THE BACKGROUND AND DEVELOPMENT OF COLLECTIVE BARGAINING THROUGH THE NATIONAL LABOR RELATIONS ACT

THESIS

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THESIS

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FOREWORD

The purpose of this study is to trace the development of collective bargaining and to show its present status under the National Labor Relations Act.

The history of labor is closely associated with that of the union, for it is through the union that labor has achieved much of its success. In fact, it is the purpose of the union to foster and develop the right of collective bargaining, and without the union as an agent for labor, it would be impossible for labor to have any success in its relations with its employers.

The first section of this study pertains to the early development of the right to bargain with employers in England and in the United States. Chapter four takes the history of the movement up to the Schecter decision and its effect on the right to bargain collectively.

Chapter five deals with the Federal government and its part in granting to employees the right to bargain, and the setting up of the National Labor Relations Board. The purpose of this Board is to see that employers do not violate the rights granted to labor as given in sections seven and eight.

The constitutionality of the right of the federal government to give to labor the right to organize and to bargain through that organization, is dealt with in

chapter six. The Supreme Court and its part in the development of the right to bargain collectively is shown through a selective examination of cases, first denying, and then upholding, that right.

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CHAPTER I

THE GROWTH OF THE LABOR MOVEMENT IN ENGLAND

Prior to the period known as the Industrial Revolution, there was a labor problem, but it might be classified as an individual problem, rather than as a group problem. It was not until the early part of the eighteenth century that it might be called a group problem. More and more the group problem became important because of the social problems involved: the congregation of workers in large factory towns; the subjection of labor to the discipline of the factory routine; the beginning of labor organizations; the rise of a new capitalistic class; and new political alignments.[1] It could be safely said, that of the problems we face today, many of them had their origin during this period.

The conditions originated in England because of several factors: (1) personal freedom, (2) the breakdown of the guilds, (3) lack of governmental interference, (4) abolition of custom barriers between towns, (5) it was a haven for skilled labor from Europe, (6) freedom from foreign aggression due to geographical location, (7) accumulation of capital goods necessary to production, (8) good markets, (9) deposits of coal and iron conveniently located, (10) steady potential labor supply.

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1 Fairchild, F. R., Furniss, E. S., and Buck, N. J., Elementary Economics, p. 57.

The population of England began to double in every five to ten years in the cities, and with it came conditions, Robert Owen said, "were worse than the conditions of the slaves of Jamaica." From one-eighth to one-fifth of the people lived in cellars with one or two changes of clothing yearly, and with no means of sanitation at all. They sold the labor of their children for food on which to live, while the children were herded together and worked as were cattle.

Men soon began to try to better themselves and the conditions under which their families had to live, but their methods were as crude as their education; brickbats, stones, and clubs were used on the employers and their factories. Violence was the only way they knew to wrest betterment for themselves and their families. Little came of their efforts except prohibitive laws which further hindered their efforts instead of encouraging them. Every form of union was banned, be it for social or economic ends. At one time seven scissors grinders were imprisoned because of membership in the "Misfortunes Club," an organization formed to assist its unemployed members and to maintain the customary rate of wages.[2] Yet, at the same time, the law permitted and encouraged employers to organize, to lower wages, and to make blacklists of former employees.

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[2] Smith, Edwin S., Speech, Release 755.

The few unions that were organized and continued activities were in utmost secrecy. Little by little, however, they emerged into the open, but nothing could be done. Some employed a secret boycott and later, peaceful picketing was permitted. Every effort of labor, thoug met with determined opposition from their employers, who i turn induced governmental action against organized labor activities.

However, in 1720, the first combination laws were passed, and supplementary laws in 1799 and 1800 made combinations for purposes of raising wages illegal, but did permit social organization. The right to strike was won in 1824-1825. Then in 1859 labor unions won the right to use peaceful persuasion in stopping workers from breaking a strike as an organization. In 1871 with the passage of the Trade Union Act, unions were recognized as legal corporate beings.

The foundation that the unions needed was given with the passage of the Act of 1875, which removed all of the other legal obstacles that had held them back. By 1895, the unions had a combined strength of over a million members. At the peak of their growth, the unions received a serious setback in the form of the Vail decision of 1901, which made unions open to suit and payment of damages resulting from, or incidental to, strikes and boycotts. Thi was remedied in 1906, when it was ruled by the courts that union funds could not be used for the payment of damages even if shown.

It was during this latter period that labor decided that it could better fight its battle through the election of representatives rather than through lobbying, the use of direct means for the indirect. It took several tries before success was achieved, but in 1884 two members were elected to the House of Commons from the Trade Union Party In 1885 a gain of eight more, or a total of ten, were elected; in 1892, sixteen were elected; and in 1893, the Independent Labor Party was launched.

Discord crept into the ranks and little was accomplished until 1906 when a new labor party elected twenty-nine members. These men through the use of compromise were able to secure the first labor legislation to be passed in the form of the repeal of the law used in the Vail decision. The new party adopted as its platform "get what we can, while we can," meaning to get all or any legislation passed that might raise wages or lower working hours by the use of any compromise method in the Commons.

After the war, the Labor Party under the leadership of McDonald, Snowden, and Hardie came into control of the English government in 1923-1924 for a short time, but accomplished little. Then in 1929, a clear majority was elected to the House of Commons that remained in power for two years. Again nothing was accomplished in the way of direct legislation due to the upheavels in the economic world; the depression had begun.

After looking briefly at the high points in the development of the power of the labor union in England up until the depression, one might examine the reform bills that were passed to remedy the conditions of labor.

In 1802, Peek's Health and Morals Act was passed to protect and punish contract and apprenticed child labor. Some of the specific clauses were that:

(1) No child should work before being nine years of age,
(2) No child should work over twelve hours per day,
(3) No child should work at night,
(4) All walls were to be whitewashed at least once a year,
(5) All buildings were to be well ventilated,
(6) Each child was to have at least one suit of clothes yearly.

The next legislation was passed in 1819 in the form of the Factory Regulation Act. It was used as a supplement to the enforcement of the Act of 1802 and to protect child labor in the textile industry. The act was fairly successful in being enforced. Its provisions were:

(1) A minimum age limit of nine years for all child labor in the textile industry,
(2) No child between the age of nine to sixteen was to labor over twelve hours a day.

Enforcement of the above two acts had grown rather slack, so in 1825 and 1831, two Enforcement Acts were passed that provided for the setting up of a central enforcement agency to see that the provisions of those acts were followed.

The next bill was the Factory Act of 1833 which applied only to textile mills. Again the act dealt with child labor:

(1) No child was to work under nine years of age,
(2) Between the ages of nine and thirteen, children were to work only nine hours a day; between the ages of thirteen to eighteen years, only ten hours a day,
(3) All children were not to work over forty-eight hours a week,
(4) At least two hours of schooling must be given each child daily,
(5) A system of centralized inspection was also provided.

Five years after the passage of this Act, child labor had fallen off approximately fifty per cent.

The Factory Act of 1844 provided that women should do no night work and should not work over twelve hours daily.

In 1847 the Ten Hour Bill was passed that limited women and children to ten hours of work per day. This act, contrary to other measures, applied to all forms and sizes of industries. Also, various safety measures had to be taken in the factory for the protection of employees.

The Factory and Workshop Act of 1878 consolidated all previous acts and their provisions into one act that was to be strictly enforced.

The first employer's liability act was passed in 1880 in which all employers were made liable for accidents occurring during working hours. This act was followed

in 1897 by a compensation act, but it only applied to certain industries. In it, the employers and employees contributed a certain per cent of their payroll and wages to which the State added a like amount. It was a form of compulsory insurance. This was followed in 1906 by a more liberal plan in which provisions gave one-half of earnings for injuries received while working and three years pay was to be paid to dependents in case of death.

The year 1908 saw the passage of an old age pension plan. The people did not like the idea of direct relief as it was considered an insult to their pride so the pension plan was worked out, and it is still used in almost the original form. It provided that:

(1) A person must be seventy years of age or over,
(2) He must be a British subject for twenty years or over,
(3) A person must not be habitually disinclined to work,
(4) One must not receive an income of over $150 yearly,
(5) A maximum payment of five schillings per week would be made if eligible,
(6) A total income of not over $3.50 per week would be allowed from pension and other income,
(7) Poor relief was excluded from old age pensions.

Since 1914, labor laws have increased, hours have been shortened in all industries, safety measures more widely used, and stricter regulation of child and women labor achieved. In comparison to the labor situation in the United States, the laborers receive a lower wage, yet

they do not have the great problems of strikes and labor fights that we have in the United States. Labor there tries to help, not hinder, the progress by violent action as if followed here.

Even though the unions had received a serious setback in the early nineteen hundreds, they had clearly won the right to bargain collectively with their employers to better their hours of work and wages. The leaders of the unions realized that this power was in reality the purpose for which the unions had been organized.

At the present time, even though labor has a great power through the strike, if they choose to use it, labor prefers to try and settle their difficulties with their employers through peaceful means rather than resorting to violence. As a result, they enjoy to a larger extent, than do the workers in the United States, the right to bargain with their employers; the employer being glad to grant and cooperate with labor in return for their cooperation. Labor and employers, have realised that through working together, both may gain.

CHAPTER II

THE GROWTH OF THE LABOR MOVEMENT IN THE UNITED STATES

Prior to the War for Independence this country did not have any trade unions in the modern sense of the term. In reality, there was no need for them, except as a social media. The benevolent associations, as they were then called, helped their members in times of illness and financial distress.[1] Too, they assumed the role of censor if their brother's workmanship fell below par due to intemperance. It is interesting to note that in their charters and by-laws, it was stated clearly that the organizations were not to "engage or concern themselves with such economic questions as wages and hours."[2]

After the separation of England and the colonies, the industrial situation changed. Where before the employer and employee worked side by side in the shop, the employer began to devote his time to management and left the actual work to foremen in the shop. The people saw a chance to make money by increasing the size of the shops to real factories; mass production over hand labor. The separation allowed new industries to spring up that had none of the old friendly relation between the owner and his help. It was no longer possible to settle differences that arose over a glass of ale in the tavern.

