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THE NORTH DAKOTA LABOR-MANAGEMENT RELATIONS ACT

CHARLES LIEBERT CRUM*

I. MAJOR FEATURES OF THE NEW ACT

In the closing days of the 1961 session of the North Dakota Legislative Assembly, after a good deal of parliamentary manuevering involving a number of companion measures,[1] enacted a comprehensive labor relations statute[2] broadly patterned after the model of the National Labor-Management Relations Act of 1947,[3] as currently amended.[4]

Originally proposed by an interim committee[5] which had studied the problems of labor relations in this state for the better part of a year, the passage of the North Dakota Labor-Management Relations Act of 1961 undoubtedly represented one of the most significant achievements of the 1961 legislature. This is so for a number of reasons. In the past this state has operated on the basis of a set of labor enactments which, whatever their intrinsic merit, lay outside the main stream of contemporary developments so far as relations between employers and employees were concerned.[6] Moreover, as applied to labor disputes the former statutes were of relatively limited coverage,[7] so that comparatively few practitioners in this jurisdiction enjoyed the opportunity for inducement to develop expertise in what is actually one of the most meaningful of all legal fields. While the virtues and defects of the new statute

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1. The most prominent of these was a measure creating a separate department of labor, which failed to pass.

2. H.B. 831, N.D. Legislative Assembly (1961), hereinafter cited as the "North Dakota Labor-Management Relations Act."

3. 61 Stat. 136 (1947), 29 U.S.C. § 141 et seq. (1958) (Taft-Hartley).

4. See Title VII, Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541 (1959).

5. This was the Special Committee to Study Labor Laws. Members of the committee were Representative Ralph Beede, Chairman; Senator Edwin C. Becker, Senator Ralph J. Erickstad, Senator O. S. Johnson, Representative Gordon S. Aamoth, Representative Kenneth C. Lowe, Representative Bruce M. Van Sickle, Mr. George Dixon, Frank F. Jestrab, Esq., Mr. William W. Murrey, and Philip B. Vogel, Esq. Mr. James Marsden, Mr. H. B. Martinson, and David Weinberg, Esq., materially aided the Committee in its deliberations. The initial draft of the North Dakota Labor-Management Relations Act was prepared by Frank F. Jestrab. The author had the privilege of serving as counsel to the Committee.

6. See Killingsworth, State Labor Relations Act 1-3 (1948). "As a matter of fact, in 1947, nearly 40 states lacked labor agencies and comprehensive labor legislation." Mr. Justice Burton, dissenting in Guss v. Utah Labor Board, 353 U.S. 1, 17 (1957).

7. It has been said that in states following the former North Dakota pattern of labor legislation the laws "are aimed exclusively at one or a few union practices, place few or no restrictions on employers, and do not attempt to establish a comprehensive labor relations policy. In virtually all states with such union-regulatory laws, no cases at all or only test cases have arisen." Killingsworth, *op. cit. supra* note 6, at 3.

invite careful examination,[8] it nevertheless represents at a minimum a break in this fundamental pattern. As a result, the attorney who comes in contact with a North Dakota labor problem in the future will find ready at hand a number of new legal tools, already tested on the federal level, which were not previously available in this state. Among these may be listed a newly-imposed duty resting on both labor and management to participate in the collective bargaining process;[9] explicit statutory recognition, raised for the first time in this state to the level of a jurally significant right,[10] of the freedom of employees to organize and to bargain collectively through representatives of their own choosing;[11] a definition of unfair labor practices, believed to be considerably more meaningful than past enactments, specifying conduct in which neither labor nor management is privileged to engage;[12] improved procedures for the determination of questions or representation and appropriate bargaining units;[13] and a considerably greater right of practical access to the courts than was enjoyed previously.[14]

These represent, it is believed, a substantial alteration in the substantive jurisprudence of this state dealing with labor relations. The proven utility of these features undoubtedly accounts for the substantially bipartisan support which the statute enjoyed during the course of its passage.[15] But even more fundamentally the Act is believed to represent a reasoned response to developments in labor laws on the federal level which have imposed new responsibilities on the states. Thus it furnishes reassuring evidence of the continued ability of this state to face the challenge of new conditions.

II. THE FEDERAL BACKGROUND

Since the changes which occurred on the federal level were in many respects the key to the adoption of the new Act, some ex-

8. "It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective intrests." Mr. Justice Frankfurter in Carpenters' Union v. Labor Board, 357 U.S. 93, 99-100 (1958).

