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# THE NATIONAL LABOR RELATIONS ACT— AN APPRAISAL

LOUIS W. KOENIG

The National Labor Relations Act is not a completely new governmental experiment in the field of labor relations. Rather, it is the logical development of the many years during which various techniques of dealing with the problem of labor relations have been utilized by the Federal Government. Since, with the development of industry, there has been a concurrent increase in industrial disputes, government has become interested in their prevention and satisfactory settlement. Legislation regulating labor relations in the railroad industry has been comparatively successful. An attempt at large-scale regulation was made in the National Industrial Recovery Act with section 7 (a), but difficulties of interpretation and enforcement made the practicability of such regulation highly questionable. Two months after the downfall of the National Recovery Act, the National Labor Relations Act was passed,<sup>1</sup> embodying in statute form section 7 (a). The Act is predicated on the fact that the denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining has led to strikes and other forms of industrial unrest burdensome to commerce.<sup>2</sup>

To protect the worker's right of self-organization for the purposes of collective bargaining, the Act outlaws the specific "unfair labor practices" on the part of the employer which would interfere with that right. Accordingly, the employer is forbidden "to interfere with, restrain, or coerce

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<sup>1</sup>49 STAT. 449. 29 U. S. C. A. §§ 151-66. For general discussions of the Act see Garrison, *The National Labor Relations Act* (1935) 24 SURVEY G. 596; Hardy, *The National Labor Relations Act* (1937) 12 LOS ANGELES B. A. B. 288; Larry and Cowley, *The National Labor Relations Act* (1936) 3 U. OF PITT. L. REV. 33; MacDonald, *The National Labor Relations Act* (1936) 26 AM. EC. REV. 412; Smith, *The National Labor Relations Act* (1937) 10 OHIO ST. B. A. REP. 199; Spencer, *The National Labor Relations Act* (1936) 30 ILL. L. R. 884; Henderson, *Sidelights on the National Labor Relations Act* (1937) 42 COMM. L. J. 163.

<sup>2</sup>Section 1. For discussions concerning the loss in wages, trade, and commerce caused by strikes, cf. *Commission for Inquiry for the Interchurch World Movement Report* (1920); COMMONS AND ANDREWS, PRINCIPLES OF LABOR LEGISLATION, (1920) 125; DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY, (1933) 356-36-; Douglas, *An Analysis of Strike Statistics* (1923) JOURNAL OF AMERICAN STATISTICAL ASSOCIATION 866-877; FITCH, CAUSES OF INDUSTRIAL UNREST (1924); HAMMOND AND JENKS, GREAT AMERICAN ISSUES (1921) 99; KING, THE NATIONAL INCOME AND ITS PURCHASING POWER (1930) 56; *National Association of Manufacturers, Convention Proceedings* (1926) 136; OLDS, THE HIGH COST OF STRIKES (1921) 210; *The Board of Inquiry for the Cotton Textile Industry Report* (1934); *Report of the Steel Strike of 1919; Strikes and Lockouts in the United States, 1916-1932*, (1933) 36 MON. LABOR REV. 1295; (1934) 39 MON. LABOR REV. 62; (1935) 40 MON. LABOR REV. 677; U. S. Coal Commission, *Labor Relations in the Bituminous Coal Industry* (1923); *Report of the Anthracite Coal Strike Commission*, U. S. Bureau of Labor Statistics, Bull. no. 46 (1903); U. S. Commissioner of Labor, *Twenty-First Annual Report: Strikes and Lockouts* (1906).

employees in the exercise of their rights of self-organization," to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it"; or "by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization."<sup>3</sup> To enforce these provisions, the Act establishes a National Labor Relations Board<sup>4</sup> which, after proper hearing and examination, may order an employer to "cease and desist" from unfair practices.<sup>5</sup> To make the Act more effective, the Board is given power to order the reinstatement of employees discharged because of union membership or union activities.<sup>6</sup> The ultimate enforcement of the Board's orders rests with the Federal Circuit Court of Appeals.<sup>7</sup>

The Act provides further that the representatives selected "by the majority" of the employees in a unit appropriate for the purposes of collective bargaining, "shall be the exclusive representatives of all the employees in such unit."<sup>8</sup> In disputes concerning the appropriate unit, the Board is to decide whether "the employer unit, craft unit, plant unit, or subdivision thereof" is to be the proper one for the purposes of representation.<sup>9</sup> Whenever necessary, the Board is to conduct an election to select representatives and certify the name or names of representatives that have been designated or selected.<sup>10</sup>

Since the Department of Labor is an executive department and the functions and duties of the Board are of a quasi-judicial nature, the two obviously fall into different departmental categories. With marked consistency, Congress, when defining a policy and creating a quasi-judicial body to carry it out, has recognized that that body should not be subject to the control of an executive department because of this incompatibility of purpose and method of functioning. The same independent departmental status which the National Labor Relations Board enjoys has previously been given to a number of administrative boards. The Communications Division, the Interstate Commerce Commission, and the Federal Trade Commission are independent of the Department of Commerce; the Reconstruction Finance Corporation and the Securities Exchange Commission of the Treasury Department; and of the Department of Labor itself, the National Mediation Board.

While Congress has made the Board independent of the Department of

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<sup>3</sup>Section 8.

<sup>4</sup>Section 3.

<sup>5</sup>Section 10 (c).

<sup>6</sup>Section 10 (c).

<sup>7</sup>Section 10 (e).

<sup>8</sup>Section 9 (a).

<sup>9</sup>Section 9 (b).

<sup>10</sup>Section 9 (c). See *The Nature of the Authority of the National Labor Relations Board* (1937) 17 BOST. UNIV. L. REV. 843.

Labor, care has been taken to prevent it from trespassing on the rightful duties and activities of the Department itself. Hence, the Board is not permitted to act as mediator or conciliator in labor disputes. The function of mediation and conciliation, under the Act, still remains in the Conciliation Service of the Department of Labor.<sup>11</sup>

Having described the National Labor Relations Act in broad outline and having indicated the position of the administrative board it establishes in regard to the Department of Labor, it remains to consider the jurisdiction of the Board as defined by the Supreme Court and to examine the interpretation of the Act made by the Board in its decisions and orders. Finally, an attempt will be made to show the bearing of the Act on a future labor policy.

### I. THE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD

In passing the Act, Congress assumed that the board's jurisdiction would extend to those manufacturing businesses which ship their finished products in interstate and foreign commerce.<sup>12</sup> Included in the sphere of authority are all instrumentalities of interstate commerce and those businesses with branches and divisions in all parts of the country, operating as a unit on a national scale.<sup>13</sup> The employees of businesses purely local in character, government employees, agricultural laborers, domestic servants, and persons employed by parents are specifically excluded from the regulations of the Act.<sup>14</sup>

The advisability and constitutional justification for such regulation was clearly stated by Mr. Chief Justice Hughes in the *Jones and Laughlin* decision, in which he found the Commerce Clause broad enough to sanction federal regulation of a vertically integrated business enterprise with wide interstate ramifications. The Court declared:

"Where industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?"<sup>15</sup>

In the cases which came before the Supreme Court challenging the constitutionality of the Act,<sup>16</sup> the decision in the bus case was unanimous, while

<sup>11</sup>Section 4 (a).

<sup>12</sup>See the Congressional findings in Section 1 of the Act. See also SEN. REP. No. 573, 74th Cong., 1st Sess. 4, 18 (1935); and speech by Congressman Connery on the floor of the House, June 3, 1935; 79 CONG. REC. 8537, 8539 (1935).

<sup>13</sup>Mueller, *Businesses Subject to the National Labor Relations Act* (1937) 35 MICH. L. REV. 1286.

<sup>14</sup>Section 2 (3).

<sup>15</sup>(1937) 4 U. S. L. W. at 970.

<sup>16</sup>National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U. S. 1 (April 12, 1937); National Labor Relations Board v. Fruehauf Trailer Co., 301 U. S. 49, 58 (April 12, 1937); Washington, Virginia and Maryland Coach Co. v. National

the four dissenters in the *Associated Press* case viewed the Act as an abridgment of the freedom of the press; and in the three "processing" cases there was a sharp conflict over the Commerce Clause. It is unquestionable that the employees concerned in these cases were not engaged in interstate commerce; their activities were wholly intrastate. Hence the problem was to determine whether or not their activities were sufficiently related to interstate commerce to warrant Congressional regulation. In previous cases,<sup>17</sup> the Court had declared that local activities must have a direct effect upon interstate commerce in order to come under national regulation. In determining this, the causal connection between the activities and the effect on interstate commerce are traced, and if an intermediate link in the causal chain is found, Congress may not regulate the local activities.<sup>18</sup> Therefore, the first test which the Court may apply to determine the justification of Congressional regulation is to answer the question: Is the effect direct or indirect? If direct, regulation is justified.<sup>19</sup>

The second test which the Court has applied in earlier cases is that of seeing whether the effect on interstate commerce is great or substantial.<sup>20</sup> Thus in *Stafford v. Wallace*,<sup>21</sup> the regulation of purely local activities by Congress was sustained under the Commerce Clause; for the Court looked upon the stock yards, to use its metaphor, as a throat through which passed

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Labor Relations Board, 301 U. S. 142 (April 12, 1937); *Associated Press v. National Labor Relations Board*, 301 U. S. 103 (April 12, 1937). For discussion of the decisions see Yorkey, *Constitutional Law—Interstate Commerce—National Labor Relations Cases* (1937) 22 CORNELL L. Q. 568; *Constitutionality of the National Labor Relations Act* (1936) 4 U. OF CHIC. L. REV. 109; Nathanson, *The Wagner Act Decisions Studied in Retrospect* (1937) 32 ILL. L. REV. 196; *The Present Status of the National Labor Relations Act* (1936) 5 INTERNATL. JURIDICAL ASS'N. BULL. 25; Woods and Wheatley, *The Wagner Act Decisions—A Charter of Liberty for Labor?* (1937) 5 GEO. WASH. L. REV. 845.

<sup>17</sup>*United States v. E. C. Knight Co.*, 156 U. S. 1 (1895); *A. L. A. Schechter Co. v. United States*, 295 U. S. 495 (1937); *Carter v. Carter Coal Company*, 298 U. S. 238 (1937).

<sup>18</sup>Avakian, *The National Labor Relations Decisions in the United States Supreme Court* (1937) 25 CALIF. L. REV. 593 at 595.

<sup>19</sup>In the Sugar Trust Case *United States v. E. C. Knight supra* note 17 the Court held that the Sherman Anti-Trust Act could not be applied to a combination of manufacturers processing 98% of the sugar of the country, on the ground that manufacture was not directly related to interstate commerce. This view was rejected in *Standard Oil Co. of New Jersey v. United States*, 221 U. S. 1, 68 (1911) and *United States v. American Tobacco Co.*, 221 U. S. 106 (1911). The most recent application of this point of view has been made in the *Schechter* and *Carter* decisions. In the *Schechter* decision (at 308) Mr. Chief Justice Hughes said:

"... where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. . . . The distinction between direct and indirect effects . . . must be recognized as a fundamental one, essential to the maintenance of our constitutional system."

<sup>20</sup>See *Houston, East and West Texas R. R. Co. v. United States*, 234 U. S. 342 (1914), where the Court held that Congress may regulate rates for wholly intrastate traffic, in order to protect interstate traffic; and *Colorado v. United States*, 271 U. S. 153 (1926), where it was held that Congress, despite the objection of the State government, may compel abandonment by interstate carrier of a wholly intrastate branch line.

