policy has its greatest force in terms of the major industries, whose operations have direct and substantial interstate repercussions, and Section 10(a) of the amended NLRA provides some basis for inferring Congressional intent to distinguish these from the essentially local industries. With respect even to the major industries, it should be possible for the states to enact supplementary regulations so long as they do not substantially impair federally assured rights. The fault of Hill v. Florida was not in the principle applied, but in the doctrinaire and absolute quality of the application. As one descends the scale from the major to the essentially local industries, the rigidity of the Court's syllogistic approach becomes especially unacceptable.

It is time that Congress address itself to this problem, even though the precise formulation of the statutory language should prove to be difficult. The person who is cynical of the competence of state government, or who feels that state politics and policies are likely at least to be inept, if not corrupted by special interests, may applaud the Court's federal-state decisions. I share some of this cynicism; but I also believe that state power should not be scuttled by indirect attack except perhaps in the most urgent situations. I think also that it is sound politics to encourage the development of responsible government at the grass roots level. The Court does not contribute to this goal with decisions like Amalgamated.

Miscellaneous Taft-Hartley Cases. In NLRB v. Rockaway News
Supply Co., Inc., the Court had the opportunity to consider whether the refusal of a worker, because of his trade union principles, to cross a picket line, is a form of protected activity under the Taft-Hartley Act. This issue had arisen also in a case decided in the Seventh Circuit, and was evidently thought by counsel not only to be present but to merit serious and elaborate argument. However, the Court refused to consider the general question on the facts presented, since the employer’s discharge of the worker had been upheld by an arbitration board, convened under contract grievance procedure, on the dual grounds that a worker should not resort to self-help with respect to a foreman’s order and that the collective agreement, in effect, obligated the worker, under the no-strike clause, to cross the picket line. The real importance of the case may lie in the Court’s implicit approval of the resolution of labor relations act (as well as contract) issues by arbitration, and in the Court’s view that a collective agreement need not be condemned as a whole simply because it contains an illegal union security provision.

ILWU v. Juneau Spruce Corporation, decided in 1952, made of Section 303 of the Act an important remedy, standing on its own foundation, by holding that an employer injured by union concerted action in the prosecution of a jurisdictional dispute could bring an action for damages without waiting for an NLRB adjudication under Title I. The opportunity which the unions have under Section 10(k) of Title I to avoid an NLRB unfair labor practice finding and order by settling their jurisdictional conflict by arbitration or otherwise is therefore not available insofar as damage liability is concerned. Moreover, the decision means that a union runs the risk (as, of course, does the employer) that

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52 345 U. S. 71 (1953).
54 The Court rejected the argument that, because the collective agreement containing the arbitration and no-strike provisions also contained an invalid union-security clause, it was invalid in its entirety.
55 342 U. S. 237.
judicial and administrative interpretations of complex but comprehensive statutory language may differ. The case, finally, may stimulate use of the damage remedy. The judgment was for $750,000.

Three decisions dealing with various aspects of back pay awards were issued during the three-year period. In *NLRB v. Cullett Gin Co., Inc.*, the Court held, without dissent but with the Chief Justice not participating, that the Board may refuse to deduct state unemployment compensation payments from such awards. *Nathanson v. NLRB* held that a back pay order may be proved by the Board against the bankruptcy estate of the employer as an implied contract under Section 63a(4) of the Bankruptcy Act, but that the claim, though proved by the Government, is entitled to priority only insofar as it represents wages, not to exceed $600 to each employee involved, earned within three months before the filing of the bankruptcy petition, thus rejecting the contention that priority might be based on the theory that such claim is a debt owing to the United States. *NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, resulted in approval by the Court of the so-called "Woolworth formula" pursuant to which the Board, since 1950, has been computing back pay by calendar quarters and offsetting against the back pay liability for a given quarterly period earnings from other employment during such period, but not during other periods. The *Gullett Gin* and *Seven-Up* cases show a continuing and commendable disposition on the part of the Court, despite the tightening up on the process of reviewing the Board's fact finding, to allow great latitude to the Board in the shaping of affirmative remedies. One might perhaps dispute the logic or soundness of the proposition that unemployment compensation payments are purely "collateral" benefits of an illegal discharge, and thus rightfully disassociated, like collateral losses, in framing