9. N.D. Labor-Management Relations Act § 4.

10. Under prior North Dakota statutes the right of employee organization was declared to be favored as a matter of public policy but was not judicially enforceable. N.D. Cent. Code §§ 34-08-02, 34-09,01.

11. N.D. Labor-Management Relations Act § 2.

12. N.D. Labor-Management Relations Act § 3.

13. N.D. Labor-Management Relations Act §§ 5-7.

14. N.D. Labor-Management Relations Act §§ 8, 10, 11.

15. It might be noted in passing that the Special Committee to Study Labor Laws was appointed by a Republican Governor and that the North Dakota Labor-Management Relations Act which the Committee recommended was approved by a Democratic one. The Act itself passed both houses of the Legislative Assembly by wide margins and party-lines did not appear to be relevant in respect to it.

ploration of the relationship between federal and state law in the field of labor relations appears justified.

Prior to 1959 the Supreme Court of the United States had ruled in numerous cases that the states were without authority to regulate or intervene in labor disputes involving business enterprises engaged in interstate commerce.[16] This denial of state jurisdiction was substantially complete, the only exception of genuine significance arising in situations wherein a labor controversy was "marked by violence and imminent threats to the public order."[17] The practical result of this situation was that while the North Dakota courts could grant relief when a labor dispute threatened the peace of the community wherein it arose,[18] they were without authority to assist in the resolution of peaceful disputes arising in this state so long as the dispute concerned a business of interstate character.[19]

The basis for the foregoing holdings was to be found in the doctrine of pre-emption, i.e., the principle that under the supremacy clause of the United States Constitution[20] a federal statute regulating a particular subject matter supersedes state legislation dealing with the same problem.[21] This was, and for that matter still is, a doctrine of great importance in the field of state labor legislation; for it is clear that when the Congress enacted the Labor-Management Relations Act of 1947 it intended — in the view of most commentators unwisely[22] — to exercise the full scope of its power over commerce among the states to the exclusion of state enactments in the field. So sweeping was the pre-emption, indeed, that the state courts were not even authorized to *enforce* the federal law, a point thoroughly expounded in *Garner v. Teamsters Union*[23] by Mr. Justice Jackson:

16. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); Guss v. Utah Labor Board, 353 U.S. 1 (1957); Teamsters Union v. N.Y., N.H., & H. Ry., 350 U.S. 155 (1956); Weber v. Annheuser-Busch, Inc., 348 U.S. 468 (1955).

17. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959). See also United Automobile Workers v. Russell, 356 U.S. 634 (1958); United Construction Workers v. Laburnum Corp., 347 U.S. 656 (1954).

18. Minor v. Building & Construction Trades Council, 75 N.W.2d 139 (N.D. 1956).

19. Northern Improvement Co. v. St. Peter, 74 N.W.2d 100 (N.D. 1955).

20. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art VI, § 2.

21. For more detailed discussion of pre-emption as it applies to labor relations, see Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L. Rev. 1297 (1954); Hall, *The Taft-Hartley Act v. State Regulation*, 1 J. Pub. L. 97 (1952); Hays, *Federalism and Labor Relations in the United States*, U. Pa. L. Rev. 959 (1954); Ratner, *Problems of Federal-State Jurisdiction in Labor Relations*, 3 Lab. L. J. 750 (1952); Rose, *The Labor Management Relations Act and the State's Power to Grant Relief*, 39 Va. L. Rev. 765 (1953); Youngdahl, *Federal Limitations on State Jurisdiction Over Labor-Management Reltations*, 12 Ark. L. Rev. 354 (1958).

22. See Cox, *supra* note 21, at 1304-05.

23. 346 U.S. 485 (1953).