<sup>21</sup>258 U. S. 495 (1922).

the flow of interstate commerce. Prior to this case, the second interpretation of the Commerce Clause had been used with deadly effect on labor interests. Since in the *Danbury Hatters* cases and others of a similar nature,<sup>22</sup> the Court has held that the Sherman Anti-Trust Act applies under the Commerce Clause to combinations of workers who were not engaged in interstate commerce on the ground that they have a substantial effect on interstate commerce if they cease their work by striking, it is ironical that the Court should now find in this same method of interpretation the justification for Congressional protection of labor's right to organize and bargain collectively. Indeed, if Congress has the power to prohibit strikes, boycotts, and other activities local in nature which have the effect of curtailing interstate commerce, why may it not accomplish the same end by going to the root of the evil and removing the cause of strikes, which is the principal objective of the Act?<sup>23</sup>

The problem remains to determine the jurisdiction of the Board according to the principle of "substantial effect." Clearly, Congress may regulate those enterprises which depend upon other states for raw materials and a market for the finished product. A second group, those obtaining raw materials from local sources and selling outside the state, are included, for their labor difficulties may burden the free flow of commerce just as effectively as those of the second group. The Court has taken this position when it said that "the fact that the means operated at one end before physical transportation commenced and at the other end" after the physical transportation ended was immaterial.<sup>24</sup>

The cases decided by the Court indicate fairly clearly the scope of Congressional jurisdiction. By the *Associated Press* case, the Court countenanced the extension of the Act to all forms of interstate communication, radio, telegraph, telephone, transportation by air and water, and transmission of oil, gas and electricity. Although the person or company may be engaged in intrastate activity, interruption of that activity may obstruct interstate activity.<sup>25</sup> In the *Fruehauf* and *Friedman-Harry Marks* cases, the Court held

<sup>22</sup>Lowe v. Lawlor, 208 U. S. 274 (1908); Lawlor v. Lowe, 235 U. S. 522 (1915); Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n., 274 U. S. 37 (1927); Coronado Coal Co. v. United Mine Workers 268 U. S. 295 (1925).

<sup>23</sup>See Jones and Laughlin decision *supra* note 16 at 627.

<sup>24</sup>Lowe v. Lawlor, 208 U. S. 274 at 301, 28 Sup. Ct. 301 (1908). See Mueller, *Businesses Subject to the National Labor Relations Act* (1937) 35 MICH. L. REV. 1286 at 1290.

<sup>25</sup>*Associated Press v. N. L. R. B.*, 301 U. S. 103, 57 Sup. Ct. 650 at 654 (1937). In *re Consolidated Edison Co.*, 4 N. L. R. B. no. 10, the Board held that although the respondent company which provided power for railroads, navigation in New York harbor, United States post-offices, telephone, telegraph, and radio systems, airports, etc., was engaged in intrastate activity; nevertheless, a cessation in its operations because of a strike would have a severe effect on its consumers engaging in interstate activity. The Board said:

"... a labor dispute between the respondents and their employees interrupting

that the principles announced in the *Jones and Laughlin* case were applicable to manufacturing concerns which are relatively small when compared with the enterprise involved in the *Jones and Laughlin* situation.<sup>26</sup>

It is interesting to note that since the Supreme Court decisions, the Board has been highly successful in securing the enforcement of its orders in the Circuit Court of Appeals. In no case has an order of the Board been set aside on the ground that it lacked proper jurisdiction.<sup>27</sup> A difficult test of the adequacy of the Court's interpretation may come, however, when a con-

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the respondents' operations would not only affect the flow of the large quantities of coal and oil which they receive in interstate commerce, but might be substantially equivalent to the effect on interstate and foreign commerce and communication which would be caused by simultaneous labor disputes in the respondents' business and in all the businesses served by the respondents that are engaged in operating the instrumentalities of interstate and foreign commerce and communication and all the businesses engaged in shipping and receiving commodities in interstate or foreign commerce."

Because of this substantial relationship to commerce and communication among the several states and with foreign countries, the Board held that the case fell within its jurisdiction.

<sup>26</sup>The Court applies the general principle that the Board has jurisdiction when "stoppage of . . . operations by industrial strife" would result in substantial interruption to the flow of interstate commerce. Where such interruption would occur, the Court has indicated, unfair labor practices on the part of the employer known to be "prolific causes of strife" have a "close and intimate relation to interstate commerce" and are subject to Federal regulation under the Act. 301 U. S. at 41-43.

<sup>27</sup>See *National Labor Relations Board v. Pennsylvania Greyhound Lines Inc.*, 91 F. (2d) 178 (C. C. A. 3d 1936), and *N. L. R. B. v. Pacific Greyhound Lines, Inc.*, 91 F. (2d) 485 (C. C. A. 9th 1936), where the application of the Act to bus drivers and garage and maintenance men employed by interstate bus lines was sustained. In *N. L. R. B. v. Tidewater Express Lines, Inc.*, 90 F. (2d) 301 (C. C. A. 4th 1937), an order of the Board requiring an interstate truck operator to reinstate with back pay drivers whom the Board found were discharged in violation of the Act was affirmed. In *Jeffery-DeWitt Insulator Co. v. N. L. R. B.*, 91 F. (2d) 134 (C. C. A. 4th 1937), the Court upheld an order of the Board directed to a small manufacturer of insulators employing from 82 to 166 persons, which imported in interstate and foreign commerce 85% in value of its raw materials, and sold in interstate commerce about 90% in value of its finished products. In *Renown Stove Co. v. N. L. R. B.*, 90 F. (2d) 1017 (C. C. A. 6th 1937), the Court affirmed the application of the Act to a company employing from 175 to 250 men, which receives about half its raw materials from outside the state and ships out fifty-five per cent of its products. In *N. L. R. B. v. Santa Cruz Fruit Packing Co.*, 91 F. (2d) 790 (C. C. A. 9th 1937), the Court affirmed the Board's order which was directed against a company engaged in the canning and packing of fruits and vegetables, "substantially all" of which were grown in the state in which the plant is located. About 39% of its products are shipped to other states and foreign countries. In *Lyons v. Eagle-Picher Lead Co.*, 90 F. (2d) 321 (C. C. A. 10th 1937), the Board issued a complaint against a company engaged in mining and in smelting, refining, and further processing of the ores mined. Prior to the Supreme Court decisions the District Court had granted a temporary injunction restraining the Board's agents from prosecuting the case. Upon appeal, after the Supreme Court decisions, the Circuit Court of Appeals for the Tenth Circuit reversed the District Court and ordered a dismissal of the bill of complaint, declaring that the Board "was proceeding within its lawful powers". The application of the Act to oil producing operations has been sustained in *N. L. R. B. v. Bell Oil and Gas Co.*, 91 F. (2d) 509 (C. C. A. 5th 1937), wherein the Court declared: "The Act is not confined in its jurisdiction to industries operating upon a nationwide scale. It extends to and embraces within its scope all activities, large or small, which are, or which affect "commerce" as defined by it. By every test of the decisions the commerce power exerted in the Act extended to this dispute, and to those involved in it."

flict of jurisdiction arises between the national board and the various boards now being created by the states.<sup>28</sup> Already in Wisconsin, New York, and Utah, state boards have been established to apply legislation substantially similar to the National Labor Relations Act. While these acts are serving the very useful purpose of supplementing the federal act, it is apparent that a conflict over jurisdiction may occur. If so, there will be a real danger of a protracted period of litigation when the employer brought before a state court claims that his case belongs to the federal board and *vice versa*.

It has been suggested that the national act be amended to provide that until the national board has exercised jurisdiction in a given case affecting interstate commerce, state labor relations acts should apply and the federal courts should not be permitted to entertain petitions for the removal of proceedings instituted in state courts under these acts. Such a provision would enable the national board to concentrate on the more important cases which are unquestionably under federal jurisdiction and would leave the less important ones together with those not so clearly under federal jurisdiction to state boards, or at least to those boards which functioned effectively and conformed to national policy.<sup>29</sup> In all such cases the state boards could proceed with unchallenged power in their own courts, as well as avert the probably long period of litigation which seems imminent if a number of state boards are established.

## II. THE INTERPRETATION OF THE ACT BY THE NATIONAL LABOR RELATIONS BOARD

### A. *Collective Bargaining*

The right of labor to organize has long been recognized by the Courts. Chief Justice Hughes, in the *Jones and Laughlin* decision, said:

"Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reasons for labor organizations. We said that they were organized out of the necessity of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employment and resist

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<sup>28</sup>UTAH LAWS 1937, c. 55, 117; WISCONSIN LAWS 1937, c. 51. See *The State Labor Relations Acts* (1938) 5 HARV. L. REV. 722.

<sup>29</sup>Garrison, *Government and Labor—the Latest Phase* (1937) 37 COL. L. REV. 896 at 900. For a discussion of the possible methods of cooperation between the federal and state governments, see Koenig, *Federal and State Cooperation under the Constitution*, (1938) 36 MICH. L. REV. 752 ff.

arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employers."<sup>30</sup>

Once a given body of labor has organized itself into a unit and has elected its representatives, it is prepared to bargain collectively. Collective bargaining is a means to an end—collective agreement. Such an agreement necessarily will concern wages, hours, and working conditions. It will have a fixed duration of existence thus stabilizing, for a certain period, the terms of employment, and thereby bring mutual advantages and protection to employer and employee alike. By contrast, collective bargaining may be unsuccessful, resulting in no agreement; for as the Board has stated in *Sands Manufacturing Company*,<sup>31</sup> "from the duty of the employer to bargain collectively there does not flow any duty on the part of the employer to accede to the demands of his employees."

When no agreement has resulted from meetings between the employer and representatives of the employees, the Board must determine whether genuine collective bargaining has taken place. It must decide whether the employer has sought to fulfill the letter of the law by merely discussing the issues perfunctorily, and, by the employment of dilatory tactics, has thwarted the ultimate purposes of collective bargaining.

The first requirement the Board makes of the employer who fails to reach an agreement with his employees through the ordinary processes of collective bargaining is to show that he negotiated in good faith.<sup>32</sup> It is the theory of the Act that if the employer is willing to sit down with representatives of the unions and negotiate in good faith, in frank discussion, the natural result will be satisfactory agreements, in many instances, and, consequently, a decrease in the amount of industrial disputes. The criterion which the Board has used to determine good faith has been the offering of counter-proposals by the employer. In *St. Joseph Stock Yards Company*,<sup>33</sup> the Board found the respondent willing at all times to meet with representatives of the employees, to discuss fully their requests, and to state the respondent's views on each request. Discussion at these conferences, however, was confined solely to the proposals of the union, since the respondent company did not offer counter-proposals when rejecting the union's demands. It justified such an attitude by its unwillingness to make any changes in the conduct of its business because of its inability to bear any increase in expenses. The Board found further that the respondent refused to enter into any agreement, oral or written, with representatives of its employees,

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<sup>30</sup>National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U. S. 1. See *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 209 (1921).

<sup>31</sup>1 N. L. R. B. 557.

<sup>32</sup>See *in re Bell Oil and Gas Co.*, 1 N. L. R. B. 562.

<sup>33</sup>2 N. L. R. B. 39.

even when the proposed agreement covered only existing policy. While the Board could not maintain on these facts that the respondent had refused unqualifiedly to deal with the organization representing its employees, it did not follow that the apparent willingness at all times to discuss working conditions could be termed genuine collective bargaining.<sup>34</sup>

If no agreement is possible, the Board must determine when the duty of the employer to bargain collectively has been fulfilled. In *Jeffery De Witt Company*,<sup>35</sup> the Board held that the employer is not required to continue bargaining when negotiations already held indicate that to do so would be futile. The principle stated was that after an impasse in negotiations has been reached, the employer is justified in refusing to meet further with the employees on the ground that no agreement is possible. The Board took cognizance of the possibility of a change in the circumstances with which the proposed agreement was concerned. In the particular case under consideration, the impasse was dissolved by the occurrence of a strike and the intervention of disinterested third persons. With circumstances so altered, the Board held that the respondent must resume negotiations to fulfil the requirements of collective bargaining.