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58 344 U. S. 344 (1953).
an order of reimbursements for lost earnings, just as one might contend that the “Woolworth formula” is not a strict application of the mitigation principle. The fact remains, however, that the Board in each instance made a case for its rule, drawing to a large extent upon its administrative experience; to the majority of the Court this settled the legal point.

The non-Communist affidavit provisions of the Act of 1947 were subjected to examination and interpretation in two important cases. The *Highland Park* case,\(^5^9\) decided in 1951, held that the filing “requirement” of Section 9(h) of Title I applies not only to the officers of the labor organization (in this case an “international,” the TWUA) which may be seeking to invoke the statute, but also to officers of the top federation, if any, with which it is affiliated (in this instance, the CIO). The Court, over the dissent of Justices Frankfurter, and Douglas, refused to give the terms “national or international,” as used in Section 9(h), the technical nominative meanings commonly accorded them in the trade union vernacular, and treated them as “geographic terms.” The dissenters had the better of the argument in terms of strict logic and semantics, for to treat these terms as simply “geographic” would be to eliminate any filing requirement for an affiliated union organized regionally, which would be nonsense. But it would equally be absurd to hold that the affiliated “international’s” officers must file, but not the top officers of the federated union; so the decision achieved the right result, granting the purpose of the provision, which was to reduce Communist infiltration of labor organizations. *NLRB v. Dant*,\(^6^0\) decided in 1953, held that the Board may entertain an unfair labor practice charge by a union whose officers are not in compliance, and may issue a complaint based upon such charge provided there is compliance by the time the complaint issues. This decision was the result of a meticulous application of the language of the Act, which literally differentiates, on


\(^{6^0}\) 344 U. S. 375.
this point, between representation and complaint proceedings. One can hardly quarrel with the decision, for the important point is that the benefits of the Act (to-wit, the actual correction of unfair labor practices, in this case) be denied to a non-complying union. The benefit accrues from the actual prosecution of an unfair labor practice charge, not the preliminary investigation of the charge.

The Railway Labor Act

The period under review produced two decisions under the Railway Labor Act. One, *BRT v. Howard*,\(^6\) resulted in an expanded application of the important 1944 doctrine of *Steele v. L & N Ry.*\(^2\) and must therefore rank as a decision of prime importance, especially since, as previously observed in referring to *Ford Motor Co. v. Huffman*,\(^3\) the concept of fiduciary obligation attaching to a statutory bargaining representative’s status is one that certainly extends to unions deriving their authority from the Taft-Hartley Act. The other case, *Transcontinental & Western Air, Inc. v. Koppal*,\(^4\) is of more limited significance, involving technical aspects of remedial procedures available with respect to illegal discharges of railway employees.

The first case was another legal chapter in the history of the problem of racial discrimination on the railroads. The Frisco Railroad, under pressure from the Brotherhood of Railroad Trainmen, had entered into an agreement, in 1946, providing that “train porters” should no longer do any brakeman’s work, although for many years the porters, who were negroes, had performed the duties of brakemen, while not being classified as brakemen. The BRT was the statutory bargaining representative of brakemen, but not of train porters, and refused to admit negroes to membership. The result of the 1946 agreement was to open

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\(^{61}\) 343 U. S. 768 (1952).
\(^{62}\) 323 U. S. 192.
\(^{63}\) 345 U. S. 330 (1953).
\(^{64}\) 345 U. S. 653 (1953).
additional brakemen's jobs to white brakemen, and to curtail job opportunities for negroes. The novel question presented by the case was whether the fact that the train porters had traditionally been represented separately by their own union, and not by the BRT, precluded the application of the principle of the Steele case.