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1 Harris, Herbert, American Labor, p. 5.

2 Ibid, p. 5.

Progress was rapid and there was little need to squabble about wages; if they were not satisfied, they could quit and get another job as there were plenty for all. Or, if freedom was wanted, the west was open and free to everyone for the taking.

During the late 1790's and early 1800's there arose a new class of business man, the so-called middleman. He was not interested in quality or the way that his activities might effect anyone, except in making a profit for himself. He bought huge consignments in Europe and sold them to retailers or stored them until needed.[3] He sold at a small profit per unit and depended on quick, quantity sales for his larger profit. He wanted to keep production costs down and urged the division of production and labor, as had been urged by William Petty, 17th century economist.[4]

To produce goods cheaply so as to be able to compete with foreign goods, American labor costs had to be cut down, and cheaper labor was looked for. This was found in the form of child and woman labor and it began to be used more and more and costs were thus kept down.

American employers, to keep going, had to accept a national and very near an international wage scale to sell their goods even at home. They could not fix their own prices, but had to sell in a cheap competitive market.

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[3] Ibid, p. 9.

[4] Ibid, p. 8.

As had been the case earlier in labor history, the employer and employee worked together to do the best they could, but wages were forced lower and lower. The employers then began to organize to secure cheaper labor, to break apprenticeship bonds, and to import labor.

The working men also began to organize, but with the purpose of keeping wages at previous levels. To achieve this, they went on strikes, the first union strike in America being, in 1799, in the boot and shoe industry. After nine weeks, they won back their current wage scale. This was labor's first victory.

Most of the organizations formed were local in character and had no national affiliation. About this time, too, the Courts granted the use of the injunction to stop strikes, using as their guide the English court decisions under the English common law.

In reply, the strikers published an article in the Philadelphia Aurora which in part was:

> "The master shoemakes, as they are called after the slavish style of Europe but who are only the retailers of our labor, and who in truth live upon the work of our hands, are generally men of large property to whom the suspension of business, though it is a loss, is not so great a loss as the total suspension of the means of subsistence, is to us who obtain our income from week to week. These masters ..... have their meetings, their associations, and they pass their resolutions ..... The name of freedom is but a shadow, if for doing, what the laws of our country authorize, we are to have taskmasters to measure our pittance..... if we are to be torn from our fireside for endeavoring to obtain a fair and just support for our families, and if we are to be treated as felons and murderers only for asserting the right to take or refuse what we deem an adequate reward for our labor."

Everywhere men took sides and, finally, the political parties took sides; the Federalist upheld the Courts and the Democratic Republicans upheld labor. The inalienable rights of man were brought up and fought over as to their meaning. In the case that was brought up, the judge instructed the jury:

> "In every point of view, this measure (the journeymen's strike) is pregnant with public mischief and private injury..... tends to demoralize the workmen.... destroy the trade of the city and leave the pockets of the whole community to the discretion of the concerned..... A combination of workmen to raise their wages may be considered from a two-fold point of view; one is to benefit themselves.... the other is to injure those who do not join their society. The rule of law condemns both .....
>
> "If the rule be clear we are bound to conform to it, even though we do not comprehend the principle upon which it is founded. We are not to reject it because we do not see the reason for it."[5]

It seems to amount to this: the laborers were wrong because they were wrong--that was all there was to it. Acting on the instructions of the judge, the jury found the men guilty of "combination to raise wages" and each one was fined eight dollars and costs.

As a result of the trial, the courts indirectly ended the life of the first active trade union, the Society of Cordwainers of the City of Philadelphia. The men lost their jobs and could not get new ones.

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5 Federal Society of Journeymen Cordwainers, Pittsburgh, Pennsylvania, (1805).

Activity was at a standstill for a short time and then started anew in 1827 as a labor movement in politics, as well as economic fields. Again it gained impetus in Philadelphia where fifteen trade unions banded together to form the "Mechanics' Union of Trade Associations." It was the first alliance of different unions ever formed.

This movement is credited as being the real foundation of labor unionism in America. The Mechanics' Union of Trade Associations wanted to keep wages up and hours down. With it, there developed a political party--the Workingmen's Party. The party was to supplement economic activity with legislative enactments. The so-called common man began to want protection of what little he had and realized that only through legislative activity could he gain it.

The party planned to make use of its only recently acquired voting power, secured by the removal of the property qualifications, to gain for its members the respect of the community; to provide lien laws, if their employer went bankrupt; to educate their children in a public free school; and above all, to find the equality and freedom and right to happiness provided for in the constitution.

Little came of the Workingmen's Party because of its own dissention about what it should do and how it should do it. Charges of communism and utopianism were laid against it by many. It did elect one member, New York, 1829, but that was the height of its success. A split

soon occurred in the party and the end was in sight. They did not know how to use the great power that they had and lacked real leadership. Politicians had found a fertile field.

Even though they lost politically, they gained some economic objectives--the abolition of imprisonment for debts and the first free schooling. Many of the leaders of labor began the cry for labor to stay out of politics and succeeded to some degree. They realized labor's weaknesses.

Little was accomplished in organization of labor for a few years after this period; a gain had beenmade, but was soon lost. Prices then began to rise and in order to try to keep wages on a par, many began to join the unions. Even the women organized as evidenced by the Female Improvement Society of the City and County of Philadelphia with sister unions in Lynn, Boston, and Baltimore. The unions claimed a membership of three hundred thousand in 1836, with five national organizations and many state.

The panic of 1837 gave another setback to labor. Where before their object had been to raise wages, it was now to keep their jobs. Unions disappeared so completely that few records are to be found of the period.

Under the guidance of Evans and Horace Greely, labor began to cry for "free farms" from the public domains. They organized the "Agrarian League" but not as a political party. Evans coupled with the homestead movement, a

demand for a ten hour day. The movement gained slowly and somewhat steadily; however, labor itself gained nothing concrete except indirectly with the passage of the Homestead Bill in 1861.

During the first three years of the Civil War period, labor gained little. Unions were hurt and few survived, but in the last two years of the War, labor was at such a premium that those that had survived gained much. During the period of 1863-1873, a movement was organized to set up a permanent national organization for labor unions. The year 1863-1864 saw an increase of nearly two hundred unions alone. Labor leaders at this time had great lobbying power and used it to full advantage to gain what they could. In 1866 the National Labor Union came forward with the eight hour day plan and "Greenbackism." The Union soon became more political than it was economic.

Labor now began an attack on big enterprise and capital replied as bitterly, or even more so; the panic of 1873 gave them an opportunity. With the full power of the blacklist and lockout, they cut union membership to an estimated fifty thousand total.

The next movement to emerge was that of the Noble Order of the Knights of Labor which was to dominate American labor for a decade. This union was founded upon secrecy with the end in mind of creating a healthy public opinion for labor.

The organization of the Knights called for a single, mighty organization regardless of "work, color, sex, religion or previous condition of servitude." They advocated public ownership of utilities; founding of cooperatives; greenbackism; eight-hour day; the abolition of child labor; and immigrant control. In 1882 and 1884 the Knights won three strikes against the railroads, but failed to grasp their opportunity to secure other advantages such as recognition of the union and right to bargain. Membership rosters jumped to seven hundred thousand as a result of their success.

With the climaxing Haymarket Affair in 1886, the Knights of Labor lost their prestige. The public blamed them for every picket, strike, flare-up, or any other outbreak of labor that occurred. During this period of labor unrest, the American Federation of Labor began to fight the Knights of Labor. This group wanted to organize only skilled labor and to exclude the unskilled. It was to be a national organization with the power of local unions to lobby for the eight-hour day. It grew as the Knights of Labor declined.

Its growth was rapid and in 1900 it had reached a membership of five hundred thousand. As a part of its code, the American Federation of Labor decided upon the policy of no political activity directly in the union, to use lobbying, to take the chance as it came, not force an issue. In full it was a policy of conservatism, with a goal of "an American standard of living" for all of its

By 1910, labor had won the eight-hour day in practicall every industry; and in 1911, the courts turned a more favorable eye on labor wherebefore they had entirely favored the employers.

The World War brought about a peaceful agreement between labor and industry to work together for the duration of the war. There were a few strikes, but they were quickly settled.

In 1920, the American Federation of Labor had close to five million members or about four-fifths of the total union strength and one-eighth of all workers. Too, public opinion swung around for the unions and two stalwart upholders of the laborer's rights were appointed to the Supreme Court--Brandeis and Clark.

There was only a short period of peace after the war for labor, for soon wages were behind prices, wages were cut and unemployment rose. Membership in unions declined about thirty per cent. Again the unionswere in discredit with the public, but it was short lived.

It was at this time that William Green succeeded Samuel Gompers (on his death) to the presidency of the American Federation of Labor and that the United States entered upon its new era of prosperity. Yet with the revival of business, the American Federation of Labor did not prosper. Capital was trying to keep a stable and satisfied labor force and combat unionism at the same time. Different forms of bonuses, "coverage" insurance,

and socials were all used by big companies and worked. To offset this, the American Federation of Labor came out for the five-day week, modernization of their insurance plans, and the adoption of the social principle. But even as they planned, "Black October," 1929, arrived and shook labor and the American Federation of Labor to their depths.[6] By 1933, the American Federation of Labor reached a low membership of 2,126,796.