"Congress did not merely lay down a substantive rule of law to be enforced by an tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."[24]

In practice, however, the device of making the National Labor Relations Board the only forum for adjudication of a labor dispute involving interstate commerce ultimately proved unworkable.[25] While the NLRB possessed technical authority over all such disputes to the exclusion of the states, it was found impracticable for the agency to exercise its jurisdiction to the full measure, if only for the reason that the appropriations and personnel at its disposal were inadequate to carry the complete case load. Thus the NLRB developed a policy of declining to accept jurisdiction in cases it considered of insufficient importance to warrant its intervention. Chief Justice Warren has described this phase of the history of the Board as follows:

"For a number of years, the Board decided case-by-case whether to take jurisdiction. In 1950, concluding that 'experience warrants the establishment and announcement of certain standards' to govern the exercise of its jurisdiction . . . the Board published standards, largely in terms of yearly dollar amounts of interstate inflow and outflow."[26]

This was an administrative policy of extra-legal character, unauthorized by the terms of any statute. Warren was careful to note, in discussing it, that the Supreme Court had never passed on the validity of the jurisdictional standards thus laid down.

The establishment of these standards had, however, an unexpected consequence. It presently became apparent that they had the effect of dividing labor disputes into three broad categories:

24. *Id.* at 490-91.

25. This was noted as early as 1954. "In exercising its new function Congress has made what has proved in experience to be an unsatisfactory allocation of power as between state and Federal Government. The problem of re-allocation is now before it as possibly the most important problem in labor relations facing the country today." Hays, *supra* note 21, at 961.

26. Guss v. Utah Board, 353 U.S. 1, 3-4 (1957).

(1) cases involving interstate commerce which the NLRB was willing to adjudicate; (2) cases involving interstate commerce which the NLRB was *not* willing to adjudicate; and (3) cases involving intrastate commerce which fell within the purview of state authority. And the status of labor disputes falling in the second category — group (2), above — rapidly proved anomalous. Cases soon arose in which employers and employees who could not obtain relief from the NLRB because their dispute was not one which fell within the scope of the federal agency's jurisdictional yardsticks sought assistance from state boards even though the dispute technically involved a business in interstate commerce. Faced with this situation the states reached varying results. Some state courts came to the forthright conclusion that the states were free to assert jurisdiction and to apply their own law in any labor dispute wherein the NLRB was unwilling to act.[27] This was a result based on the argument there could be no interference with federal labor policy as a result of state action if the federal government itself had refused to rule on the case.[28] Conversely, other courts concluded that even though the NLRB had declined to adjudicate a dispute the states were without power to intervene in it so long as the controversy involved commerce of an interstate character.[29] Underlying this position was the basic question of what body of law — state or federal — was applicable to the dispute; the courts reaching the latter result reasoned that if the dispute affected interstate commerce the substantive rights of the parties were determined by the federal statute, which they were powerless to apply, and hence that state law could not logically be used for the resolution of the dispute.[30]

In 1957 this situation came to a head in *Guss v. Utah Labor Board*,[31] which focussed national attention on the problem. Guss was a Utah manufacturer of photographic supplies engaged in

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27. Garmon v. San Diego Building Trades Council, 45 Cal.2d 657, 291 P.2d 1 (1955), *rev'd*, 353 U.S. 26 (1957); Building Trades Council v. Bonito, 71 Nev. 84, 280 P.2d 295 (1955); Hammer v. Local 211, United Textile Workers, 34 N.J. Super. 34, 111 A.2d 308 (1954); Dallas General Drivers v. Jax Beer Co., 276 S.W.2d 384 (Tex. Civ. App. 1955).

28. Thus the Supreme Court of California stated that: "A remedy under federal laws available to an injured party may justify pre-emption of the field of labor relations, but when the application of that rule would result in the loss of all protection, there is no reason to bar state courts from providing relief." Garmon v. San Diego Building Trades Council, 45 Cal.2d 657, 291 P.2d 1, 5 (1955), *rev'd*, 353 U.S. 26 (1957). See also Hammer v. Local 211, United Textile Workers, 34 N.J. Super. 34, 111 A.2d 308, 317-18 (1954).

2. Retail Clerks v. Your Food Stores, 225 F.2d 659 (10th Cir. 1955); New York Labor Board v. Wage Transportation System, 130 N.Y.S.2d 731 (1954), *aff'd*, 284 App. Div. 883, 134 N.Y.S.2d 603 (1954).