On this point the Court split. The majority, through Mr. Justice Black, held that the dispute did not hinge on the proper craft classification of the porters, for, as the opinion states, "the contention here with which we agree is that the racial discrimination practiced is unlawful, whether colored employees are classified as 'train porters,' 'brakemen,' or something else." As the dissenting opinion points out, this view did in fact carry the Court beyond the proposition, as declared in Steele, that a statutory bargaining agent is under an obligation to represent its constituents fairly (and thus without practicing racial or other forms of improper discrimination in the negotiation and administration of agreements). Now the legal proposition must apparently be formulated about like this: A bargaining agent holds its statutory bargaining rights or privileges as a public trust, and may not, in the exercise of such rights or privileges, pursue policies, such as racial discrimination, inimical to the public interest. The three dissenting justices took the view that the decision in effect wrote into the law something approaching a fair employment or union practices code, which thus far Congress, itself, has refused to do. Perhaps a legal rationale for the decision may be found in the suggestion, made both in the Steele and the J. I. Case Co.65 opinions, that the bargaining powers of a statutory representative are comparable to those possessed by a legislative body, and are thus to be exercised subject to fundamental constitutional limitations which Congress is to be presumed to have intended. This is legal fiction, of course, but it is not the first time legal fictions have been used to reach results deemed desirable. In this area the Court has moved where Congress has feared to tread. Whether

or not one will be inclined to applaud or criticize will depend upon his general attitude toward the respective roles of Congress and Court in the lawmaking process, and perhaps (though unconsciously) his personal evaluation of the importance of the race issue. In any case, with Steele and Howard leading the way, I wonder whether the Court will not, before long, close in another arc in the circle by holding, as did the Kansas court in Betts v. Easley, that a statutory agent may not both exercise its statutory powers and have discriminatory membership standards?

The Koppal case held that a discharged employee of an air carrier is not precluded by the Railway Labor Act from electing to sue for damages, where the discharge is alleged to have been in violation of a collective agreement, instead of pursuing the statutory remedy before the National Railroad Adjustment Board, but that such suit, being necessarily one under state law, cannot be maintained without a prior exhaustion of administrative remedies if this is the state rule. So, if the applicable state law has the prior resort rule, the effect is to force any employee covered by a collective agreement to use the contract grievance procedure and the Adjustment Board if he is to have a remedy, but if the state does not require prior resort, the employee may elect as between a damage action and the administrative remedy.

This result followed from the distinctions drawn in the earlier Moore and Slocum opinions between cases which do and do not involve questions of interpretation of the collective agreement. In the Slocum case the Court had ruled, as it had in the earlier case of ORC v. Pitney, that questions of interpretation are the exclusive prerogative of the Adjustment Board, at least in the first instance, and also had suggested that a damage remedy on account of a wrongful discharge, as contrasted with the authority

to order reinstatement, is also beyond the power of the Adjustment Board to provide, although just why it is difficult to understand. In Moore it was held that the Railway Labor Act did not require prior resort to the administrative remedy in the case of wrongful discharge. The Moore case, in my judgment, set the wrong pattern, although it certainly may have been right in its appraisal of Congressional intent. It would be salutary, generally, for courts to require grievants to use the contract (or contract and statutory) grievance machinery, at least if there is no denial of due process to them, nor is there any sound reason for differentiating between “interpretation” and “damage” issues. At present, however, the problem is confused not only “on the railroads,” but generally. Insofar as Taft-Hartley employers and unions are concerned, the federal courts will have an opportunity to make a rule on this point if, as seems likely, Section 301 must be deemed to create a federal right to enforce collective agreements.