The passage of the National Industrial Recovery Act and its famous section 7a, guaranteeing to labor the right to bargain through representatives of its own choosing, stirred labor to seek membership with the American Federation of Labor. Foremost of problems that appeared to the unions with the passage of the act was that of the admittance of industrial unions with the crafts. A rift appeared in the Council on the question, and on its presentation to the Atlantic Convention in 1935, the vote was 18,024 to 10,933 for the continuation of the craft union policy. For the first time in its fifty-five years of history, the American Federation of Labor had dissention in its rank.

On October 5, 1935, the Committee for Industrial Organization was formally launched in Washington and in September, 1936, elected John L. Lewis as its president. Peace negotiations failed between the factions and a bitter rivalry sprang up.

The passage of the National Labor Relations Act of July 5, 1935, and its power to designate what union should act for a plant, as its unit, to deal with employers, brought the bitter fight more to the notice of the people. The Committee for Industrial Organization and the American Federation of Labor each claimed the Board was partial to the other, but a study of the cases ruled on since its origin reveals that of forty-one cases that were issue cases between the rival factions, twenty-one were decided in favor of the American Federation of Labor and sixteen for the Committee for Industrial Organization. Many of these cases were settled by an election in the plant--the men themselves selecting their representative.

Today, the fight is still going on between these two great organizations and again the public is becoming disgusted with labor.

A summary of the gains made by labor since its first organization shows that labor has won:

1. Legal recognition of the union
2. Almost universal shorter working hours--the eight-hour day
3. Higher wages
4. Suffrage
5. Woman and child labor regulation
6. Immigrant control
7. Accident, death, sickness, and unemployment insurance
8. Realization of the unequalness of employer-employee relations
9. Right to bargain collectively

Even with all of its gains, labor is still dissatisfied and, worse, has taken to fighting among itself as well as with industry. We could do well to follow the example set by English labor.

CHAPTER III

THE PASSAGE OF THE NATIONAL INDUSTRIAL RECOVERY ACT AND THE CREATION OF THE NATIONAL LABOR BOARD

The range of collective bargaining was severely limited and collective agreements between unions and employers were few and far between in 1900. The agreements that did exist had little machinery for adjustments of any dispute that arose.

As has already been pointed out, the growth of collective bargaining was greatly hindered by the law and the attitude of the public. The strikes of 1884-1887, and 1892-1894 firmly set up a fear of labor over the nation in the minds of business as well as the public.

Then with the passing of the Sherman Anti-trust Act of 1890, a set-back was received in the placing of the same provisions over labor unions as well as over business concerns. An example of this was found in the famous Danbury Hatters Case of 1903.[1] The decision was based on the principle that the right to make contracts existed with the individual, not a group.

A number of employers' organizations--the National Association of Manufacturers, the Citizens Industrial Alliance, and the American Anti-Boycott Association--started a legal and economic drive against labor and

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1 Commons, J. R. and Andrews, J. B., Principle of Labor Legislation, 1920, p. 845.

their unions between 1904-1908. During this period, the employers, with the help of their lawyers, formulated most of the arguments current today against such union practices, as limitation of apprentices and output, interference with the right to hire and fire, alleged corruption of "walking delegates" and "business agents," violence in strikes, the boycott, inter-union jurisdictional disputes, and above all the closed shop.[2] Their arguments were that practices such as these increased labor costs; undermined morale in the shop; interrupted production; penalized the scrupulous business man; and violated those fundamental principles of constitutional law, the "inalienable" rights of "property" and "liberty."

Preceeding the World War, the Unions made considerable progress, as well as developed new forms and methods of collective bargaining. New type unions were formed for heretofore unorganized labor. New schemes of "industrial self-development" were developed in the garment trades, while the practice of arbitrating disputes through bi-partisan boards of employers and workers was applied on a larger scale than ever before in the building trades, the printing industry, and elsewhere. There was talk, also during this period, that industry could govern itself

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2 Lorwin, L. B. and Wubnig, A., Labor Relation Board, p. 98.

by developing a system of law based on its own special needs and administered through special agencies of its own, and that differences between employees and employers could be settled by using such devices as "protocols of peace," the "preferential union shop" and permanent boards of arbitration with impartial chairmen.

The passage of the labor provisions of the Clayton Anti-trust Act was received in 1914 by the American Federation of Labor under the favorable Wilson administration. This was considered one of labor's major victories over the courts, which had invoked the Sherman Anti-trust Act against them. However, their victory was empty, for later interpretations by the courts neither relieved the unions from their liabilities under the Sherman Act nor seriously inhibited the issuance of injunctions by federal judges.[3]

Preceding America's entry into the World War, labor unions grew with the unrest of war. Even the Industrial Workers of the World forged ahead in membership as did the American Federation of Labor. In 1915 the Colorado Iron and Steel Company established one of the pioneer employee representation plans in the United States. This plan was later to become the forerunner of many shop committees, work councils, company unions, and other plans.

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[3] Mason, A. T., Organized Labor, 1925, p. 10.

After the United States entered the War, a cessation of labor disputes was sorely needed, but organized labor was determined to protect existing standards, to expand their organization, and to obtain representation on government boards dealing with production. Employers wanted anything that would weaken labor's demands and position.

Through government adjusting boards dealing with wages, hours, output standards, and employee-employer relationships, a balance was maintained for a short period. But labor was restless, and strikes grew in number during the period of 1917-1918.

In the summer of 1917, President Wilson appointed a Mediation Commission to investigate and settle some of the most troublesome disputes. In issuing its findings in January, 1918, the Commission urged that the government commit itself to a national labor relations policy based on three principles: first, that some form of collective bargaining between workers and management be declared to be indispensible; second, that a continuous administrative machinery be established for orderly adjustment of labor disputes; and third, that a single central board be set up for the duration of the war to give a unified direction to labor policy.[4] The Commission also urged that trade unions should cease all practices tending to restrict maximum output.

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[4] Lorwin, L. L. and Dubnig, A., op. cit., p. 99.

As a result of these recommednations, the National War Labor Board was established in April, 1918. The purpose of the Board was: first, to mediate and conciliate in labor disputes threatening war production; second, to act as a court of appeals for the special government adjustment agencies created in different industries. The principles and policies to guide the Board were equally binding and obligatory on employees as well as employers.[5]

The real purpose of the Board was to maintain a status quo for the duration of the War. Where trade unions existed prior to the creation of the Board, the employer was to bargain collectively with the union. Where no unions existed prior to that time, the Board avoided any action that might lead to an attempt to force union activity on non-union employers. A study of the result will show, however, that the tendency of the Board was to promote collective bargaining through unions. Of the 490 awards made by the Board, 226 provided for collective bargaining in some form, either directly or indirectly.

One of the largest problems faced by the Board is one also facing the National Labor Relations Board--the recognition of the plant representatives. Where there was a dispute, a shop committee was elected by secret ballot to work with the Board in settling the cause of the trouble, but they were not too successful.

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5 United States Bureau of Labor Statistics Bulletin, No. 287.

In May, 1919, the War Labor Board was discontinued and a War Labor Policies Board was organized. This Board tried to develop a set of principles to guide the wage and employment policies of governmental war agencies. These principles were conceived as a "code" which would in time be extended to all industry. The "code" provided for an eight-hour day, a minimum wage, extra pay for overtime, legal holidays, and wage differentials. It was hoped by the Board that the President would proclaim the codes as a permanent basis of industrial relations in the United States, but President Wilson delayed considering them and after the Armistice they were shelved.

As soon as the War was over, both labor and employers demanded the cessation of government control and regulation--the business men on the basis that the activities of the government boards were helping to spread unionism and the unions on the basis that restraints were placed on them in their efforts to raise wages. With these complaints all boards and agencies of the government were allowed to go out of existence soon after 1918. With the discontinuance of government interference, both sides engaged in the greatest industrial battle in American history.[6] In 1919 and 1920, there were over 7,041 strikes involving 5,623,000 workers.

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[6] Lorwin, L. L. and Wubnig, A., op. cit., p. 15.

In this period of tense relations, President Wilson called a National Industrial Conference in October of 1919 to formulate principles for a "genuine and lasting co-operation between capital and labor." During the conference, several strikes were already underway or awaiting the outcome of the conference to be called. The railroad unions were agitating for the government ownership and management of the railroads under the Plumb Plan. Too, the radical elements in the labor movements were gaining strength and were loud in their demands for general strikes, recognition of Russia, and social legislation.

The Conference soon came to grief because the employees and employers could not agree on a meaning of and methods of collective bargaining. Finally in 1920 the government ceased trying to bring capital and labor together after the failure of a Commission appointed to study possible remedies and to offer a feasible plan.

In 1926 the Railway Labor Act passage gave labor a notable gain for two reasons, namely: first, the first provision of section two made it a mutual duty of the carriers and employees to make every effort to make and maintain agreements concerning wages, hours, working conditions, and rules; and second, provision three of section two, stated the rights of workers to choose representatives for purposes of collective bargaining. This was tested in the Texas and New Orleans Railway Company case in which

the Supreme Court held that the attempt of the employer to impose a company union upon his employers constituted an interference with their right to designate representatives for collective bargaining.[7]

Another step was the passage of the Norris-La Guardia Anti-Injunction Act in 1932. This Act for the first time recognized the inequality, heretofore denied, that labor and employers were not on the same footing and tended to aid unions in their fight for the right to bargain collectively. The Act passed in the lowest phase of the depression and indicated the changed attitude with which Congress was viewing labor.

Up to the passage of the National Industrial Recovery Act in 1933, not over three million workers were covered by collective agreements with their employers. Even some of these union agreements seemed to be crumbling. Elsewhere, industry was closed against such agreements and even unions were prohibited. Some company unions were active, but the depression was cutting down their activity.[8] Labor unions seemed to be barely destined to survive as a major power. With the passage of the Railway Labor and Anti-Injunction Acts, labor looked for a new deal.