In another instance, the employer had refused to bargain collectively on the ground that a union representing the employees was negotiating not for a change in the wage and hour scale, nor to improve working conditions, but for a closed shop. In the *Columbian Enameling* case,<sup>36</sup> the Board held that such a demand by the Union did not excuse the employer from bargaining. Employers have also maintained that they have fulfilled the requirements of collective bargaining when they deal with grievances on an individual basis, instead of meeting with representatives of the employees. In *Atlantic Refining Company*<sup>37</sup> and again in *International Filter Company*,<sup>38</sup> the Board has held that where a majority of the employees in an appropriate unit have

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<sup>34</sup>See *in re Atlas Mills, Inc.*, 3 N. L. R. B. no. 3, wherein the respondent employer through delays, postponements, and his refusal to sign a written agreement, besides making constant changes in the basis of negotiations, proved that he was not engaging in genuine collective bargaining. See also *in re Black Diamond Steamship Corporation*, 3 N. L. R. B. no. 101, wherein the Board held that the willingness of the respondent to meet with union representatives was of no importance in the face of his closing down his plant in preference to negotiating with the union. In the *Inland Steel Company* decision, the Board ruled that the respondent company, in refusing to put in writing any agreements reached between itself and the union, did not fulfil the requirements of collective bargaining. The Board declared, "The representatives of the employees are not obliged to go through the process of negotiating understandings, when they are informed that their objective, the written agreement, will never be conceded." The Board has taken the position that "the reduction of collective agreements to writing has become an integral element of the collective bargaining process." See *N. Y. Times*, April 7, 1938, pp. 1, 10.

<sup>35</sup>1 N. L. R. B. 618.

<sup>36</sup>*In re Columbian Enameling and Stamping Co.*, 1 N. L. R. B. 181.

<sup>37</sup>1 N. L. R. B. 359.

<sup>38</sup>1 N. L. R. B. 489.

designated representatives for the purposes of collective bargaining, the duty of the employer as established in the Act remains undischarged by the mere adjustment of individual grievances.

A further problem is to find whether the employer has been and is discharging his duty to bargain collectively when his workers resort to strike. In *Columbian Enameling Company*,<sup>39</sup> the Board found that since the Act provides that employees do not cease to be such even when they are on strike, the employer must still resort to collective bargaining; for collective bargaining is an instrument of industrial peace, and the need for its use is as imperative during a strike as before. By means of its application, a settlement may be obtained.

### B. *The Investigation and Certification of Representatives*

Section 9 (c) of the National Labor Relations Act<sup>40</sup> empowers the Board to certify representatives only when a question concerning the representation of employees has arisen.<sup>41</sup> The instances in which elections have been found necessary are many and diverse. It may be that more than one labor organization exists among the employees and that the employer deals with one to the exclusion of the others,<sup>42</sup> or it may be that the employer is dealing with each of the organizations as the representative of its membership.<sup>43</sup> The question may also arise where only one labor organization exists among the employees, and the employer, while meeting with the organization, refuses to recognize its right to act for all the employees.<sup>44</sup> The Board has

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<sup>39</sup>1 N. L. R. B. 181. The respondent company refused to meet with a committee of the strikers as it had promised, for the company was in a position to reopen its plant and by so doing without negotiating at all with the union it would discourage active support of the union.

*In re Sands Manufacturing Co.*, 1 N. L. R. B. 557, the Board ruled that the respondent was unjustified in failing to negotiate with a committee of strikers after a shut-down of the plant.

<sup>40</sup>Section 9 (c): "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

<sup>41</sup>In cases where a demand to bargain collectively has been made and the employer has refused to enter into negotiations, the employees may ask for an investigation and certification under section 9 (c). A labor organization will resort to section 9 (c) when it is uncertain of its right to represent a majority or when the propriety of the unit is in question.

The Board may certify representatives with or without elections, depending upon the circumstances of the case. *In re John Blood and Co.*, 1 N. L. R. B. 371, the Board certified on the basis of a petition signed by a majority of the eligible employees just prior to the filing of a petition for investigation.

<sup>42</sup>See *in re Pittsburgh Steel Co.*, 1 N. L. R. B. 256; *in re Dwight Manufacturing Co.*, 1 N. L. R. B. 309.

<sup>43</sup>See *in re Bendix Products Corporation*, 1 N. L. R. B. 173.

<sup>44</sup>*In re Saxon Mills*, 1 N. L. R. B. 153; and *in re American Tobacco Co.*, 2 N. L. R. B. 198.

accepted an admission by an employer that he does not know if a particular labor organization represents a majority of the employees, as proving the existence of the problem.<sup>45</sup> In a number of cases, this admission by the employer is in the form of a demand that the labor organization secure a certification from the Board before he will bargain with the organization as the exclusive representative of his employees.<sup>46</sup> Again, the employer may contend that certain agreements established a formula for the handling of controversies, provide for wages, hours, and working conditions, and constitute a legal obligation to the employees who signed them. The Board has held that such agreements could not prevent the holding of an election; for the whole process of collective bargaining and unrestricted choice of representatives assumes the freedom of the employees to change their representatives, while at the same time continuing the existing agreements under which the new representatives must function.<sup>47</sup>

The most vexatious problem of elections has been how to determine the will of the employee who desires individual bargaining. In an early decision,<sup>48</sup> the Board ruled on the motion of a company that the voters be given the privilege of expressing on the ballot a preference for individual bargaining. The Board denied this motion, declaring:

"It is not our function to hold elections in order to determine whether employees desire individual rather than collective bargaining with their employer. Employees desiring individual bargaining may either refrain from voting or cast a blank ballot. The ballot to be used in this election will therefore not provide for a place in which a preference for individual bargaining may be expressed. It will contain the names of

<sup>45</sup>*In re* New York and Cuba Mail Steamship Co., 2 N. L. R. B. 97.

<sup>46</sup>*In re* American Cyanamid and Chemical Corporation, 2 N. L. R. B. 881; *in re* Motor Transport Co., 2 N. L. R. B. 492; *in re* R. C. A. Communications, Inc., 2 N. L. R. B. 1109. See *in re* Johns-Manville Products Corporation, 2 N. L. R. B. 1048, where the employer made a similar demand after the union refused to submit a list of members to prove its claim.

*In re* Wadsworth Watch Case Co., 4 N. L. R. B. no. 67, the company refused to enter any contract with any labor organization until the proper bargaining agency had been determined and certified by the Board. Since much uncertainty prevails over the appropriate unit, companies hesitate to bargain with representatives of the workers until they have been certified by the Board. See also, *in re* Bishop and Co., 4 N. L. R. B. no. 71, wherein the company refused to accept an offer of proof of majority representation by the union. In the investigation made by the Board, the complainant union could offer no substantiating proof that it did represent a majority of the employees.

*In re* Shell Chemical Co., 4 N. L. R. B. no. 36, prior to May 26, 1936, the company had entered into separate agreements with several crafts organizations affiliated with the American Federation of Labor. The Oil Workers Union, affiliated with the Committee for Industrial Organization, wished to negotiate a contract with the company, which was restricted to do so because of the previous contract. The company, however, was willing to have the matter settled by the Board, agreeing to bargain in the future with whatever organization represented a majority of the employees.

<sup>47</sup>See *in re* Swayne and Hoyt, Ltd., 2 N. L. R. B. 282; *in re* New England Transportation Co., 1 N. L. R. B. 130; *in re* Black Diamond Steamship Corporation, 2 N. L. R. B. 241.

<sup>48</sup>*In re* International Mercantile Marine Co., 1 N. L. R. B. 384.

the three labor organizations which claim to represent the engineers of the company."<sup>49</sup>

Such a position seems inconsistent with other rulings of the Board. In election cases involving only one labor organization, the Board has directed that an election be conducted to determine whether or not the employees desired that union to represent them. The ballot in such cases provides a space to vote for, and a space to vote against a named organization. In *American France Line*,<sup>50</sup> the Board provided for a space on the ballot in which the voter could indicate that he does not desire either of the named organizations to represent him. In this space, which is indicated by the words, "or by neither", the employee can vote against both labor organizations. Obviously, a small number of employees voting "or by neither", may, in some cases, prevent either of the designated unions from securing a majority. The Act, however, does not require an unwilling majority of the employees to bargain through representatives. It merely guarantees the right of the majority to bargain collectively if it chooses to exercise it. If the opportunity to vote against the organizations named on the ballot were denied, a majority might be forced against its will to accept representation by one or other of the nominees. In *Radio Corporation of America*,<sup>51</sup> the Board held that those who did not vote were presumed to acquiesce in the choice of the majority of those who did vote, and thus any employee not desiring to be represented by either designated union would not express that preference by refraining from voting. In the recent *Interlake* case,<sup>52</sup> the Board provided for the "or by neither" phrase to be placed on the ballot, adding that in the event that the election should result in none of the three preferences obtaining a majority, it would, upon request of the labor organization receiving the greatest number of votes, promptly direct a run-off election in which the employees would be permitted to vote for or against the organization.<sup>53</sup>

As a matter of policy, the Board has been scrupulously careful not to be-

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<sup>49</sup>*Ibid.* at 390.

<sup>50</sup>3 N. L. R. B. no. 45.

<sup>51</sup>1 N. L. R. B. 384.

<sup>52</sup>*In re Interlake Iron Corporation*, 4 N. L. R. B. no. 9.

<sup>53</sup>Mr. Edwin S. Smith, dissenting, said:

"I would permit the 'or by neither' place to continue on the ballot. I would provide, however, that unless the ballots marked in this space constitute a majority of the ballots cast they should be disregarded in tabulating the effective vote. Under such an arrangement these ballots would merely have filled the role of indicating to the Board that less than a majority of those voting do not desire to be represented by either labor organization. The wishes of this minority should then properly be held ineffective to prevent a choice of representation of one of the contending agencies."

See also *in re American France Line*, 3 N. L. R. B. no. 45; *in re Pennsylvania Greyhound Lines*, 3 N. L. R. B. no. 69; *in re Ohio Foundry Co.*, 3 N. L. R. B. no. 71; *in re John Morrell and Co.*, 4 N. L. R. B. no. 59; *in re Walker Vehicle Co.*, 4 N. L. R. B. no. 34.

In several cases, the "or by neither" phrase has obtained the largest number of votes. See *in re American France Line*, 4 N. L. R. B. no. 75.

come responsible for settling disputes within a labor organization such as the American Federation of Labor. A number of cases have arisen involving jurisdictional disputes, which more logically should be settled by the Federation itself. The *Aluminum Company* case<sup>54</sup> is an example. The problem there was not whether the union should represent the employees, but rather, who should represent the union in its dealings with the company. The Board was satisfied that the union had been selected by a majority of the employees, but it did not feel duty-bound to intervene and decide an issue involving solely and in a peculiar fashion the internal affairs of the Federation and its chartered bodies. Such a matter, it felt, could best be decided by the parties themselves. While in this case the dispute was between two groups of officials in the same labor organization, the Board has assumed a similar position of *laissez-faire* in disputes involving two or more unions affiliated with the Federation whenever the existing labor organization possessed the authority to render a decision in the matter.<sup>55</sup>

### (1) *Majority Rule*

When representatives have been designated by the majority of employees in a unit appropriate for the purposes of collective bargaining, it is the right of these representatives to be treated as the exclusive bargaining agency for all the employees in the unit. The right is reserved to the minority, however, to present their grievances to the employer. Despite the fact that "majority rule" has been adopted by every important board created for the regulation of labor relations,<sup>56</sup> some discussion has centered about its desirability.<sup>57</sup>

Perhaps the most important justification for majority rule, in that it establishes representatives who shall be the sole bargainers for the group,

<sup>54</sup>*In re* Aluminum Co. of America, 1 N. L. R. B. 537.

<sup>55</sup>*In re* The Axton-Fisher Tobacco Co., 1 N. L. R. B. 604. See also *in re* Standard Oil Co. of California, 1 N. L. R. B. 614, where the rule was followed even though several of the unions involved had no membership among the employees in the alleged bargaining unit; and *in re* American Tobacco Co., 2 N. L. R. B. 198, where, after ordering an election in a unit in which the machine adjusters were included, the Board amended its direction of election to exclude those employees on a petition for intervention filed by the International Association of Machinists subsequent to the direction of election.

<sup>56</sup>The following boards may be mentioned: The War Labor Board, Bridgeport Case, Docket No. 132 (shop committees); but *cf.* *Employees v. General Elec. Co.*, Docket No. 19; Railroad Labor Board, International Association of Machinists *v.* Atchison, T. & S. F. Ry., Dec. No. 119, 2 R. R. L. Bd. 87 (1921); *Brotherhood v. Pennsylvania System*, Dec. No. 220, 2 R. R. L. Bd. 216 (1921); The National Labor Board, *in re* Denver Tramway Corp., 1 N. L. B. 64, March 1, 1934; *in re* Real Silk Co., N.R.A. Release No. 4647, April 27, 1934; Petroleum Labor Policy Board, *in re* Magnolia Petroleum Co., P. L. P. B. No. 2, at 2, Feb. 28, 1934 (82002); but *cf.* *in re* Texas Co. P. L. P. B. No. 6, May 15, 1934 (85090). See WATKINS, LABOR PROBLEMS AND LABOR ADMINISTRATION IN THE UNITED STATES DURING THE WORLD WAR (1919) 142 (Shipbuilding Labor Adjustment Board).