Federal Wage-Hour Legislation

There remains to be considered three cases decided under the Fair Labor Standards Act and one which involved the Walsh-Healey Act. Taking the latter first, the Court in Unexcelled Chemical Corp. v. United States70 unanimously held that the two-year limitation period prescribed with respect, inter alia, to causes of action for “liquidated damages” under the Fair Labor Standards Act, the Walsh-Healey Act or the Bacon-Davis Act, applied to a suit by the Government to recover liquidated damages for employment of child labor in violation of the Walsh-Healey Act, and, significantly, that the cause of action accrued, for this purpose, when the defendant actually employed the minors, not, as the Government contended, when it was administratively determined that the contractor was liable for liquidated damages. Here the Court simply refused to entertain the Government’s suggestion that it should, in effect, amend a statute which in this instance

70 345 U. S. 59 (1953).
used unambiguous language. In the light of the doctrine of prior resort, which the Court implies that it would apply without question to Walsh-Healey enforcement proceedings, it is evident that the decision has the effect of barring any action for liquidated damages in cases where the administrative finding is not made within two years after the actual violation. This is a weakness in the remedial system under the Walsh-Healey Act which Congress should correct.

The most important of the group of cases being considered are *Alstate Construction Co. v. Durkin*\(^{71}\) and *Thomas v. Hempt Bros.*,\(^{72}\) in which the Court held that workers engaged in manufacturing or quarrying operations, where the product, in substantial part, was used in the repair of interstate roads, were engaged “in the production of goods for commerce” within the meaning of the Fair Labor Standards Act. The Court rejected the contention that, since the goods were to be used locally in highway repair work, they were not being produced “for commerce,” pointing out that to accept this contention would be to read the statute as if it provided for coverage, under the production test, only if the goods are produced “for transportation” in commerce. As dissenting Justices Douglas and Frankfurter point out, it is difficult to fix the limit of coverage under the principle, as stated by the majority, that “he who produces goods for these indispensable and inseparable parts of commerce [referring to interstate highways and railroads] produces goods for commerce.” Yet the alternative would be to hold that only employees actually engaged in the actual processes of interstate commerce are covered under the “in commerce” test, and the Court shows no inclination to reverse its direction and overrule such cases as *Overstreet v. North Shore Corp.*\(^{73}\) Congress addressed itself to the problem of deciding who are producers, for the purposes of the “production of goods for commerce” test, by defining “produced” in such a way as to reach

\(^{71}\) 345 U. S. 13 (1953).
\(^{72}\) 345 U. S. 19 (1953).
\(^{73}\) 318 U. S. 125 (1943).
activities closely related or directly essential to actual production. The Court has really linked the "in commerce" and "production of goods for commerce" bases of coverage in these two cases, and in substance, in using an "indispensability" test, is only doing, with respect to the meaning of "in commerce" what Congress has approved in dealing with "production." Yet the result will necessarily be to reach manufacturing and processing operations which would not be reached otherwise.

The fourth case of the wage-hour group was *United States v. Universal C.I.T. Credit Corp.* Here, with only Mr. Justice Douglas dissenting, the Court took much of the sting out of the criminal sanctions provided by the FLSA by holding that the offense made punishable by the statute is a "course of conduct," not each separate transaction resulting in civil liability to an employee, and, presumably, not each failure to keep each record required to be kept. The decision makes it highly important to be able to determine what is a course of conduct, and the answer, as given by the Court, is that it consists of all violations that arise "from that singleness of thought, purpose or action, which may be deemed a single 'impulse'." Thus, a single decision, or impulse, of management that certain kinds of activities are not compensable working time would evidently constitute but one criminal violation, though more than one day or week and more than one employee are affected. The decision of the Court was one not clearly required under the language of the Act. Indeed, Mr. Justice Douglas charged the majority with inventive lawmaking. The majority found some support for their conclusion in the legislative history of the provisions in question, but one may well suppose that they were influenced also by the fact that the preventive and civil remedies provided by the Act are the more important sanctions. The fact that the damage action can result in double recovery, and thus itself partakes of a punitive character, makes stiff criminal penalties less necessary than would otherwise be the case.

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74 344 U. S. 218 (1953).