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7 Texas and New Orleans Railroad Company v. Brotherhood of Railway and Steamship Clerks, 281 United States 548, (1930).

8 National Industrial Conference Board, Collective Bargaining through Employee Representation Plans, 1933, p. 6.

On June 16, 1933, the National Industrial Recovery Act was signed by the President and became a law. Included in the Act was the famous section seven. In the original bill, Section 7a was rather short and to the point, reading:

> A. That employees shall have the right to organize and bargain collectively through representatives of their own choosing.
> B. That no employee and no one seeking employment shall be required as a condition of his employment to join any organization or to refrain from joining a labor organization of his own choosing.
> C. That employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.[9]

Section 7b instructed the President to encourage the making of collective agreements on wages, hours, and other working conditions; and these were to have the force of codes, when approved by him. Section 7c prescribed a procedure for determining labor standards in the absence of such collective agreements as might, after presidential approval, possess the force of codes. The original bill on its transmission to Congress was somewhat general and confusing as to its statements on collective bargaining and the relations of the A, B, and C parts of Section 7. During the fight over its passage through Congress most all of the debate centered on Section 7. It was fought by industry at every turn.

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[9] 73rd Congress, 1 session, House Report 5664, May 17, 1933.

The final and approved draft of the Act divided Section 7 into its original three parts and in much the same form as the original draft only more complete.

Truly the passage of Section 7a was a victory for labor unions, especially the American Federation of Labor, yet--was it to become the great force for helping labor, that it was anticipated? From the very first, industry strived to place its interpretation of it in the codes; labor strived to place its; and the administration of the act, its. At the end of four months, little had been accomplished, except to re-phrase the question of Section 7a in a new form, and place it under a new jurisdiction, the National Labor Board.

It was soon evident that the National Industrial Recovery Act was not going to prove the Magna Carta to labor that it was thought. Instead of settling problems, Section 7 became the storm center of strikes and threatened to cause more. Too, the administrators of the Act had their hands full in trying to formulate codes for the various industries.

To allay this unrest, so as to insure peaceful industrial relations, the National Labor Board was created August 5, 1933, to act as an agency for the mediation of labor disputes arising under the President's Re-employment Agreement. Also, the Board expanded its functions so as to deal with the disputes arising from the various codes, and later set itself up as an interpreter of

Section 7a in the light of the circumstances of particular disputes. It was not long before the National Labor Board overshadowed the National Industrial Recovery Act as an interpreter of the Act.

The Board consisted of seven members, three labor representatives, three industry representatives, and an impartial chairman. For the first three months, the National Labor Board was successful in its work. The Reading Formula was developed which proved most successful as a working basis for the settlement of most disputes.[10] It looked as if the National Labor Board was going to be able to continue its work, when the National Association of Manufacturers made a public attack on the Board. At the same time the Weirton and Budd cases broke, and the National Labor Board was faced with a crisis; employers had flatly refused to abide by the decision of the Board. On December 16, 1933, the President issued an executive order calling for the observance of the Board's orders, and giving it absolute administrative standing, heretofore not definite.[11] The Weirton and Budd companies still defied the Board and its usefulness was beginning to be questioned. Other companies followed the lead of those companies, and strikes were becoming ominous once more.

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10 National Recovery Act, Release No. 285.

11 Executive Order, No. 6511.

At this time a conflict of opinion between the administrator of the National Recovery Act and the Board arose. The employers of the country added to the confusion as well with their dissent over the Board's actions. A series of cases again questioned the authority of the Board, and adverse court decisions hastened its failure. On June 24, 1934, the President established the National Longshoremen's Board.[12] This further weakened the power of the National Labor Board, and June 28 saw the establishment of the National Steel Labor Relations Board to handle steel labor disputes.[13]

On June 29, 1934, a National Labor Relations Board was set up to replace the National Labor Board, by executive order, and July 9, 1934 saw the dissolution of the old Board after eleven months of early success, and later, failure. Although it failed, the Board did much to bring about a better understanding of the meaning of collective bargaining; its basic principles being: (1) a presumed obligation upon employers and employees to bargain; (2) manifestation by both parties of a will to agree; (3) the exertion of every reasonable effort to conclude bilateral agreements; and (4) formal agreements (preferably written) as the end result of the process of bargaining.[14]

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12 Executive Order, No. 6748.

13 Executive Order, No. 675.

14 Lorwin, L. L. and Wubnig, A., op. cit., p. 175.

CHAPTER IV

THE NATIONAL LABOR RELATIONS BOARD OF THE NATIONAL INDUSTRIAL RECOVERY ACT

The first National Labor Relations Board established as the successor to the National Labor Board, July 9, 1934, was created under the authority granted the President by the National Industrial Recovery Act. The power and jurisdiction of the Board were based upon Public Resolution No. 44, and specific details of the executive order.[1] Its powers and jurisdiction to be as follows:

(1) The Board could investigate any and all labor disputes which arose under Section 7a of the National Industrial Recovery Act or which affected interstate commerce; (2) it could order elections among any group of employees to determine through secret ballot by what persons or organizations the employees wished to be represented for purposes of collective bargaining; (3) it could hold hearings and issue findings of fact in all cases involving alleged violations of Section 7a; (4) it could, subject to Presidential approval, lay down rules and regulations necessary to carry on its investigating activities and to assure freedom from coercion with regard to elections; (5) it could recommend to the President rules and regulations relating to collective bargaining, labor relations, and labor representation subject to Section 10a of the National

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1 Decisions of National Labor Relations Board, July-December, 1934, pp. V, VI, VII, IX.

Industrial Recovery Act; and (6) it could act as a tribunal of arbitration upon voluntary joint submission.[2]

In addition to holding labor elections, the Board was to study the other Boards established under the National Industrial Recovery Act as to their work and worth, and to also advise regarding the establishment and need of regional boards to further carry out the work of Resolution No. 44. The powers served to establish the National Labor Relations Board over all other Boards unless changed by Presidential orders.

Section 4c allowed the Board to "take cognizance of any labor dispute where there is another means of settlement." Later this was changed by executive order so that the Board could only make "final adjudication" of cases already provided for. If the Board took action on a case, however, no other agency of the executive government could intervene nor could the acts of the Board be questioned or reviewed. The Board, while acting in connection with the Department of Labor, was entirely independent of it.

The offices of the National Labor Relations Board were in Washington, with seventeen regional Boards in seventeen districts over the nation. The National Labor Relations Board, itself, consisted of three members appointed by the President. The original members They were: Lloyd Garrison, Dean of the Law School of University of Wisconsin; Harry A. Millis, Chairman of the Department of Economics of the University of

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2 Ibid, p. 1.

Chicago; and Edwin S. Smith, former Commissioner of Labor and Industries of Massachusetts. In November, 1934, Mr. Garrison resigned and was replaced by a Philadelphia attorney, Francis Biddle. The regional offices and other employees comprised a force of about six hundred.

The activities of the Board consisted of: (1) the settlement of labor disputes so far as they involved issues relating to Section 7a; (2) quasi-judicial interpretation of the Statute; (3) the enforcement of the statute's collective bargaining requirements; and (4) the conduct of elections.[3]

One of the most important tasks of the National Labor Relations Board was the holding of employee elections to select representatives. The regional boards usually had charge of these unless the company refused to cooperate with the board; then it had to be referred to the National Labor Relations Board itself. The Board had to be very careful at all time to determine if the company was engaged in interstate commerce before it could act. The actual procedure of holding the elections may be found in the records of the Board of March 6, 1935.

From July 10, 1934 to January 9, 1935, the National Labor Relations Board conducted 103 elections affecting 528 industrial units. Trade unions won the election in 301 units; company unions won in 162 units; and, independent representatives in 65 units.

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3 Ibid, p. 2.

The general policies of the National Labor Relations Board were based on their conception of the Act. Their meaning of collective bargaining is clearly given in the decision of Chief Justice Hughes in the Texas and New Orleans Railway v. Brotherhood of Railway and Steamship Clerks, as already referred to in the previous chapter. The Board also upheld the idea that the employer must cooperate to bring about the usefulness of the Act or it was useless. Here the Board was greatly handicapped through the lack of enforcement means the courts were too slow and little else could be done.

As to company unions, the National Labor Relations Board saw no reason to be prejudiced against them unless there was evidence of coercion and interference on the part of the company. In many of the elections, the Board recognized the company union as the representatives of the employees for purposes of bargaining.

In regard to discrimination against an employee because of union activities or any activities concerned with self-organization, the Board ordered reinstatement, with full back pay to their former position.

The National Labor Relations Board was very cautious in its approach of the question of the closed-shop. In several of the cases it upheld the discharge of workers, and in others it ordered reinstatement upon identical evidence.[4] In general the Board ruled that a closed shop

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[4] Hildinger-Bishop Co. v. National Labor Relations Board, Decisions of National Labor Relations Board, June 9, 1934-December 1934, pp. 127-130.

contract with a company union was invalid; was valid with American Federation of Labor unions; and, was invalid with minority union members.[5]

In all of its decisions and orders, the National Labor Relations Board was hindered by lack of enforcement powers; the members of the Board openly admitting this.[6] They were blocked by crowded dockets, and more so by the use of injunctions; the Department of Justice was too slow in its action as well. In the face of all of this, the National Labor Relations Board was more successful than had been the National Labor Board. This was accomplished because of the cutting of so much red tape that had hindered the National Labor Board. Also, the National Labor Relations Board was not hampered by having to act in a mediational capacity as had the National Labor Board.