<sup>57</sup>For the case against majority rule, see Sargent, *Majority Rule in Collective Bargaining under Section 7* (a) (1934) 29 ILL. L. REV. 275.

is the fact that such rule is effective in preventing internecine competition.<sup>58</sup> If several groups competed with the one designated by the majority, the employer would be in a position to play the groups off against each other and divide the strength of the unit. Thus, in the *Sands Manufacturing* decision,<sup>59</sup> the employer had shut down his plant because of a dispute with the union representing a majority of the employees. Later, after successful negotiations with a union not representing a majority, he was able to reopen the factory. The Board held that the employer was not justified in altering the "status quo" without bargaining with the prior union as the exclusive representative of the employees.

In light of the restrictions of the Act on employer activity in regard to unions; company or otherwise, the employer will not be eager to press an election even when a company union victory is likely; and if he takes the initiative in recognizing a company union, he will almost certainly be found guilty of interference. Majority rule thus insures against the employer's breaking the power of a victorious union by favoring or dealing separately with a company union. A union which loses an election, although handicapped by a loss of prestige, is allowed to continue its efforts. Majority rule implies the ability to call an election at any time to test the strength of the majority or to see whether there has been a change in the composition of the majority. Thus there appears to be a danger of frequent elections, especially where two unions are close contenders for majority representation. Such rivalry will mean not only incessant union activity in the plant, a source of annoyance to the employer, but, further, that the minority union can frequently challenge the right of the other to represent the majority by demanding that the Board hold elections. This would be unfair to the employer and would weaken collective bargaining, in that the authority of the representatives could be so constantly questioned.

There is a danger that majority rule will operate to preserve artificially the balance of factional strength at the time of election. It will be the problem of the Board to see that elections, when demanded, shall be held at intervals sufficiently short so that representatives will mirror larger-scale shifts of loyalty. Any possible solution must take into consideration the fact that the duration of collective agreements is definitely limited; and, according to decisions of the Board, if employees in a unit vote to change their representatives during the duration of the contract, new representatives must abide by the contract already negotiated. In view of these considerations, it would seem desirable to hold elections at the close of the contract in order

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<sup>58</sup>*The Decisions of the National Labor Relations Board* (1935) 48 HARV. L. REV. 629 at 638.

<sup>59</sup>*In re Sands Manufacturing Co.*, 1 N. L. R. B. 546. See (1934) 34 COL. L. REV. 1362.

to attain greater stability in labor relations. Since grievances which may arise are the only items not covered by the contract, and furthermore, since minority groups can present their grievances to the employer, regardless of the majority representatives, it would not seem worth while to change the majority representatives during the running of the contract, since they could do no more than the minority group, which might increase to a majority.

In its rulings on the "by the majority of the employees" clause, the Board has had to decide on one of three possible interpretations. This was done in the *Radio Corporation* case,<sup>60</sup> where a boycott of the election for representatives was carried on by the Employee's Committee Union, one of the two contestants for the bargaining privilege. The total number of employees eligible to vote in the election was 9,752, while the total number of ballots cast amounted to 3,163. Since there were so few participants, was the election a valid one? The phrase, "majority of employees", could refer to an affirmative majority of all employees eligible to vote.<sup>61</sup> Or it could be interpreted as meaning a majority of those participating in the election, provided the number of votes cast was a majority of those eligible to vote. Finally, the phrase might be interpreted as referring to a majority of the eligible employees voting in the election, so that the organization receiving a majority of the votes cast is to be certified as the exclusive representative. The first interpretation was rejected in *Virginian Railway Co. v. System Federation No. 40*,<sup>62</sup> where the Court applied the second interpretation. In rulings following the *Virginian Railway* decision,<sup>63</sup> the Board has not required that an organization receive a number of votes equal to a majority of the eligible employees in order to be certified as the exclusive representative. The grounds for such an interpretation are that minority organizations, merely by peacefully refraining from voting, can prevent certification of organizations which they cannot muster enough strength to defeat in an election. In the *Radio Corporation* case, the Board adhered to the third interpretation.<sup>64</sup>

### C. The Appropriate Bargaining Unit

Majority rule presupposes the existence of a bargaining unit; and being

<sup>60</sup>*In re* R. C. A. Manufacturing Co., 2 N. L. R. B. 159 at 168.

<sup>61</sup>In all cases prior to July 1, 1936, where an election had been held, the Board required that an organization to be certified must obtain a majority of the votes of those eligible to vote. Thus in the case of *in re* Chrysler Corporation, 1 N. L. R. B. 164, where 700 persons were eligible and only 125 ballots were cast, the Board refused to make any certification.

<sup>62</sup>84 F. (2d) 641 (C. C. A. 4th, 1936).

<sup>63</sup>*In re* Associated Press, 1 N. L. R. B. 686; *in re* New England Transportation Co., 1 N. L. R. B. 130; *in re* American-Hawaiian Steamship Co., 2 N. L. R. B. 424; *in re* Consolidated Aircraft Corporation, 2 N. L. R. B. 774.

<sup>64</sup>This same interpretation has been applied *in re* American-Hawaiian Steamship Co., 2 N. L. R. B. 195, where, although 55 employees were eligible to vote, only 19 ballots were cast; *in re* Williams Dimond and Co., 2 N. L. R. B. 859; *in re* Charles Cushman Shoe Co., 2 N. L. R. B. 1017.

so predicated, it is evident that the effect of the rule depends upon the Board, which is authorized to designate the unit. Because of the great variety of cases which the Board must decide, it is impossible to obtain a clear conception of what constitutes an appropriate bargaining unit.<sup>65</sup> The Act admits the possible forms which the unit may assume; it may be the craft unit, plant unit, or even some other unit.<sup>66</sup> A unit is simply a particular group of employees whose occupations and activities are so similar that it is logical, practical, or customary to specify the terms of their employment in a single collective agreement.

Since its first rulings, the Board has consistently applied several principles in determining the appropriate unit. One of these is the history of labor relations in the industry itself and the established course of dealing between an employer and his employees. Thus in *M. H. Birge and Sons Company*,<sup>67</sup> the facts that for the last fourteen years the manufacturers in the industry negotiated agreements with the union on behalf of color mixers, machine printers, and print cutters, and the respondent had bargained collectively with the union and its predecessors regarding the same workers, were held to be controlling in determining the unit.<sup>68</sup> The Board has assumed that collective bargaining is facilitated by adhering to the methods of the past, in the absence of any indication that a change in those methods has become necessary.

Determining the appropriate unit by considering the methods which have

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<sup>65</sup>See *Second Annual Report of the National Labor Relations Board*, 122-123 (1937). Determination of a unit is required in two types of cases: petition for certification of representatives, pursuant to section 9 (c) of the Act, and complaints charging that an employer has refused to bargain collectively with the representatives of his employees, in violation of section 8 (5) of the Act. In both cases a determination of the appropriate unit is indispensable to the decision; for a certification of representatives would be meaningless if there was no definition of the unit to be represented, and similarly, a complaint alleging that an employer had refused to bargain collectively with the representatives of his employees may be sustained only if those representatives were designated by employees in a unit appropriate for the purposes of collective bargaining. See Little, *The Appropriate Unit for Collective Bargaining* (1937) 12 Wis. L. Rev. 367.

In the only case which was presented to both the Wagner Board and its successor, contrary conclusions were reached as to the appropriate unit. Compare *in re* Gordon Baking Co., 1 N. L. R. B. (old) 102 with *in re* Gordon Baking Co., 2 N. L. R. B. 53.

<sup>66</sup>Section 9 (b) of the Act provides that: "The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

<sup>67</sup>1 N. L. R. B. 731.

<sup>68</sup>See *in re* International Mercantile Marine Co., 1 N. L. R. B. 384; *in re* Bell Oil and Gas Co., 1 N. L. R. B. 562; *in re* S. L. Allen and Co., 1 N. L. R. B. 714; *in re* Swayne and Hoyt, Ltd., 2 N. L. R. B. 282; *in re* Remington Rand, Inc., 2 N. L. R. B. 626; *in re* Shell Oil Co. of California, 2 N. L. R. B. 835; *in re* R. C. A. Communications, Inc., 2 N. L. R. B. 1109; *in re* Huth and James Shoe Manufacturing Co., 3 N. L. R. B. no. 20.

*In re* Whittier Mills Co., and *in re* Silver Lake Co., 3 N. L. R. B. no. 34, the Board ruled that both plants of the respondent should be considered as one unit, because previous negotiations had considered them so. See also *in re* Rossie Velvet Co., 3 N. L. R. B. no. 82; *in re* Jones Lumber Co., 3 N. L. R. B. no. 89.

been used successfully in the industry as a whole is illustrated by *Portland Gas and Coke Company*,<sup>69</sup> in which a question arose as to whether the men in a division of the company's plant, which was separated from the balance of the plant by seven miles, should be included within a single unit with the remaining employees. The Board, in its ruling, pointed out that it should be included since it was not exceptional for labor organizations in the industry to have members scattered over fifty miles.<sup>70</sup>

Another consideration made by the Board in determining the proper unit is the past efforts of the employees to organize or their present self-organization. Thus in *American Tobacco Company*,<sup>71</sup> the petitioning union argued that the appropriate unit be limited to those employees actually engaged in production. The company, on the other hand, maintained that employees in collateral departments should also be included. The Board found in favor of the smaller unit on the basis that the employees themselves organized their union along lines which excluded from membership employees in the adjunct departments.<sup>72</sup> When the employees in a smaller group have indicated a desire not to be included with other employees in a single bargaining unit as they did in *Motor Transport Company*,<sup>73</sup> the Board has abided by their wishes.

In a number of instances, the Board has determined that the rules of eligibility to membership in the unions formed by the employees constitute a clear manifestation of the manner in which they desire to bargain collectively.<sup>74</sup> In two cases, *Cushman Company*<sup>75</sup> and *Interlake Iron Corporation*,<sup>76</sup> the qualifications for membership in the competing unions were the same and the Board ruled on the basis of this fact in determining the appropriate unit. In *Wilcox Manufacturing Company*,<sup>77</sup> the union's admission to membership of certain temporary employees was a factor in the ruling that the appropriate unit should not be restricted to permanent production

<sup>69</sup>2 N. L. R. B. 552. See also *in re International Mercantile Marine Co.*, 1 N. L. R. B. 384; *in re Mosinee Paper Mills Co.*, 1 N. L. R. B. 393; *in re M. H. Birge and Sons Co.*, 1 N. L. R. B. 731; *in re Swayne and Hoyt, Ltd.*, 2 N. L. R. B. 282; *in re Motor Transport Co.*, 2 N. L. R. B. 492; *in re Williams Dimond and Co.*, 2 N. L. R. B. 1109.

<sup>70</sup>Cf. *in re Hoffman Beverage Co.*, 3 N. L. R. B. no. 64, where the Board held that the distance between the two plants was too great to warrant their being included in the same unit. See also *in re Pennsylvania Salt Manufacturing Co.*, 3 N. L. R. B. no. 74.

<sup>71</sup>2 N. L. R. B. 198.

<sup>72</sup>See *in re Chrysler Corporation*, 1 N. L. R. B. 164; *in re Agwilines, Inc.*, 2 N. L. R. B. 1; *in re Crucible Steel Co.*, 2 N. L. R. B. 298; *in re Oregon Worsted Co.*, 2 N. L. R. B. 417; *in re American Cyanamid and Chemical Corporation*, 2 N. L. R. B. 881.

<sup>73</sup>2 N. L. R. B. 492. See also *in re International Mercantile Marine Co.*, 1 N. L. R. B. 384; *in re R. C. A. Communications, Inc.*, 2 N. L. R. B. 1109.