On January 22, 1935, the National Labor Relations Board lost its power to claim original or review jurisdiction over disputes arising under codes equipped with labor relations agencies. Then January 31, 1935 saw the incorporation of the Automobile Labor Board to the dismay of the National Labor Relations Board as this was one of the principal fields of authority of the National Labor Relations Board. From this time on, the National Labor Relations Board continued to function and render decisions,

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5 Princess Theatre v. National Labor Relations Board, Ibid, pp. 128.

6 Sixth Monthly Report of the National Labor Relations Board to the President, 193, Jan. 1935, p. 7.

but no one obeyed them. The crowning blow to the National Labor Relations Board was given May 27, 1935 when the decision of the Schechter case by the Supreme Court ruled that the National Industrial Recovery Act was unconstitutional.[7] The Supreme Court did not rule directly on the National Labor Relations Board, but included it merely as a part of the National Industrial Recovery Act. After that time the National Labor Relation Board of the National Industrial Recovery Act existed, but in name only.

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[7] Schechter v. United States, 295 United States 49 (1935).

CHAPTER V

THE NATIONAL LABOR RELATIONS BOARD

After July 5, 1935

The National Labor Relations Board created under Section 3 of the National Labor Relations Act passed by Congress July 5, 1935 derived its legal sanction from the power of Congress to regulate interstate commerce. It was granted continued life by the Supreme Court in April, 1937. The Act introduced by Senator Wagner was modeled on the same pattern as was the Labor Disputes bill of 1934; the Board was the direct outgrowth of Section 7a of the National Industrial Recovery Act, modified, however, to avoid the errors and loopholes of that section. It passed through Congress with greater ease than had been anticipated by its backers.[1] The Act officially ended the life of the old National Labor Relations Board, and transferred all of its property, staff, and papers to the new Board.

The National Labor Relations Act gave Congress more power than it had had before over instate commerce although few realized it.[2] Under the National Labor Relations Act regulation of manufacturing and selling, as related to labor, despite the absence of interstate shipment, if such manufacturing or selling is vital to interstate commerce is possible.

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1 Lowrin, L. L. and Wubnig, A., Labor Relations Board, 1935, p. 330.

2 Tax Research Interstate Analysis of Federal Labor Legislation, p. 1.

While the Act has this aspect of regulation, the purpose of it is:

> "To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes."[3]

In other words, the Act set up as its goal, to remove the causes of industrial strife and stop any interference with interstate commerce that was being done and might continue to be done through strikes. It also declared that no longer could employers refuse to their employees the right to organize, and in so refusing them that right, cause them to strike to gain it. To this end, in Section 7, is found this statement:

> "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."[4]

It is the restatment that labor shall have the same power to bargain with their employer, as had their employer with labor; that employees could try to better their wages without fear of losing their jobs. The old belief in the equality of employee and employer was at an end in Congress.

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[3] Title of the National Labor Relations Act, 49 Statute 449.

[4] National Labor Relations Act, p. 5.

To valuate the work of the Board, the Act itself must be understood.[5] Contrary to many beliefs, the Act does not set up a board that has to concern itself with mediation, arbitration, or any of the activities with which other boards had to contend. Neither does the Board concern itself with wages, hours, or working conditions. Other federal and state agencies enforce these laws. Its only purpose is that the right of employees to bargain with their employers must not be violated, and it is simply and clearly stated therein.

The Board to administer the Act was to consist of three men to be appointed by the President with the consent of the Senate. One of the original was to serve for one year, one for a term of three years, and one for a term of five years, but all their successors were to be appointed for five years each, except any one chosen to fill an unexpired term of the member he succeeds.[6] The members of the Board were J. Warren Madden, Chairman, Edwin S. Smith, and John M. Carmody. Mr. Carmody resigned and was succeeded by Donal Wakefield Smith who was re-appointed for a five-year term in August, 1936. Each member was to receive a salary of $10,000 yearly and was not to engage in any other business activity.[7]

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5 National Labor Relations Act, pp. 1-11.

6 Ibid, p. 3.

7 Ibid, p. 4.

Mr. Madden, Chairman, is an ex-school teacher, forty-eight years of age. At first he was prone to view the proceedings with a detached, legalistic viewpoint, but soon became more interested and is now termed a liberal. He is known for his cross-examination, as well as his power before the courts, earned from his experience as the Dean of the University of Pittsburgh. In his home, he reads Shakespeare, and plays in the family orchestra with his two daughters and three sons.[8]

Edwin S. Smith, forty-seven years of age, specialized in employee relationships after covering a reporter's beat for the Springfield, Massachusetts, Republican, and later served as Massachusett's Commissioner of Labor and Industries until 1934 when he was called to Washington to serve on the old National Labor Board. He is the only member to dissent in any of the Board's decisions; doing so twelve times, and earning the name of "radical." His was the only carry-over appointment from the old board on its dissolution. In private life he loves books and fancy ties.[9]

The youngest member of the Board, Donald Wakefield Smith, thirty-nine, was a successful Philadelphia lawyer when appointed. During his college life, he spent his

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[8] Nichols, E. R. and Logan, J...., Arbitration of the National Labor Relation Board, p. 130.

[9] Ibid, p. 131.

summers working in his father's steel foundry. His appointment to the Board was made over the protests of the American Federation of Labor, but due to the influence of Senator Guffey of Pennsylvania, he was appointed. He is often referred to as Donald Duck. Although two of the members are named Smith, neither is related to the other though Washington correspondents annoy them by their references to the "Smith Brothers."

In addition to the Board itself, there is a staff of about 300 young men for the most part, who are employed in the different divisions of the organization. In the Washington organization, there are five major divisions: the Administrative, Legal, Trial Examining, Economics Research, and Publications. In the regional organization there are twenty-two divisions each headed by a regional director and assisted by field examiners, a regional attorney, and a varied office staff.

The policy of the Board has been to secure young men, if possible, in all positions. This is one reason that the Board's public relations are bad and its litigation record good.[10] Too, the young men have a greater capacity for work and are not afraid to do it.

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10 *Fortune*, October, 1936, p. 115.

The procedure of the Board in hearing a case is not as complicated as one might think. Any employee or labor organization may go to one of the twenty-two regional offices and file a complaint charging unfair labor practices. A field examiner hears the case after investigating both the employees and employers concerned and finds evidence that justifies the employee's complaint. About 40% of the cases the Board has are dismissed or withdrawn at this point because of lack of evidence or foundation in fact. This is one reason that so few cases heard by the Board are decided in favor of the employer--something must be wrong before the case is heard. If the evidence warrants a hearing, the trial examiner submits an intermediate report containing his finding and recommendations. This report is served on the parties and either, within ten days of the filing of the report, may file with the Board a statement of exceptions to the report, or any part of it, or the record made of the case.[11] Upon request to the Board, it may permit either of theparties to submit briefs and present oral argument before the Board. If the Board thinks the evidence warrants it, the case may be transferred directly to their jurisdiction. If no exception is made to the report, and the regional director and attorney find substantial evidence to support the employee's complaint, and effort is made to

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[11] Rules and Regulations, Article II, Section 32.

encourage a settlement without issuing a complaint. Many cases have been settled thus informally and amicably, about twenty-five per cent of the cases being settled that way. If the employer refuses to settle the case and comply with the request of the Board, the regional director issues a complaint citing the practices with which he is charged. If the employer still refuses to comply with the law, he is allowed a period of time to answer the complaint, and a hearing is scheduled before a trial examiner appointed by the Washington office. /The reason for the use of the Washington office in the case, is to avoid unintentional collusion between Board attorneys and Board examiners; the regional offices investigate and the Washington office provide the judicial function. So far only about five per cent of the cases have ever reached the trial stage. At the hearing, the employer may call his witnesses and cross-examine the Board's witnesses; any labor union interested in the case may intervene during the hearing as well. Some cases are settled during the hearing as was the Borden Company case.[12] After the hearing, if an agreement is not reached, the trial examiner files an "intermediate report" and again objections may be filed. The Review Section of the Washington office then reviews the case and then it is reviewed by the Board itself. After the review, some companies are given complete clearance of any charges placed against them--among

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12 Third Annual Report, National Labor Relations Board, p. 16.

them the Solvay Process Co., the United Fruit Co., and the General Chemical Co., and substantial portions of other complaints have been dismissed.[13] But, if the employer is found guilty of the charges, he is given another opportunity to bring himself within the law without further litigation. If he refuses, the Board petitions a Circuit Court of Appeals for a court order directing the employer to comply with the Board's cease-and-desist order. The employees may then present their case to the court. Finally if the Court upholds the Board's order--anywhere from one to two years after the charges are filed--the employer comes under legal compulsion to obey the law. If he still is dissatisfied, he may then, as his last chance, appeal to the Supreme Court.

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13 *Fortune*, October, 1938, p. 116.

CHAPTER VI

PROCEDURE OF THE NATIONAL LABOR RELATIONS BOARD

In regard to the due process of the procedure, in the National Labor Relations Board v. Mackay Radio and Telegraph Company, the Supreme Court and the Circuit Court of Appeals both held that the companies had not been deprived of due process of law under the procedure of the Board.[1] The Court said, in part:

> "The fifth amendment guarantees no particular form of procedure; it protects substantial rights. Compare Morgan v. United States (298 U. S. 468, 478). The contention that the respondent was denied a full and adequate hearing must be rejected."[2]

As an additional safeguard, the Board sees that the regional attorneys who prosecute complaints under the Act play no part in the decision of the cases.

In no case decided under the Act, has an order of the Board been set aside because of procedural defects.

A peculiarity of the Act that should be noted is that there is no punishment which can be invoked by the National Labor Relations Board if the practice is continued after a desist order has been given. The Courts have the only means of enforcement of the order, but no punishment can be dealt out by them except holding them in contempt of court. The Board does have the power to conduct investigations and subpoena records and witnesses, resistance of which subpoena may mean a year imprisonment or a $5,000 fine, or both.

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[1] National Labor Relations Board v. Mackay Radio and Telegraph Company, 304 U. S. 333.

[2] Ibid, supra

The principles of the Board have been established by the decisions made during the three years of the Board's existence. They depend entirely upon the cases heard and have been accumulative principles--not all being handed down at once. Many of these rulings have caused great criticism of the Board, but in spite of that, the Board has gone ahead as it sees its way.

The first six sections of the Act deal entirely with the findings of the Act, definitions, the Board itself, and the authority of the Board. So it is with Section 7, that the decisions have been made to establish--that employees shall have the right to bargain collectively.

Section 8 of the Act defines what shall constitute an unfair labor practice for an employer. In Section 8(1) is found the general statement that no employer shall "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." The Board has consistently held that a violation of Section 8, parts (2), (3), (4), (5), is also a violation of subdivision (1).[3] Their reasoning is that in Section 8(3), discharge, because of union membership and activity, would constitute interference with employees, restraint, and coercion by the employer as listed in Section 8(1) as well. On the other hand, part (1) might be violated by

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[3] National Labor Relations Act, pp. 5-6.

activities which do not fall within the specific violations of the other four subdivisions of the section. The sponsors realized that they could not foresee and codify all the ways in which labor could be coerced by the employer. This general statement of Section 8(1) is one of the reasons why the Act is so hard to evade.[4] Yet the net result of a violation of Section 8(1) is an order not to do it again.

One of the violations held by the Board under Section 8(1) has been that of espionage by the employer. It seems that it is a practice of various companies to hire professional spies to mingle with or work with employees to determine union members, and then to fire those members on disclosure to the company by the informer. In the case of the National Labor Relations Board v. Fruehauf Trailer Company, the Board ordered the company to desist such practices, and later this order was upheld in its entirety by the Supreme Court.[5] In the case of a company encouraging its employees to report union activities of fellow employees, the Board also held this to be in violation of Section 8(1). Even though the employees were not paid spies, they acted as such to either have fellow employees fired or coerced into foregoing any union activity. This rule was also upheld in the case of Aguilines, Incorporated v. National Labor Relations Board.[6]

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[4] Fortune, October, 1938, p. 120.

[5] National Labor Relations Board v. Fruehauf Trailer Company, 301 U. S. 49.

[6] Aguilines, Inc. v. National Labor Relations Board, 87 F (2d)

Another type of violation in regard to espionage is that of company officials watching union meeting places and then firing those men that frequent them, or of foremen asking employees about union activities and firing them when information was refused. Both practices have been held violations of the Act and upheld by the Court.[7]

Several forms of bribery--such as open bribes to union leaders to cease activities; promotions, increased pay to employees, vacations with pay, and the like--have all been denounced by the Board and upheld by the Court, as a means of foregoing the right to organize.[8]

Employers soon found that they could not get away with the direct firing of one employee on the basis of union activity; so they would try to "frame" them into a situation and then fire them because of it. When such is the case, and enough evidence can be found, the Board is able to help the employee, but sometimes the employer's intent can not be proved. In the United Carbon Company a plant superintendent offered an employee a reward if he would start a fight with an active union man so that he might fire him without fear of the Board intervening.[9]

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7 Boss Manufacturing Co. v. International Glass Workers of America, 3 NLRB 400.

8 Carlisle Lumber Co. v. National Labor Relations Board, 304 United States 575.

9 United Carbon Company v. National Labor Relations Board, 7 NLRB 598.

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Other companies trying to discourage organization have had organizers beaten up, shot at, attempted lynching, and hired professional strike breakers.[10] All such actions have been held violations of Section 8(1).

Other violations of Section 8(1) are: eliciting renunciations of union affiliation from employees through coercive circumstances, such as forced voting; the use of contracts of employment with individual employees to refrain from joining or organizing any union in a period of time;[11] intimidating or forcing anti-union statements;[12] and, preference being shown by the employer, between rival unions, for one union over the other.[13]

Differing from Section 8(1), subdivision (2) sets forth a specific violation of the Act: "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."[14] This section of the Act is clearly intended to keep the employer from interfering with or participating in the labor organization and its administration. The only way that the Board could administer this section is to follow the law, and for this reason many of their decisions

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10 Remington Rand v. National Labor Relations Board, 304 United States 500.
11 Sunshine Mining Co., v. National Labor Relation Board, 7 NLRB 1252.
12 Jones & Laughlin Steel Co., supra.
13 Consolidated Edison Company of New York, supra.
14 National Labor Relations Act, p. 5.

have appeared arbitrary and inconsistent, but from the point of view of collective bargaining and the Act, they are just. An example of this is found in the Matter of the American Potash and Chemical Corporation.[15] Here the company had a complex structure involving a wide range of activities including collective bargaining, conduction of social affairs, administration of sick-benefits, and forms of insurance. True the employees benefitted from such an arrangement, but the company through the structure, gained influence over its employees and even unconsciously influenced them.

The most difficult division of Section 8 to administer is number (3). This section makes it an unfair practice for an employer to hire or fire or to control an employee's status so as to discourage or encourage membership in a union--unless his company is operating under a valid closed-shop contract. As long as the employer's motive is not based on union activities, he may fire or hire anyone as to his own whim, because of the color of their hair, age, efficiency, race, religion, the way they treat their wives, or their political beliefs. The Board is, therefore, faced with the problem of learning the true motive behind the discharge of an employee.

In the Jones and Laughlin Steel Corporation case, a worker was fired for leaving a key on a bench. On investigation, the Board found that: the man had worked

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15 American Potash and Chemical Corporation v. National Labor Relations Board, 3 NLRB 140.

for the company for fifteen years as a crane operator and that it was not unusual for a craneman to forget his key; that he was active in union affairs and that the company had adopted a strong anti-union policy. In the face of such evidence, the Board ordered his reinstatement. In the Pacific Greyhound Bus Case, a driver was discharged for causing an accident involving a $55 damage claim. Investigation showed that the driver had an excellent safety record, and as a rule the company did not dismiss men for this kind of accident, if his record was good. He was known to be an active unionist, and again, this company had a strong anti-union policy. The Board also ordered this man reinstated.

It is true that the Board has probably made mistakes, and might be the first to admit it. They realize as well that the return of discharged employees is bad for discipline--expecially if the employee was discharged honestly for cause. However, the Board has ordered the reinstatement of an employee in few cases when it did not find evidence of definite anti-union activity on the part of the employer.

The exception to every rule is not untrue of this statement even; it is found in the Matter of the Star Publishing Company.[16] The Star had agreed to bargain with the Newspaper Guild as the representative of company employees.

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16 National Labor Relations Board v. Star Publishing Company, 4 NLRB 498, 97F (2d) 465, 1938.

The Guild soon after that left the American Federation of Labor and joined the Committee for Industrial Organization. The American Federation of Labor then told the Star that if twenty members employed in the circulation department did not join the Teamsters Unions or were not replaced by members of the union, the Teamsters would refuse to deliver the Star the next morning. A vote was taken and the Guild members voted unanimously not to join the Teamsters. The management then asked the Guild if they would guarantee delivery of the paper, and they refused, saying that the Teamsters were picketing the truck entrance. The Star then informed the Teamsters that they could replace Guild members in the circulation department. However, instead of being fired, the Guild members were given temporary jobs in various other departments. Next morning the Star was delivered and the Guild members went on strike.

The newspaper through no fault of its own was guilty of coercion under the Act; the Guild members had had their status changed because of union membership. The Board had to return a decision for the Guild as the law allowed no discretion. In its decision the Board stated:

> "..... under all the facts, the transfer was excusable. The Act permits no immunity because the employer may think that the exigencies of the moment require infraction of the statute. The newspaper was in an unenviable position," and how true it was.[17]

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17 Ibid

The only exception to the rule that an employer may require union membership for employment, is found in a valid closed-shop contract. This contract must not have been made: to obstruct unionization; or to dominate the membership of a union; when it does not represent the majority of the workers' choice; and, with individual members of the union. Unless these provisions can be met, the Board holds the employer in violation of the Act even if a closed-shop contract exists.

There have been few complaints issued under Section 8(4) which declares it an unfair labor practice to discriminate against an employee because he has filed a charge or appeared before the Board as a witness.[18] In one case, a girl was fired "because she caused all that trouble," but of course, she was ordered reinstated by the Board. Employers know the result before any action is taken and do not openly make themselves vulnerable.

Many of the cases in which the Board had found that the employer did not discharge his obligation under Section 8(5) of the Act reveal simply a refusal by the employer to enter into negotiations with the representatives of his employees.[19] Frequently the employer absolutely refuses to talk with the representatives or to recognize the union, or to accept a registered letter containing a proposed agreement.[20]

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[18] National Labor Relations Act, p. 6.

[19] Ibid, p. 6.

[20] Third Annual Report of National Labor Relations Board, 1938, p. 91.

On February 17, 1937, ninety-five employees of the Fansteel Metallurgical Company called a "sitdown" strike and occupied two key buildings of the corporation. After several attempts by officers to remove the men by force, and ignoring a court injunction, the strikers were removed on the twenty-sixth of February. Some of the strikers returned to work, and others refused to return unless there was union recognition and mass reinstatement. New men were then hired to replace those who did not return. In April a new union was organized among the employees of the company as an "independent," and the respondent offered help in various forms in the formation of the organization.[21]

On appeal to the Board, by the non-returning strikers, a hearing was held and the company was ordered to reinstate the employees on the grounds that the men had struck to gain the right to elect representatives of their choosing. The new union was also ordered discontinued as an unfair labor practice.[22] The case was taken to the Supreme Court and in its decision it ruled against the National Labor Relations Board. This was the second time that the Court had ruled against the Board in any of the Board's cases. In his majority opinion, Chief Justice

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[21] Supreme Court Reporter, p. 402.