<sup>74</sup>See *in re Timken Silent Automatic Co.*, 1 N. L. R. B. 335; *in re International Filter Co.*, 1 N. L. R. B. 489; *in re Agwilines*, 2 N. L. R. B. 1.

<sup>75</sup>2 N. L. R. B. 1015.

<sup>76</sup>2 N. L. R. B. 1036.

<sup>77</sup>2 N. L. R. B. 97.

employees, but should also include those of a temporary nature.<sup>78</sup> It should be emphasized, however, that while this is a principle applied by the Board to determine the appropriate bargaining unit, the eligibility of some of the employees involved to membership in a union is not necessarily a bar to their inclusion in a unit found appropriate by the Board.<sup>79</sup> In other cases, the Board has ruled that the appropriate unit be limited to a group smaller than the eligible membership of the unions concerned. In *Merchants and Miners Transportation Company*,<sup>80</sup> the issue was whether the units for licensed deck officers and licensed engineers should include certain lower rank employees who were not required to be licensed, but who, in fact, held licenses entitling them to positions of high rank. All three of the participating unions admitted these employees to membership and contended that they should be part of the appropriate unit. The Board, however, adopted the company's contention and excluded those employees, saying that in view of other circumstances the mere condition of eligibility, standing alone, did not warrant their inclusion.<sup>81</sup>

A further consideration of the Board in determining the appropriate unit is that of the existence or lack of existence of a mutual interest among the employees concerned. This is based upon the obvious principle that mutual interest among the employees is likely to further harmonious organization and make for more effective bargaining. Accordingly, in *Canton Enameling and Stamping Company*,<sup>82</sup> the Board found that the machinists, who do work of a highly skilled nature and receive wages substantially greater than those received by the employees of the production departments, should constitute a separate unit, because of these differences between themselves and their fellow workers.<sup>83</sup>

Among the specific circumstances which make for a community of interest is the nature of the work. In *Agwilines, Inc.*,<sup>84</sup> for the convenience of the industry, the longshoremen and dock workers were divided into two classifica-

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<sup>78</sup>See *in re Acklin Stamping Co.*, 2 N. L. R. B. 872; *in re Huth and James Manufacturing Co.*, 3 N. L. R. B. no. 20; *in re The B. F. Goodrich Co.* 3 N. L. R. B. no. 40; *in re Mergenthaler Linotype Co.*, 3 N. L. R. B. no. 51.

<sup>79</sup>For rulings of a similar nature see, *in re Luckenbach Steamship Co.*, 2 N. L. R. B. 181; *in re Grace Lines, Inc.*, 2 N. L. R. B. 369; *in re New York and Cuba Mail Steamship Co.*, 2 N. L. R. B. 595.

<sup>80</sup>2 N. L. R. B. 747.

<sup>81</sup>See *in re Bendix Products Corporation*, 3 N. L. R. B. no. 68.

<sup>82</sup>1 N. L. R. B. 402.

<sup>83</sup>For rulings concerning machinists, apprentices, and helpers, see *in re Duplex Printing Press Co.*, 1 N. L. R. B. 82; *in re New England Transportation Co.*, 1 N. L. R. B. 130; *in re International Filter Co.*, 1 N. L. R. B. 489. For rulings concerning ship carpenters, caulkers, and joiners, see *in re Harbor Boatbuilding Co.*, 1 N. L. R. B. 349; concerning printing pressmen and assistants, see, *in re Edward E. Cox, Printer, Inc.*, 1 N. L. R. B. 594; blank cutters, *in re Pioneer Pearl Button Co.*, 1 N. L. R. B. 837; licensed deck officers and engineers, *in re Black Diamond Steamship Corporation*, 2 N. L. R. B. 241; and *in re International Mercantile Marine Co.*, 1 N. L. R. B. 384.

<sup>84</sup>2 N. L. R. B. 1.

tions; but the Board held that since the workmen were frequently interchanged and were paid on the same hourly basis, they had a common interest. Thus in a number of decisions the Board has held that production workers should be considered a unit separate from the clerical and supervisory staff,<sup>85</sup> and those who perform essentially different tasks are ordinarily considered as a separate bargaining unit.<sup>86</sup>

Another consideration in determining whether a community of interests exists is the skill of the workers. In *Chrysler Corporation*,<sup>87</sup> the designing engineers employed by the company could be classified in three groups, chassis, body, and tool and dye engineers. Each in turn had certain subclasses, the members of which had special aptitudes and experience. The Board held that all the designing engineers engaged by the company constituted an appropriate unit; for practically all the men had received professional training in technical schools or colleges and were fitted by training and experience to work in more than one subclassification. Hence the group was distinguished from clerical and production workers in function and training and also from electrical and chemical engineers.<sup>88</sup>

Either a common wage rate or a similar method of payment may identify a class of employees with a community of interest sufficient to place them in the same bargaining unit. This factor, however, may do no more than point out the difference otherwise existing between two groups of employees

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<sup>85</sup>See, *in re* R. C. A. Manufacturing Co. Inc., 2 N. L. R. B. 159; *in re* United States Stamping Co., 1 N. L. R. B. 123; *in re* The American Tobacco Co., 2 N. L. R. B. 198; *in re* Crucible Steel Co. of America, 2 N. L. R. B. 298; *in re* Motor Transport Co., 2 N. L. R. B. 492; *in re* Remington Rand, Inc., 2 N. L. R. B. 626; *in re* Consolidated Aircraft Corporation, 2 N. L. R. B. 772; *in re* R. C. A. Communications, Inc., 2 N. L. R. B. 1109; *in re* Industrial Rayon Corporation, 3 N. L. R. B. no. 2; *in re* Atlas Mills, Inc., 3 N. L. R. B. no. 3; *in re* Hunter Packing Co., 3 N. L. R. B. no. 10; *in re* Mergenthaler Linotype Co., 3 N. L. R. B. no. 13; *in re* Suburban Lumber Co., 3 N. L. R. B. no. 17; *in re* Northrop Corporation, 3 N. L. R. B. no. 19a; *in re* Central Truck Lines, Inc., 3 N. L. R. B. no. 26; *in re* Lane Cotton Mills Co., 3 N. L. R. B. no. 31; *in re* United States Coal and Coke Co., 3 N. L. R. B. no. 37; *in re* The Boss Manufacturing Co., 3 N. L. R. B. no. 39; *in re* Georgia Duck and Cordage Mill, 3 N. L. R. B. no. 42; *in re* National Electric Products Corporation, 3 N. L. R. B. no. 47; *in re* John Morrel and Co., 3 N. L. R. B. no. 84.

<sup>86</sup>See *in re* St. Joseph Stock Yards Co., 2 N. L. R. B. 39; *in re* Consumers' Research, Inc., 2 N. L. R. B. 57; *in re* American Tobacco Co., 2 N. L. R. B. 198; *in re* R. C. A. Manufacturing Co., 2 N. L. R. B. 159; *in re* Carlisle Lumber Co., 2 N. L. R. B. 248; *in re* Crucible Steel Co. of America, 2 N. L. R. B. 298; *in re* Bendix Products Corporation, 3 N. L. R. B. no. 68; *in re* Pennsylvania Greyhound Lines, 3 N. L. R. B. no. 69; *in re* Commonwealth Division of General Steel Castings Corporation, 3 N. L. R. B. no. 78; *in re* Goodyear Tire and Rubber Co. of California, 3 N. L. R. B. no. 81.

Mutual interest occurs when there is a large degree of interchangeability among the members of the groups. *In re* Portland Gas and Coke Co., 2 N. L. R. B. 552, although the operating department of the company was divided into four bureaus each performing somewhat dissimilar functions, frequent interchangeability of workers made the entire operating department constitute a single appropriate unit. See also, *in re* Argvillines, Inc., 2 N. L. R. B. 1; *in re* Luckenbach Steamship Co., Inc., 2 N. L. R. B. 181; and *in re* Globe Mail Service, Inc., 2 N. L. R. B. 610.

<sup>87</sup>1 N. L. R. B. 164.

<sup>88</sup>For cases see note 83 *supra*.

of the same employer. Employees paid on an hourly basis, for example, may be production workers, while those paid weekly are clerical employees.<sup>89</sup>

In a number of cases, the Board has not determined the unit. The fact that all of the parties to a proceeding are agreed as to the extent of the unit has usually been treated by the Board as decisive and conclusive.<sup>90</sup> Exceptions have been made, however, for the absence of contention over the appropriate unit does not necessarily require the Board to accept unquestioningly the unit assumed by the parties to be appropriate.<sup>91</sup>

More recently, the Board has been following a principle which was foreshadowed in a decision of the National Labor Board, that of allowing the employees to determine the unit themselves.<sup>92</sup> Thus in *Commonwealth Division of General Steel Castings Corporations*,<sup>93</sup> the Board, in its decision, made no final determination as to the appropriate unit. One of the contesting unions claimed that all the employees engaged in production and maintenance, exclusive of supervisory employees, constituted a single appropriate unit. Federation unions contended that the company's welders and acetylene cutters, together with other workers of a more skilled nature, should constitute separate units. The Board, in its ruling, stated that since the contention of either union could be sustained, it would direct that separate elections be held for the described groups which would decide the issue on the basis

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<sup>89</sup>*In re* Canton Enameling and Stamping Co., 1 N. L. R. B. 402; *in re* Westinghouse Electric and Manufacturing Co., 3 N. L. R. B. no. 1; *in re* McCabe, Hamilton, and Renny, Ltd., 3 N. L. R. B. no. 53, (determination of regular and casual labor by the wage rate); *in re* West Virginia Pulp and Paper Co., 3 N. L. R. B. no. 67; *in re* Pennsylvania Salt Manufacturing Co., 3 N. L. R. B. no. 74.

<sup>90</sup>This agreement may appear: (1) as a stipulation entered into between the parties. See *in re* American-Hawaiian Steamship Co., 2 N. L. R. B. 424; *in re* Santa Fe Trail Transportation Co., 2 N. L. R. B. 767; *in re* Todd Seattle Dry Docks, Inc., 2 N. L. R. B. 1070; (2) or in the pleadings and testimony given at the hearing, see, *in re* Lykes Brothers Steamship Co., Inc., 2 N. L. R. B. 102; *in re* Samson Tire and Rubber Corporation, 2 N. L. R. B. 148; *in re* Shell Oil Co. of California, 2 N. L. R. B. 835; *in re* American Cyanamid and Chemical Corporation, 2 N. L. R. B. 881; *in re* International Mercantile Marine Co., 2 N. L. R. B. 971; *in re* Cambell Machine Co., 3 N. L. R. B. no. 79; *in re* Star and Crescent Oil Co., 3 N. L. R. B. no. 93; *in re* Hat Corporation of America, 3 N. L. R. B. no. 99.

See *in re* Stone Knitting Mills Co., 3 N. L. R. B. no. 22, wherein the Board held that the unit agreed upon by both contestant unions was appropriate for the purposes of collective bargaining. See also *in re* Lane Cotton Mills Co., 3 N. L. R. B. no. 31. *In re* The B. F. Goodrich Co., 3 N. L. R. B. no. 40a, the contestant unions were agreed except in a few particulars as to the appropriate unit. The Board decided the unit for 12 laboratory workers.

<sup>91</sup>*In re* Richards-Wilcox Manufacturing Co., 2 N. L. R. B. 97, a proceeding concerning representation in which only one union was involved and in which the company itself did not participate, the Board refused to limit the appropriate bargaining unit to the company's permanent production workers, as the union desired; but extended it to include the temporary production workers because of the substantial similarity of their interests. See also, *in re* International Freighting Corporation, *et al.*, 3 N. L. R. B. no. 70. *In re* American France Line, *et al.*, 3 N. L. R. B. no. 7, the Board decided upon a unit other than that favored by both contestant unions. The companies wished the Board to decide the controversy.

<sup>92</sup>See *in re* Budd Manufacturing Co., 1 N. L. R. B. 58, 61.