[22] National Labor Relations Act, p. 5.

Hughes said that the sit-down strike "was a high-handed proceeding without a shadow of legal right, and that the company could discharge the wrong doers without violating the National Labor Relations Act. It was an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner." In an editorial of March 1, 1939, in the Dallas Morning News, is this statement:

> "The NLRA has gone very far toward giving the employee inherent rights in his job during good behavior. It does seek to protect labor against unjust discrimination, expecially where its offense is only insistense on its right to union membership. Now the Supreme Court says to him forcibly and rightfully that resort to violence makes him a labor outlaw. If the government will sit firmly in the saddle as an unprejudiced referee, there will be less labor strife and ultimately more labor content."

Another important decision was that of the Columbian Enameling and Stamping Company and was likewise decided against the Board. The Board held that the company had refused to bargain collectively with union, as a result of which a strike had been called to protect the laborers' rights. Some time before the strike was called, the employees asked the company to meet them to settle the difficulties, but the company refused, as they maintained the demands were not arbitrable under the agreement.

By August 19, the company had resumed operations through employing old employees as well as new ones. In the meantime, two labor conciliators had appeared from the Department of Labor to try and settle the strike. The

company refused to meet with the conciliators after the company had tried several times to arrange a meeting, but failed. The Board in their hearings held that the company was guilty of refusal to negotiate with their employees. Justice Stone in the majority decision stated that: "the employer should not have to seek his employees out or request their participation in negotiations for purpose of collective bargaining, and that he may ignore overtures from third persons not acting for his employees. The employer can not be charged with refusal of that which is not offered."[23]

Even though the Board received a reversal of its orders, it was in the main largely successful in its enforcement of Section 8(5). In the period from July 1, 1937, through June 30, 1938, the Board issued forty-four orders, exclusive of the above reversals and eleven consent decrees of both parties, based on the refusal of the employer to bargain collectively. In twenty-one of the forty-four cases, strikes followed the refusal to bargain or prolonged strikes already existing. The strikes were all settled after the Board's orders were issued, showing the success of the Board in the main.

The next section of the Act that required interpretation is that of Section 9. Section 9(a) provides that representatives designated or selected for the purposes of

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[23] National Labor Relations Board v. Columbian Enameling and Stamping Co., Inc., U. S. 59 S. Ct. 501, 505.

collective bargaining by a majority in an appropriate unit are the exclusive representatives of all employees in such unit for the purposes of collective bargaining.[24] For an employer to refuse to bargain with these representatives constitutes a violation of Section 8(5) which the Board is empowered to prevent by its orders. Thus it is really Section 8(5) that most of the cases are heard under and not section 9(a).

Next of importance is the investigation and certification of the representatives. This is found in Section 9(c) which states that the Board may ascertain these representatives through holding secret elections for them or if there is no question, to secure their certification as representatives from the union or employees. The purpose of Section 9(c) is to give the Board the authority to determine if the representatives are in reality representatives of a majority of the workers, and not only of a certain group or minority.[25]

The qualification for voting is usually based on the last payroll preceding the election although no set rule is followed by the Board. The Board has held that in case employees have been laid off due to slack conditions, that they may vote if they have expectation of returning to work for the company.[26] After the election is held, and

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[24] National Labor Relations Act, p. 6.

[25] Ibid, p. 6.

[26] Martin-Rockwell Corporation v. National Labor Relations Board, 7 NLRB 836.

the votes counted, the organization having a majority of votes cast by the eligible voters is certified as exclusive bargaining representatives for that group.[27]

Establishing the "appropriate unit" for bargaining is like setting freight rates under the Interstate Commerce Commission, and as the Board stated in its first report, "the complexity of modern industry, transportation, and communication, and the diverse forms which organization among employees has taken preclude the application of rigid rules. Through thick and thin, hell and high water, the Board has maintained this principle--flexibility must rule its unit decisions."[28] Yet this is the problem Section 9(b) puts before the Board: "to decide whether the unit appropriate for bargaining shall be the employer unit, craft unit, plant unit, or subdivision." It is here that the great fight between the American Federation of Labor and the Committee for Industrial Organization centers--to gain the role as representative for the various units.

The determination of what unit shall be used is required in two types of cases: (1) cases involving petitions for certification of representatives pursuant to Section 9(c), and (2) cases involving complaints charging that an employer has refused to bargain collectively with representatives of his employees, in violation of Section 8(5).

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[27] Cudahy Packing Co. v. National Labor Relations Board, 4 NLRB 39.

[28] Fortune, October, 1938, p. 118.

Representation thus seems to depend entirely upon the individual company, and it is hard to formulate any set policy. The closest the Board has come to this is found in its Globe policy; this policy being named after the Globe Machine and Stamping Company.[29] In a company where several units ask to be designated as the representative, and the Board finds other factors in the case to be as equal as possible in the situation, the employees are permitted to elect the unit they desire through a secret election; the unit receiving a majority to be designated as the representative for the company. It is in connection with this policy that Edwin S. Smith has dissented with the Board. He says that this policy places in the hands of a small group the determining of the representatives for the whole group, and does not actually represent all of the employees in fact in the company.

Section 9(d) states that the records and certification of investigation for representatives shall be included in the transcript of the entire case as heard so that it may be available for further proceedings, if such arises.

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29 Globe Machine and Stamping Company v. Metal Polishers Union, Local No. 3, 3 NLRB 294.

With the constitutionality of the Act determined, and the Board's jurisdiction established by the Supreme Court in the Jones-Laughlin case other important principles that have been built up may be briefly summarized:

1. Workers on strike retain the status of employees and are entitled to the protection of the Act irrespective of whether the strike was caused by an unfair labor practice.[30]

2. Where a strike was caused by an unfair labor practice, the Board may under Section 10(c) order the employer to reinstate the striking employees, discharging, if necessary, workers hired subsequent to the unfair labor practice which caused the strike. Back pay is usually remitted on returning to work by order of the Board.[31]

3. Where an employer has dominated or interfered with the formation or administration of a labor organization, the Board may under Section 10(c) order the employer to withdraw recognition, and to disestablish it as a collective bargaining agency.[32]

4. Notice to the company's dominated union need not be given for its disestablishment as a bargaining agent.[33]

5. Improper conduct by a union grants no immunity to an employer to violate the Act.[34]

6. An employer may not engage in unfair labor practices in order to avoid threatened economic loss and thus transfer the burden to his employees.[35]

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[30] Jeffery Dewitt Insulation Co. v. National Labor Relations Board, 302 U. S. 731.

[31] National Labor Relations Board v. Jones & Laughlin Steel Corporation 301 U. S. 1.

[32] National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U. S. 261.

[33] Ibid

[34] National Labor Relations Board v. Remington Rand, Inc., 94 F (2d) 862 (C. C. A. 2d)

[35] National Labor Relations Board v. Star Publishing Co., 97 F (2d) 465 (C. C. A. 9th)

7. The Board is entitled to legal enforcement of its order by the court notwithstanding that the order has been complied with.[36]

8. An employer who has refused to bargain with representatives selected by a majority of his employees on the grounds that he was under no obligation to do so, cannot later justify his conduct on the ground that he had been offered no proof of a majority electing the representatives.[37]

9. The Board's findings of fact, if supported by the evidence presented, are conclusive.[38]

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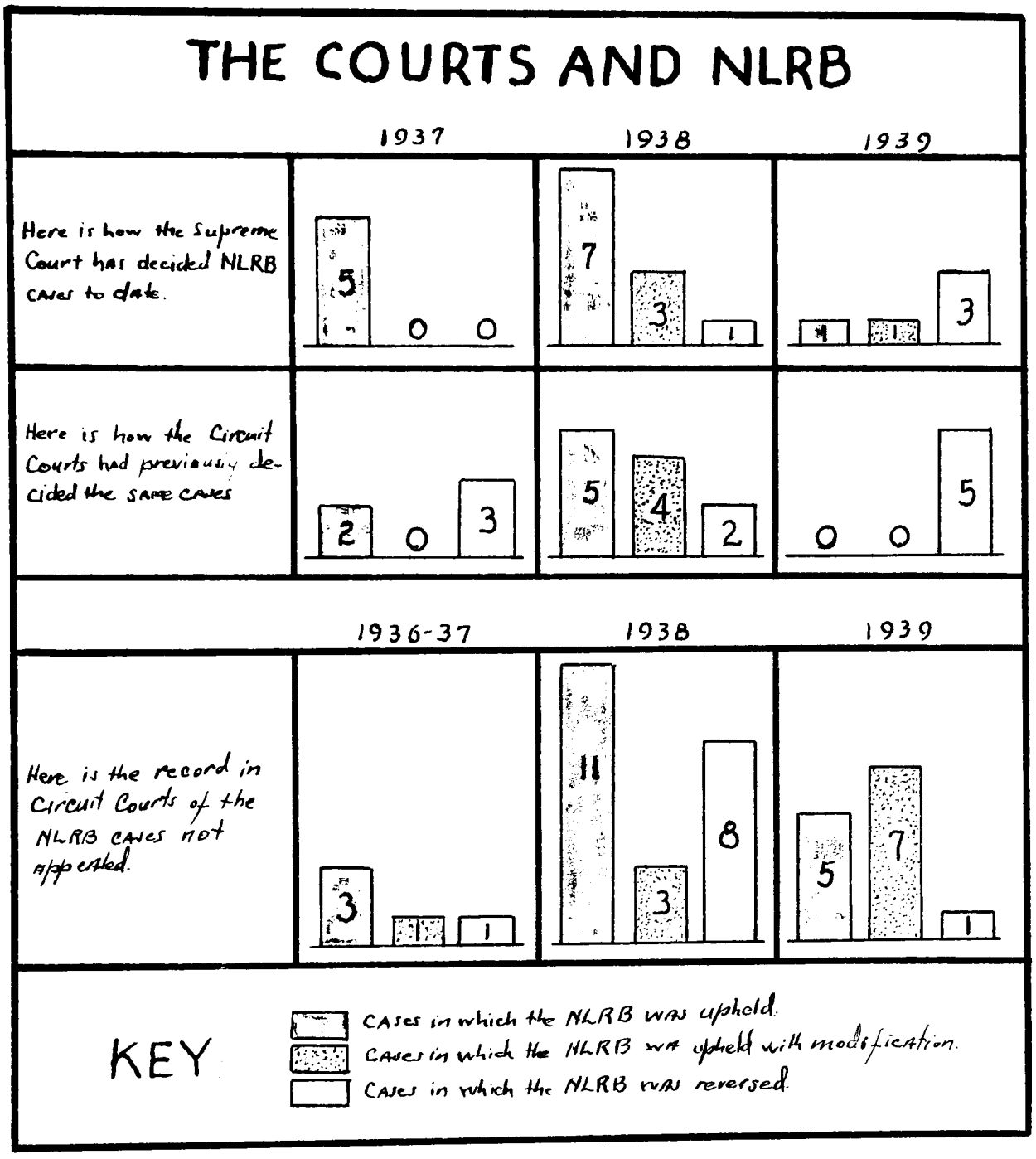
[36] National Labor Relations Board v. Pennsylvania Greyhound Lines, supra.