<sup>93</sup>4 N. L. R. B. no. 22.

of the preference indicated by the employees in the elections. Similar rulings were made in the *Globe Machine and Stamping Company*<sup>94</sup> and the *Shell Company* decisions,<sup>95</sup> where the Board found that the considerations as to the units or unit to which the craft groups should belong were sufficiently balanced so that the determining factor should be the desires of the men themselves.<sup>96</sup>

Thus in granting workers the right to vote in order to determine whether they desire to continue under the craft form of organization, and since the history of past attempts at negotiations, previous experience in collective bargaining, and the community of interests through skill, wages and training all point in favor of the craft method of unionization, it appears that the craft method is assured of more than a fair deal at the hands of the National Labor Relations Board. If the craft unit is active enough to retain the loyalty of its members, it is given the assurance of continued existence under the Act.<sup>97</sup>

#### D. Unfair Labor Practices

##### (1) *Domination and Interference With the Formation and Administration of a Labor Organization and Contribution of Financial or Other Support to It*<sup>98</sup>

The so-called "company union" came into its own under the National

<sup>93</sup>N. L. R. B. no. 25.

<sup>94</sup>N. L. R. B. no. 36b.

<sup>95</sup>See *in re City Auto Stamping Co.*, 3 N. L. R. B. no. 24; *in re The Globe Machine and Stamping Co.*, 3 N. L. R. B. no. 25; *in re Pennsylvania Greyhound Lines et al.*, 4 N. L. R. B. no. 37; *in re Commonwealth Division of General Steel Castings Corporation*, 3 N. L. R. B. no. 78; *in re Pacific Gas and Electric Co.*, 3 N. L. R. B. no. 87; *in re Worthington Pump and Machinery Corporation*, 4 N. L. R. B. no. 61.

<sup>96</sup>Cases in which the American Federation of Labor and the Committee for Industrial Organization have been contestants, and have been decided in favor of the former on the basis of: (1) history of labor organization, include, *in re The H. Neuer Glass Co.*, 4 N. L. R. B. no. 14; *in re The Texas Co.*, 4 N. L. R. B. no. 27; *in re Allis-Chalmers Manufacturing Co.*, 4 N. L. R. B. no. 24; (2) skill, *in re Pittsburgh Plate Glass Co.* 4 N. L. R. B. no. 30; *in re Friedman Blau Farber Co.*, 4 N. L. R. B. no. 23; (3) wages, *in re The H. Neuer Glass Co.*, 4 N. L. R. B. no. 14.

The C. I. O. position was upheld *in re Scottdale Mills*, 4 N. L. R. B. no. 1, in which the Board held that the production and maintenance employees constitute a unit appropriate for the purposes of collective bargaining. *In re Chicopee Manufacturing Corporation*, 4 N. L. R. B. no. 62, during the hearing the American Federation of Textile Operatives indicated willingness, in the event that it should be chosen as the bargaining representative of the company's employees, to amend its charter so as to render eligible for membership all employees of the company except clerks and supervisors. The Board held that no adequate evidence was introduced to show that the loom fixers should constitute a separate bargaining unit. For a discussion of the Board's position, see *The National Labor Relations Board faces A. F. of L.—C. I. O. Rivalry (1937)* 6 INTER-NATL. JURIDICAL ASS'N. BULL. 41.

<sup>98</sup>Sections of the Act relevant to this unfair labor practice include section 8 (2), which declares that it shall be 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", and section 7 which guarantees to employees "the right to self-organization" and "to bargain collectively through representatives of their own choosing."

The term "labor organization" means "any organization of any kind, or agency

Industrial Recovery Act. It is estimated that approximately 70% of the company unions now in existence came after the passage of the Act.<sup>99</sup> Nothing in the National Labor Relations Act prohibits the formation of a company union if such an organization of workers is confined by its own volition to the boundaries of a particular plant or employer. The Act seeks to make such an organization the free choice of the employees, and not a choice dictated by forms of interference which are weighty because of the existence of the employer-employee relationship.<sup>100</sup>

To dominate unions, violators of the Act have resorted to a number of techniques. Often the labor organizations are openly espoused by the employer, the mechanics of the plan's functioning leaving no doubt of its subserviency to the employer's will.<sup>101</sup> In the formation of the organizations, the employer may help draft the constitution and by-laws.<sup>102</sup> Employees are urged and sometimes coerced to join the association.<sup>103</sup> Officers of the employer attend and address meetings, and officers of the dominated union may carry on the work of the organization on the company's time.<sup>104</sup> Clerical expenses are met by the company. The inadequacy of representation is revealed by the paucity of successful agreements concerning wages and hours, although accord may be reached over such topics as picnics, bowling, ventilation, and general improvement of working conditions.<sup>105</sup>

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or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." (Section 2 (5)) Whether the labor organization is an employee representation plan, good will club, friendship association, department council, or back-to-work association, if it has for a purpose to deal with the employer in the matters specified above, it is a labor organization within the meaning of the Act.

<sup>99</sup>See *Extent and Characteristics of Company Unions* (Preliminary Report) (1935) 41 MON. LABOR REV. 1; Garrison, *The National Labor Relations Act*, (1935) 24 SUR. G. 596 at 598..

<sup>100</sup>Thus the employer can continue his contributions to the pension fund and other welfare activities if both he and the workers so desire. Such contributions are valid so long as they do not influence bargaining relations between employer and employees. It is of interest to note that some company unions have revised their charters to extend their activities to include the function of collective bargaining. *In re* S. Blechman and Sons, Inc., 4 N.L.R.B. no. 3, the company union so adjusted its charter to allow collective bargaining activities. It is clear that the Association never filled this function, for Art. V, sec. 5, of the Association's charter provides that "all voting shall be strictly by open ballot." It was found further that supervisory and influential employees succeeded in monopolizing the offices and perverted its functions to fit the labor policies of the respondent.

<sup>101</sup>See *in re* International Harvester Company, 2 N.L.R.B. 310, wherein the employer introduced a council plan in 1919 which was adopted in 25 of the respondent's plants. See also *in re* Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B. 1; *in re* Western Union Telegraph Co., 3 N.L.R.B. no. 32; *in re* Bemis Brothers Bag Co., 3 N.L.R.B. no. 23.

<sup>102</sup>*In re* Pacific Greyhound Lines, Inc., 2 N.L.R.B. 431.

<sup>103</sup>*In re* Carlisle Lumber Co., 2 N.L.R.B. 248; *in re* National Electric Products Corporation, 3 N.L.R.B. no. 47.

<sup>104</sup>*In re* Pacific Greyhound Lines, Inc., 2 N.L.R.B. 431; *in re* Highway Trailer Co., 3 N.L.R.B. no. 65.

<sup>105</sup>See *in re* International Harvester Co., 2 N.L.R.B. 310. For a discussion of this decision, see *Second Annual Report of The National Labor Relations Board*, 95ff (1937).

A labor organization, although not organized by the employer nor assisted by him in any way, may be contrary to the intent of the Act. In *Regal Shirt Company*,<sup>106</sup> the mayor and influential local citizens addressed the employees and sought to dissuade them from joining the union, declaring that if the employees joined, the factory would move out of town. Hence an Association was formed, the creature of the mayor's efforts to keep the factory in town. The Board, in holding that the Association was in violation of the Act, took the same position it assumed in *Ansin Shoe Company*<sup>107</sup> when it ruled that the "organization had sprung up in response to the employer", although he had not aided nor sponsored it.

(2) *Encouragement or Discouragement of Membership in a Labor Organization by Discrimination*<sup>108</sup>

The most clear-cut violation of this section is the open discharge of certain employees for participating in union activities.<sup>109</sup> In most cases of alleged

<sup>106</sup>4 N.L.R.B. no. 74.

<sup>107</sup>1 N.L.R.B. 929. The Board said:

"We do not so narrowly interpret section 8 (2) as to require this direct and immediate link between the employer and the outlawed organization. This section does not stand alone; its meaning is derived not solely from its words but from related sections and from the purposes of the act. This section makes specific one of the ways in which an employer can interfere with the broad right of the employees under section 7 to bargain collectively through representatives of 'their own choosing' and is to be construed so as to further the intention of section 7. Its object is to protect the rights of employees from being hamstrung by an organization which has grown up in response to the will and the purposes of the employer, an organization which would not be in the sense of section 7 an organization of the employees' choice. The workers may be aware of their employer's antipathy to union organization and seek to propitiate him by acceptable conduct. This may be unavoidable. But the employer can be prevented from engaging in overt activity calculated to produce that result. If labor organizations are to be truly representative of the employee's interest, as was the intention of Congress as embodied in this Act, the words 'dominate and interfere with the formation of any labor organization' must be broadly interpreted to cover any conduct upon the part of an employer which is intended to bring into being, even indirectly, some organization which he considers favorable to his interests."

See also *in re Hill Bus Company, Inc.*, 2 N.L.R.B. 781. See *in re Oregon Worsted Co.*, 3 N.L.R.B. no. 5 wherein the Board criticises a State Board of Conciliation for exerting pressure upon striking employees to secure a settlement.

<sup>108</sup>Section 8 (3) of the Act provides that it is an unfair labor practice for an employer:

"By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided: That nothing in this act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in this act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a) in the appropriate collective-bargaining unit covered by such agreement when made."

<sup>109</sup>In no case has a respondent admitted in its pleadings or at the hearing that it has discriminated against employees because of their union activity. Evidence has gone uncontradicted. See *in re Fruehauf Trailer Co.*, 1 N.L.R.B. 68; *in re Timken Silent*

discriminatory discharge, the employer has contended that the dismissals had nothing to do with organizational activity, but were caused by inefficiency, insubordination, infraction of rules, or some other legitimate cause.<sup>110</sup> In evaluating the assertions of employers who discharge workers for inefficiency rather than for union activities, the Board has considered such factors as length of total employment, experience in the particular position from which the employee was discharged, efficiency ratings, the testimony of foremen or other employees associated with the worker in question, and the treatment given to other employees of apparently equal or less efficiency.<sup>111</sup> Long service does not connote the efficiency of the employee; it does indicate, however, that the employer has not considered his possible inefficiency of itself serious enough to merit discharge. Similarly, the fact that employees were retained who had committed errors as serious as those advanced as reasons for the discharge does not imply that discharge for such an error would not have been justified. It indicates only that error may not have been the motivating cause in the severance of employment. Hence in *Pennsylvania Greyhound Lines*,<sup>112</sup> the respondent claimed that the discharge of the driver was due to an accident amounting to fifty dollars damages. Evidence disclosed, however, that the bus driver, an active and important union organizer, had been previously rewarded for his exceptional record as a driver and had received a bonus for having completed a year of driving without accident. It was further disclosed that it was not the policy of the respondent to discharge men for an accident of such a nature unless their previous record was a poor one. In light of this evidence, the Board doubted the sincerity

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Automatic Co., 1 N.L.R.B. 335; *in re* Fashion Piece Dye Works, Inc., 1 N.L.R.B. 285; *in re* J. Freezer and Son, Inc., 3 N.L.R.B. no. 12; *in re* Clover Fork Coal Co., 4 N.L.R.B. no. 33.

For cases of discharge of employees shortly after election to union offices, see *in re* Agwilines, Inc., 2 N.L.R.B. 1; *in re* Crucible Steel Co., 2 N.L.R.B. 298; *in re* Houston Cartage Co., 2 N. L. R. B. 1000.

<sup>110</sup>See *in re* Houston Cartage Co., Inc., 2 N.L.R.B. 1000; *in re* Agwilines, Inc., 2 N.L.R.B. 1 (charge of inefficiency); *in re* National New York Packing and Shipping Co., Inc., 1 N.L.R.B. 1009 (insubordination). See also *in re* Martin Dyeing and Finishing Co., 2 N.L.R.B. 403; *in re* Herbert Robinson and Otto A. Gulluber, co-partners, 2 N.L.R.B. 460; *in re* Wallace Manufacturing Co., Inc., 2 N.L.R.B. 1081; *in re* Botany Worsted Mills, 4 N.L.R.B. no. 43.

<sup>111</sup>To determine the validity of a respondent's contentions, the Board has consistently followed the rule established in its first decision when it stated, "in reaching a decision between these conflicting contentions the Board has had to take into consideration the entire background of the discharges, the inferences to be drawn from testimony and conduct, and the soundness of the contentions when tested against such background and inferences." [Cf. *Norris v. Alabama*, 294 U. S. 587 (1930)] As the Supreme Court has said, "motive is a persuasive interpreter of equivocal conduct." Cf. *Texas and New Orleans Railroad Co. v. Brotherhood of Railroad and Steamship Clerks*, 281 U. S. 548 (1930).

See *in re* General Industries Co., 1 N.L.R.B. 1009, wherein the insubordination of a union employee was found to have been a pretext rather than the motivating cause of his discharge. See also *in re* Thompson Products, Inc., 3 N.L.R.B. no. 97.

<sup>112</sup>2 N.L.R.B. 431.

and validity of the reason advanced by the respondent for discharging the driver.<sup>113</sup>

The Board has ruled that an employee need not be a member of a union nor actively engaged in union activities for his discharge to constitute a violation of this part of the Act. What must be proved is that the discharge has the effect of discouraging union membership. In *Quidnick Dye Works*,<sup>114</sup> it was found that the discharge of an employee who was not engaged in union activities was discriminatory, when the reason advanced was the discharge on the preceding day of his brother who was an active union member.<sup>115</sup>

The phrase, "discrimination in regard to hire and tenure of employment", may apply to cases not only of outright discharge but also of demotions, temporary lay-offs, or furloughs, when discriminatorily applied.<sup>116</sup> In the *Hardwick Stove Company* case,<sup>117</sup> the Board held that in an atmosphere charged with coercion and intimidation, the demotion of two expert molders, who had been seen by the respondent attending union meetings, to more menial and irregular jobs, constituted a discrimination in regard to conditions of employment.<sup>118</sup>

A refusal to reinstate employees because of union affiliations or activities has been held a violation, even though the original severance of employment may have been entirely proper, either in the case of a shut-down for lack of business or because of a strike.<sup>119</sup> Ordinarily a refusal to reinstate has

<sup>113</sup>The Board made a similar finding as to the discharge of another operator, who was an active union member with an excellent record as a driver, where the defense given by the respondent was "a failure to properly perform driving duties." See *in re* Harry G. Beck, Trading as Rocks Express Co., 3 N.L.R.B. no. 11.

<sup>114</sup>2 N.L.R.B. 963.

<sup>115</sup>See *in re* Bemis Brothers Bag Company, 3 N.L.R.B. no. 23.

<sup>116</sup>*In re* Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B. 1 at 36, the Board said:

"If the motivating cause of the discriminatory change in the tenure of employment was interference with the employees in the exercise of their guaranteed rights or discouragement of membership in a labor organization, a violation is established whether the change is temporary or permanent."

See *in re* Somerville Manufacturing Co., 1 N.L.R.B. 864; *in re* Maryland Distillery, Inc., *et al.*, 3 N.L.R.B. no. 16.

<sup>117</sup>2 N.L.R.B. 78.

<sup>118</sup>*Cf. in re* Wallace Manufacturing Co., Inc., 2 N.L.R.B. 1081, wherein the demotion of the president of a union was followed by his discharge and retention of non-union employees of lesser seniority. *In re* Greensboro Lumber Co., 1 N.L.R.B. 629, the respondent company shut down its mill two days after the union had sought to bargain collectively, on the ground that there were few orders and no lumber readily available to fill them. This was not considered a lock-out by the Board. The later employment of inexperienced non-union stackers while the union stackers previously employed were idle, however, was held to be an act of discrimination discouraging to union membership.

<sup>119</sup>See *in re* Mackay Radio and Telegraph Co., 1 N.L.R.B. 201; *in re* Segall Maigen, Inc., 1 N.L.R.B. 749; *in re* Mooresville Cotton Mills, 1 N.L.R.B. 950.

The Board has held it immaterial in such cases whether or not the individuals discriminated against retained their status as employees of the respondent at the time they were refused reemployment. See *in re* Algonquin Printing Co., 1 N.L.R.B. 264, wherein the employer, having refused reinstatement to two union members after a tem-

not been found a violation in such cases unless the employees have applied for reinstatement either in person or through their representatives<sup>120</sup> and have been refused.<sup>121</sup> Where employers themselves have taken the initiative in recalling employees and it has been understood that only those so notified would be reemployed, application for reinstatement by the employees themselves has not been required.<sup>122</sup> Where the original severance of employment was itself an unfair labor practice, the Board has held that the employer was under a duty to offer reinstatement to his employees and their failure to apply for it was immaterial.<sup>123</sup>

An offer of reemployment, conditioned upon the abandonment of union activities by the employee has been found to be equivalent to a refusal to reinstate.<sup>124</sup> As decided in *Sunshine Hosiery Mills*,<sup>125</sup> rejection of an offer of immediate reemployment by employees while out on strike did not prevent a ruling that a later refusal to reinstate them was a violation of section 8 (3).<sup>126</sup> Rejection of such an offer at the close of a strike, however, merely because the wages offered were too low, has been held to preclude a finding that the employer had in that instance been guilty of a discriminatory refusal to reinstate.<sup>127</sup> In *Mackay Radio and Telegraph Company*,<sup>128</sup> the respondent,

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porary shut-down of his plant, argued that since they had ceased to be his employees within the meaning of the Act, a refusal to reemploy them could not be an unfair labor practice. The Board rejected the argument in ruling, "Section 8 (3), in forbidding discrimination in employment, is not limited to those who are employees at the time of the discrimination. It forbids discrimination in regard 'to hire' generally. The purpose of the provision, is, it is true, to protect employees in their right to self-organization. But surely a refusal by an employer to rehire a former employee because of his union activities which are well known to his former fellow workers discourages the latter and so restrains them in the exercise of their right to self-organization." For a similar ruling see, *in re Radiant Mills*, 1 N.L.R.B. 274; *in re Bell Oil & Gas Co.*, 1 N.L.R.B. 562; *in re Kentucky Firebrick Co.*, 3 N.L.R.B. no. 46.

<sup>120</sup>See *in re United Aircraft Manufacturing Corporation*, 1 N.L.R.B. 236; *in re The Sands Manufacturing Co.*, 1 N.L.R.B. 546; *in re Somerville Manufacturing Co.*, 1 N.L.R.B. 864; *in re Alabama Mills, Inc.*, 2 N.L.R.B. 20; *in re Elbe File and Binder Co., Inc.*, 2 N.L.R.B. 906; *in re Mooresville Cotton Mills*, 2 N.L.R.B. 952.

<sup>121</sup>See *in re Timken Silent Automatic Co.*, 1 N.L.R.B. 335; *in re Jeffrey-DeWitt Insulator Co.*, 1 N.L.R.B. 618; *in re Alabama Mills, Inc.*, 2 N.L.R.B. 20; *in re Wald Transfer and Storage Co., Inc.*, 3 N.L.R.B. no. 72; *in re Stylecraft Leather Goods Co., Inc.*, 3 N.L.R.B. no. 102.

<sup>122</sup>See *in re United Aircraft Manufacturing Corporation*, 1 N.L.R.B. 236; *in re Atlanta Woolen Mills*, 1 N.L.R.B. 316; *in re Friedman-Harry Marks Clothing Co., Inc.*, 1 N.L.R.B. 411; *in re Columbia Radiator Co.*, 1 N.L.R.B. 847.

<sup>123</sup>See *in re Washington, Virginia, and Maryland Coach Co.*, 1 N.L.R.B. 769; *in re Smith Cabinet Manufacturing Co.*, 1 N.L.R.B. 950; *in re Club Troika, Inc.*, 2 N.L.R.B. 90; *in re Remington Rand, Inc.*, 2 N.L.R.B. 626; *in re Lion Shoe Co.*, 2 N.L.R.B. 819.

<sup>124</sup>See *in re Somerville Manufacturing Co.*, 1 N.L.R.B. 864; *in re Alabama Mills, Inc.*, 2 N.L.R.B. 20; *in re Carlisle Lumber Co.*, 2 N.L.R.B. 248 (yellow-dog contract); *in re Clarke and Reid Co.*, 2 N.L.R.B. 516 (requiring employees to give up their membership in an outside union).

<sup>125</sup>1 N.L.R.B. 664.

<sup>126</sup>See also *in re Alaska Juneau Gold Mining Co.*, 2 N.L.R.B. 125; *in re Mooresville Cotton Mills*, 2 N.L.R.B. 952.

<sup>127</sup>See *in re Pioneer Pearl Button Co.*, 1 N.L.R.B. 837. The holding does not imply that a later refusal of the employer to reinstate these employees, if discriminatory and discouraging to union membership, might not be found to be a violation of section 8 (3).

<sup>128</sup>1 N.L.R.B. 201.

who had blacklisted certain employees and made it clear that they would not be reemployed, caused them to delay their requests for reemployment until their positions had been filled by other men, and then contended that its refusal to reemploy them was not based upon their union record but simply because there were no vacancies. The Board held that as the blacklist was based upon the union activities of the employees and was the direct cause of their delayed application, the employer's action was equivalent to a discriminatory refusal to reinstate. Similarly, contracting out work to another concern in order to avoid reemploying workers locked out because of union activities was held a violation of the Act.<sup>129</sup>

Violations also occur when the employer has discriminated by ordering the foremen to prefer members of a company-dominated union to members of an outside union, by demoting a foreman for giving an outside union man a good job, and by paying higher wages to company union members than to outside union members for equivalent work.<sup>130</sup> Likewise, the conditioning of reemployment after a strike upon membership in a company-dominated union is contrary to the Act.<sup>131</sup> Also prohibited is the conduct of the employer in announcing a "yellow-dog" policy not to hire any of his employees who have been striking unless they renounced all their affiliations with labor organizations. Likewise soliciting and requiring employees to sign applications for work whereby they agreed to renounce all affiliation with labor organizations, constitutes a discrimination against these employees with regard to terms or conditions of employment.<sup>132</sup>

Section 8 (3) allows employees to require membership in a labor organization as a condition of employment if that labor organization represents the employees in the established collective bargaining unit.<sup>133</sup> This provision, however, has the qualification that the labor organization must not have been established, maintained, or assisted by any procedure defined in the Act as an unfair labor practice. Thus in *Clinton Cotton Mills*,<sup>134</sup> the respondent, having shut down its plant, concluded a closed-shop contract with the "Clinton Friendship Association," a labor organization controlled by the

<sup>129</sup>See *in re Santa Cruz Fruit Packing Co.*, 1 N.L.R.B. 454.

<sup>130</sup>See *in re Agwilines, Inc.*, 2 N.L.R.B. 1; *in re Wheeling Steel Corporation*, 1 N.L.R.B. 699; *in re Hardwick Stove Company, Inc.*, 2 N.L.R.B. 78.

<sup>131</sup>See *in re Clinton Mills*, 1 N.L.R.B. 97; *in re Hill Bus Co.*, 2 N.L.R.B. 781; *in re Lion Shoe Co.*, 2 N.L.R.B. 819.

<sup>132</sup>See *in re Carlisle Lumber Co.*, 2 N.L.R.B. 248. See also *in re Atlas Bag and Burlap Co., Inc.*, 1 N.L.R.B. 292, wherein the Board held that the action of the respondent in forcing certain employees to sign individual contracts of employment which deprived them of the right to strike, demand union recognition, or question discharges, discriminated against these employees in regard to terms or conditions of employment. A similar ruling was made *in re Tidewater Express Lines, Inc.*, 2 N.L.R.B. 560; *in re Alabama Mills, Inc.*, 2 N.L.R.B. 20; *in re Clark and Reid, Inc.*, 2 N.L.R.B. 516.

<sup>133</sup>See note 108, *supra*.

<sup>134</sup>1 N.L.R.B. 97.

respondent employer. On the reopening of the mill, the respondent posted a notice stating that pursuant to this contract only members of the Clinton Friendship Association would henceforth be employed. To justify the refusal of employment to the ninety-six employees who did not join the Association, the respondent contended that since a closed-shop contract was permitted by the provision, its conduct did not constitute discrimination within the meaning of the Act. The Board ruled that as the Association had been established by acts defined as unfair labor practices in section 8 (2), it came within the qualification of the provision.<sup>135</sup>

It might be added that the Act does not legalize the closed shop agreement in the states where it has been declared illegal. Furthermore, nothing in the Act declares that the employer must consent to the closed-shop when demanded by the union.