[37] National Labor Relations Board v. Remington Rand, Inc., supra.

[38] Consolidated Edison Co. v. National Labor Relations Board, 58 Sup. Ct. 1038.

THE COURTS AND NLRB



Business Week, May 13, 1939

CHAPTER VII

AN EXAMINATION OF CASES BEARING ON THE SUPREME COURT'S VIEWS ON COLLECTIVE BARGAINING

It was not until the passage of the Interstate Commerce Commission Act in 1887, that the Federal Government interested itself in labor legislation. Until that time all legislative action in regard to labor had been passed in the various states, with the exception of the slave laws passed by the Federal government in 1865-66. The various Congresses of the nation had looked on legislating for labor as leading to anarchism. They felt that the courts with the use of its injunctive power could look to the welfare of labor activities.

There are several important decisions in the development of labor's right to bargain collectively. In 1908 one of the first important cases involving labor rights was tried before the Supreme Court of the United States. It was the case of Adair v. United States.[1] Action was based on the constitutionality of an act of Congress of June 1, 1898, concerning carriers engaged in interstate commerce and their employees.[2]

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1 Adair v. United States, 208 U. S. 161, 28 S. Ct. 277, 1908.

2 30 Statutes at Large 424, Chapter 370, U. S. Composite Statutes, 1901, p. 3205.

The tenth section of the act states in part that no employer subject to the Act shall require any employee as a condition of employment to agree to not join any form of labor union or threaten him with loss of employment if he is already employed, and joins a union or is already a member.

It appears in the case that W. Adair, an employer of the Louisville and Nashville Railroad Company, discharged O. B. Coppage because of his membership in a labor organization.

The question of law then arose "did the agent of a company subject to the Act have full authority to dismiss an employee because of his membership in a labor organization?"[3]

In delivering the opinion of the Supreme Court, Justice Harlan and his associates went back to the fifth amendment as a basis for their opinion.[4] In summation

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[3] Evans, L. B., Cases Constitutional Law, fourth edition, p. 267.

[4] To fully understand the background leading up to the various cases of the National Labor Relations Board, one should study the history of the rise of the due process clause and its evolution in the Courts of the United States. Such a study would be of great length and needless here, but if the reader is interested, he might read the following cases for a clearer insight into the history of the reasoning and its development in the Courts of our nation:

Adair v. United States, 208 U. S. 161 (1908).
Coppage v. Kansas, 236 U. S. 1 (1913).
Texas and New Orleans Railway Co. v. Brotherhood of Rail & Steamship Clerks, 281 U. S. 548 (1930).
National Labor Relations Board v. Jones-Laughlin Steel Company, 301 U. S. 1 (1937).

of Justice Harlan's majority opinion, it is found that they were still believers in the equality of the employee and the employer; that the employer and employee must be free to bargain with each other without interference from any law or agency to upset that necessary balance. Legislation passed to upset that balance in favor of the employee was repugnant to the fifth amendment and an illegal invasion of the rights of property and personal liberty of the employer. In view of the opinion delivered, the decision of the lower court for conviction was reversed and the case dismissed; the constitution had been violated.

Justice McKenna's dissent brought out the point that the law as passed by Congress was a necessary law in order to bring about the settlement of labor disputes, and that it was within the power of Congress to pass such a law under the Commerce power. Justice Holmes in writing his own dissent said that it was alright to pass the law even if it had no relation to the settlement of disputes--that the Court was not interested in why the law was passed, but that Congress had no right to interfere directly with labor and the unionization of labor; and that the Act was therefore unconstitutional.

In 1903 the legislature of Kansas passed an act which outlawed "yellowdog" contracts.[5] The act read in

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[5] A contract in which the laborer agreed to refrain from union membership, and under which he would be discharged by the employer if he did join.

substance as did the act passed by Congress on June 1, 1898, and tried in the case of Adair v. United States, but it was passed under the police power of the State of Kansas. The Supreme Court of Kansas upheld the law and conviction of the defendant.[6] On appeal to the Supreme Court of the United States, Justice Pitney, in delivering the majority opinion, held that the case was identical with the Adair case, and that the law passed by the Legislature was a violation of the police power as well as a violation of the due process law as limited by the fourteenth amendment. He further stated that there was no question as to the legality of the labor unions or of the importance of their purpose to better the conditions for the working man. But he brought out that man has no inherent right to belong to such an organization, and that the State could not give man that right. The State in trying to do so was in fact depriving the employers of their liberty to contract, and in so doing, was building up labor organization. He further stated that in no light could the Act have been passed to better the health, morals, or public welfare of employees beyond leveling inequalities of fortune through depriving one of his natural rights. If a man agrees, as a term to employment, to forge his right to join a union, that is his right as an individual to do so, and

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6 Coppage v. Kansas, 236 U. S. .

the privilege of an employer to include it in an employment contract if he so desires without interference from any statute or agency. Again the Courts had upheld the inequality of the employer and the employee.

Of great interest, however, was the dissenting opinions of Justices Holmes and Day. Justice Holmes brought out that he realized that an employee, as an individual, was not on the same equal footing with his employer as the Courts had before held; that labor was at a distinct disadvantage with their employers. In view of this he stated that the judgment of the lower court should be affirmed; that a laborer could not by his own power secure a fair contract of employment. He further stated that the cases of Adair v. United States and Lockner v. New York, should be overruled as there was nothing in the Constitution to prevent such action as Congress and the State legislatures had taken.[7] Labor had at least scored.

In 1930, the Supreme Court in the case of the Texas and New Orleans Railroad Company v. Brotherhood of Railway and Steamship Clerks, definitely recognized the right of labor to organize for the purpose of collective bargaining with employers.[8] Chief Justice Hughes in

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[7] Adair v. United States, supra, and Lochner v. New York, 198 U. S. 45; [illegible].

[8] Texas and New Orleans Railroad Company v. Brotherhood of Railway and Steamship Clerks, 281 U. S. 548.

delivering the opinion of an unanimous court brought out that no longer was the legality of collective action on the part of employees to be disputed. "Congress was not required to ignore this right, but could safeguard it and seek to make it an instrument of peace rather than of strife. Such action would be a mockery if representation were made futile by interference with freedom of choice." The reference here, by Justice Hughes, is clearly stated by Justice Stone in the case of Virginian Railroad Company, "that employees were free to organize and to make their choice of representatives without the "coercive interference" and "pressure" of a company union organization; and that the statute protected the freedom of choice of representatives, which was an essential of the statutory scheme, with a legal sanction which it was the duty of courts to enforce by appropriate degree."[9] This ruling although by statute statement covered only employees of rail companies, was ruled to be applicable to all clerks not directly connected with rail facilities or employment.

Labor had finally won recognition of its right to organize and bargain for the betterment of its members as a group with employers without being penalized by the Courts. With that right had been won the right as well to elect representatives from their number to act as their agents without fear of reprisal on those agents from their employers.

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9 Virginian Railroad Company v. System Federation No. 40, 300 U. S. 515.

CHAPTER VIII

CONCLUSIONS

The National Labor Relations Act of 1935 has caused much doubt and fear on the part of individuals and corporations. This doubt and fear has resulted in adverse criticism of the Federal government, as well as of the probable results of the Act. This is true not only of this Act, but of all legislation that has seemed to favor labor. The people as a whole have always been afraid that such legislation will result in giving too much power or benefits to one group so that they will use that power to injure the employer and the general public.

But history has proved that labor usually uses the gains made by it to better itself in justifiable ways. True, violence is employed, as is sometimes the case in the use of the strike, but labor must have some right or means to protect itself, and violence is the exception rather than the rule.

To make up for those benefits they receive as a group, labor increases not only its own standard of living, but that of the nation as well; thus making up for any loss it may occasion in specific instances.

Much of the legislation passed by the government is the embodiment of old ideas applied in new form, and others are entirely new ideas. Some of them have been held unconstitutional by the Supreme Court, and others upheld.

But at last it seems that labor has won not only legislative, but legal sanction as well, of its right to organize and bargain collectively.

The National Labor Relations Board has tried to build up through its decisions, certain principles that will continue to uphold the rights gained by labor with the passage of the National Labor Relations Act.

It seems that at last, labor has won the permanent right to bargain collectively.

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