(3) *Interference, Restraint, and Coercion in the Exercise of the Rights Guaranteed in Section 7 of the Act*<sup>136</sup>

The most complete description of the violations of this part of the Act have been set forth by the Board in the *Remington-Rand* decision wherein the "Mohawk Valley Formula" was discussed.<sup>137</sup> The plan, or formula, consists of the employer's resorting to all sorts of propaganda to discredit union leaders, the securing of unnecessary police protection when a strike is called, the calling of a "mass meeting" of the citizens to coordinate public sentiment against the strike, the formation of a large police force to intimidate the strikers and to exert a psychological effect upon the citizens, and the sponsoring of "back-to-work" movements by "loyal employees". In declaring these activities a violation of section 8 (1) of the Act, the Board has held that the employer was utilizing these tactics to end the strike by breaking it, rather than by settling it through the processes of collective bargaining.<sup>138</sup>

In other cases, the Board has declared all kinds of spying an interference with the Act, whether it be done by officials of the company or by regular employees themselves, or outside hirelings.<sup>139</sup> The Board has also found

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<sup>135</sup>The Board similarly condemned closed-shop contracts executed with company-dominated unions *in re* Hill Bus Co., 2 N.L.R.B. 781; *in re* Lion Shoe Co., 2 N.L.R.B. 819; *in re* Southern Chemical Co., 3 N.L.R.B. no. 90.

<sup>136</sup>Sections of the Act which concern this unfair labor practice are: section 7, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection"; section 8 (1) makes it an unfair labor practice for the employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

<sup>137</sup>*In re* Remington Rand, Inc., 2 N.L.R.B. 626.

<sup>138</sup>See *Second Annual Report of the National Labor Relations Board*, 61 (1937).

<sup>139</sup>See *in re* Washington, Virginia, and Maryland Coach Co., 1 N.L.R.B. 769; *in re*

a violation of section 8 (1) in employer interference with self-organization through disseminating propaganda against unions, thereby not only prejudicing the minds of workers against them, but also indicating that the employer is antagonistic to unions.<sup>140</sup> Most of this propaganda is aimed at the worker's fear of loss of his job.

Another device is the threat to close or move the plant if the unions succeed in organizing the employees. This has proved highly effective in the more mobile industries in which the movement by employers to areas where labor is unorganized and ready to accept low wages is well-known, as in the clothing and shoe industries.<sup>141</sup>

Frequently, the employer seeks to discredit the union and bring it into disrepute, by denouncing it as a "racket" or the organizers as "racketeers".<sup>142</sup> Charges of "Communism" are not unusual.<sup>143</sup> Anti-union statements have taken the form of threats to discharge union members.<sup>144</sup> In other instances, workers have been threatened with blacklist and disrepute.<sup>145</sup>

Another method of intimidation and coercion of the individual employees may be found in cases where the employer has called in individual employees one by one and asked them bluntly if they belonged to a union.<sup>146</sup> The refusal of employers to deal with representatives who are not in their employ, thus discouraging affiliation with an outside union, is a frequently used technique.<sup>147</sup>

Confronted with the possibility of dealing with unions which may be affiliated either with the American Federation of Labor or the Committee for Industrial Organization, employees have preferred, in several cases, to deal with the milder Federation unions rather than with the more belligerent C.I.O. Accordingly, in the *Friedman Blau Farber Company* decision,<sup>148</sup>

*Agwilines, Inc.*, 2 N.L.R.B. 1; *in re Hardwick Stove Co.*, 2 N.L.R.B. 78; *in re Millfay Manufacturing Co.*, 2 N.L.R.B. 919.

<sup>140</sup>See *in re Remington Rand, Inc.*, 2 N.L.R.B. 626.

<sup>141</sup>See *in re Friedman-Harry Marks Clothing Co.*, 2 N.L.R.B. 432; *in re S and K Knee Pants Co., Inc.*, 2 N.L.R.B. 940; *in re Quidnick Dye Works, Inc.*, 2 N.L.R.B. 963.

<sup>142</sup>*In re Atlas Bag and Burlap Co., Inc.*, 1 N.L.R.B. 292; *in re Jones and Laughlin Steel Corporation*, 1 N.L.R.B. 503; *in re Wheeling Steel Corporation*, 1 N.L.R.B. 699. See *First Annual Report of the National Labor Relations Board*, 74-75 (1936).

<sup>143</sup>*In re Radiant Mills Co.*, 1 N.L.R.B. 274.

<sup>144</sup>*In re Pacific Greyhound Lines, Inc.*, 2 N.L.R.B. 431.

<sup>145</sup>See *in re Renown Stove Co.*, 2 N.L.R.B. 117; *in re Elbe File and Binder Co., Inc.*, 2 N.L.R.B. 626; *in re Harrisburg Children's Dress Co.*, 2 N.L.R.B. 1058.

<sup>146</sup>See *in re Greensboro Lumber Co.*, 1 N.L.R.B. 629; *in re Hardwick Stove Co., Inc.*, 2 N.L.R.B. 78; *in re D. and H. Motor Freight Co.*, 2 N.L.R.B. 231; *in re Pacific Greyhound Lines, Inc.*, 2 N.L.R.B. 431; *in re Herbert Robinson and Otto A. Golluber*, 2 N.L.R.B. 460; *in re Clark and Reid Co.*, 2 N.L.R.B. 516; *in re William Randolph Hearst, et al.*, 2 N.L.R.B. 530; *in re Quidnick Dye Works*, 2 N.L.R.B. 963; *in re Harrisburg Children's Dress Co.*, 2 N.L.R.B. 1058.

<sup>147</sup>The Board has ruled that this is a violation of sections 8 (1) and 8 (5) of the Act. See *in re Oregon Worsted Co.*, 1 N.L.R.B. 916; *in re Wallace Manufacturing Co., Inc.*, 2 N.L.R.B. 1081.

<sup>148</sup>4 N.L.R.B. no. 23. See also *in re Consolidated Edison Co. of New York, Inc., et al.*, 4 N.L.R.B. no. 10.

the Board found that the respondent company opened its plant freely to Federation organizers, allowing them to sign members during working hours. The company itself went so far as to threaten its employees with discharge if they did not join, and entered into a contract with the union, presumably assuring itself that it would not now have to deal with an embryonic C.I.O. union which was seeking to organize the plant. The C.I.O. union asked the Board for an election. The A. F. of L., however, contended that the contract entered into with the company barred an election. The Board found that the interference, intimidation, and coercion on the part of the company substantially negated the contention of the A. F. of L. that it had been freely designated as representative by a majority of the employees at the time of the contract. Hence the Board ordered an election.<sup>140</sup>

### III. THE NATIONAL LABOR RELATIONS ACT AND A FUTURE LABOR POLICY

It has been urged that the present Act should be extended to restrain labor unions in their undesirable activities just as the employers are curbed at present. Whatever proposals are offered to regulate the activities of trade unions, it must be remembered that the purpose of the Act is to redress an existing unbalance between employer and employees. Any changes in the Act which would hamper unions might serve to restore this unbalance and defeat the original purpose of the Act. There seem to be adequate restrictions on labor unions at present. The strike for a closed shop is illegal in a majority of states.<sup>150</sup> Picketing is subject to careful restrictions,<sup>151</sup> particularly wherever violence coming from picketing is manifested. In such instances, application to a court of equity for an injunction is the usual procedure, conceivably a better one than any arrangement under an extension of the Act could be.<sup>152</sup> Racketeering in unions is dealt with by the criminal statutes concerning extortion and conspiracy,<sup>153</sup> and where interstate commerce is involved, racketeering activities of labor unions may be enjoined or prosecuted under the federal anti-trust laws.<sup>154</sup> There is a problem, however, of preventing the labor unions from "coercing" and "intimidating" workers to join their ranks. To solve this difficulty, it has been suggested

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<sup>140</sup>For other cases in which the employer is dealing with one union to the exclusion of the other, see *in re Pittsburgh Steel Co.*, 1 N.L.R.B. 256; *in re Dwight Manufacturing Co.*, 1 N.L.R.B. 309.

<sup>150</sup>See OAKES, ORGANIZED LABOR AND INDUSTRIAL CONFLICTS, Sec. 292 (1927).

<sup>151</sup>See Hellerstein, *Picketing Legislation and the Courts*, 10 N. C. L. REV. 158 (1932).

<sup>152</sup>Magruder, *A Half Century of Legal Influence upon the Development of Collective Bargaining*, 50 HARV. L. REV. 1071 at 1108 (1937).

<sup>153</sup>See *People v. Barondess*, 113 N. Y. 649, 31 N. E. 625 (1897); *People v. Walczac*, 315 Ill. 49, 145 N. E. 660 (1924); *People v. Walsh*, 322 Ill. 195, 153 N. E. 357 (1926). See *Legal Implications of Labor Racketeering*, (1937) 37 COL. L. REV. 993.

<sup>154</sup>*Local 167, International Brotherhood of Teamsters v. United States*, 291 U. S. 293 (1934). See *Labor Injunctions Since the NRA*, (1934) 43 YALE L. J. 625.

that the section of the Act concerning this aspect of the unfair labor practices on the part of the employer be extended to labor unions also.

While the Act has gone far to prevent strikes from occurring because of the failure of the employer to bargain collectively with the representatives of his employees, the other fifty per cent of strikes have to be reckoned with, those concerning wages, hours, and working conditions. Collective bargaining does not guarantee a collective agreement. A young labor union which has just organized and has received recognition from the employer will desire to use its strength rather than accept what it considers to be the unfair offers of the employer. Thus the Act may have the effect not of reducing considerably the number of strikes, but merely decreasing them in one category and increasing them in another.

It has been suggested that when the Board has defined an appropriate unit, held an election, and certified representatives, at least the employer has an authoritative determination of his duty. If some other labor organization, wishing to dispute the decision of the Board, calls a strike against the employer obeying the Board's order, it is conceivable that such a strike could be held illegal at common law on the grounds that while the Act does not make the right to strike illegal, it does impose a duty upon the employer; and a strike compelling a person to violate his legal duty may be held illegal.<sup>155</sup>

It is apparent, however, that the problem of strikes will still be a pressing one in the future. In considering its regulation, reference may be made to the Railway Labor Act as a successful attempt on the part of the national government to eliminate as far as possible, through mediation and arbitration, strikes which are destructive to the industry.<sup>156</sup> It is interesting to note that the recent report of the former chairman of the Maritime Commission favors an extension of the Railway Labor Act to the shipping industry, so that through the offices of an arbitration and mediation commission many of the strikes rampant in the industry and detrimental to its stability may be prevented.<sup>157</sup> While it is true that the National Labor Relations Board has been successful in holding elections for the purpose of selecting representatives for collective bargaining, it cannot prevent, under the present Act, strikes caused by failure to reach an agreement concerning wages and hours stipulations.

Thus it may prove feasible to extend arbitration and mediation to all

<sup>155</sup>See Taft, Circ. J., in *Toledo, A. A. & N. M. Ry. v. Pennsylvania Co.*, 54 Fed. 730 (N. D. Ohio, 1893). See also *Michaelson v. United States ex rel. C., St. P., M. & O. Ry.*, 291 Fed. 940, 945 (C. C. A. 7th 1923), *rev'd on other grounds* 266 U. S. 42 (1924). See Magruder, *A Half Century of Legal Influence upon the Development of Collective Bargaining*, (1937) 50 HARV. L. REV. 1071 at 1107.

<sup>156</sup>See Garrison, *The National Railroad Adjustment Board* (1937) 46 YALE L. J. 567.

<sup>157</sup>See N. Y. Times, Feb. 17, 1938, p. 15, for the text of the letter sent by Chairman Kennedy of the Maritime Commission to Senator Copeland, Chairman of the Committee on Commerce.

industries coming under the jurisdiction of the present Act in order that the primary purpose of governmental regulation of labor relations may be realized, namely, the securing of more stable conditions in interstate commerce through the diminution of strikes. In this light, the National Labor Relations Act appears to be the basis of a far-reaching governmental labor policy. When, if ever, in the evolution of our labor legislation, that policy shall be completely attained, only the future can tell.