30. See New York Labor Board v. Wage Transportation System, 130 N.Y.S.2d 731, 750 (1954).

31. 353 U.S. 1 (1957).

interstate commerce. In 1953 the plant employees, through their union, filed unfair labor practice charges against Guss with the National Labor Relations Board. Pursuant to its jurisdictional standards the NLRB declined to rule upon the case, whereupon the union filed the same charges with a state agency, the Utah Labor Board. Utah possesses a state labor relations act [32] closely resembling a pioneering enactment of Wisconsin[33] and the union got the relief it wanted; a remedial order was issued by the Utah Labor Board and affirmed by the Utah Supreme Court.[34] Guss then appealed to the Supreme Court of the United States, raising the basic point that since it was in interstate commerce the state lacked jurisdiction to apply its law to the dispute. Though recognizing that the practical result of its ruling was to create a legal vacuum in the field of labor relations — an area where *neither* state *nor* federal law was applicable — the Court nevertheless found itself constrained to rule that the objection to the state's jurisdiction was well taken. "Since Congress' power in the area of commerce among the states is plenary," observed Chief Justice Warren, "its judgment must be respected whatever policy objections there may be to creation of a no-man's land."[35]

Because the decision left a substantial number [36] of labor disputes to what was, in effect, the law of the economic jungle, it was by no means well received. Remedial action eventually came on several fronts. On August 1, 1959, the National Labor Relations Board amended its jurisdictional standards so that additional cases could be heard.[37] And shortly thereafter, in passing the Labor-Management Reporting and Disclosure Act of 1959, the Congress inserted the following amendment to the Labor-Management Relations Act of 1947:

> "(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction; *Provided,* that the Board shall not

32. Utah Code § 34-1-1 et seq. (1953).
33. Wis. Stat. §§ 111.1 — 111.19 (1957). See Lampert, *The Wisconsin Labor Peace Act,* 1946 Wis. L. Rev. 193.
34. Guss v. Utah Labor Relations Board, 5 Utah 2d 68, 296 P.2d 733 (1956).
35. 353 U.S. at 11.
36. "How many labor disputes the Board's 1954 standards leave in the 'twilight zone' between exercised federal jurisdiction and unquestioned state jurisdiction is not known. In any case, there has recently been a substantial volume of litigation raising the question . . ." Warren, C.J., in Guss v. Utah Labor Board, 353 U.S. 1, 4 (1957).
37. See *infra,* pp. ....

decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

"(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."[38]

The effect of the foregoing language is to vest in the states jurisdiction to hear and to decide, pursuant to their own law, all cases involving labor disputes which the NLRB declines to entertain. It should be observed that under the terms of the enactment just quoted the NLRB is free to increase its own jurisdiction, but may not decrease it beyond the present limits without the consent of the Congress.

III. THE N.L.R.B. JURISDICTION STANDARDS

The substance of the NLRB jurisdictional standards which took effect August 1, 1959, is presented here for convenience.[39] They provide in substance that the National Labor Relations Board will assume jurisdiction in the case of labor disputes involving:

(a) *Non-retail business* — if the yearly outflow or inflow of goods or services, direct or indirect, is $50,000.[40]

(b) *Office buildings* — if (1) gross yearly revenue is $100,000 *and* (2) $25,000 of the revenue is derived from organizations which meet any of the jurisdictional yardsticks.

(c) *Retail concerns* — if the gross yearly volume of business is $500,000.

(d) *Instrumentalities, links, and channels of interstate commerce* — if (1) $50,000 yearly revenue is derived from the interstate or linkage part of the enterprise, or (2) $50,000 yearly revenue is derived from services performed for employers in interstate commerce.

(e) *Public utilities* — if (1) gross yearly volume of business is

38. 73 Stat. 541 (1959), 29 U.S.C.A. § 164 (c) (1)(2).

39. See NLRB Press Release R-576, Current Jurisdictional Yardsticks, Oct. 2, 1958; CCH Lab. L. Guide ¶ 1022. As to judicial notice of the yardsticks, see Dallas General Drivers v. Jax Beer Co., 276 S.W.2d 384, 389-90 (Tex. Civ. App. 1955); N.D. Cent. Code §§ 31-10-02 (1). The practitioner is advised to consult NLRB Reg. § 101.40 *et. seq.*, 29 U.S.C.A. (Supp. 1960), for informal NLRB procedures relating to jurisdictional determination.

40. It should be noted that inflow and outflow across a state line cannot be added together in order to meet the $50,000 figure. This is true regardless of whether such inflow or outflow is direct or indirect. Outflow is direct if it consists of goods shipped or services furnished by the employer outside the state, and is indirect if the employer makes sales within the state to users meeting any jurisdictional standard. Inflow is dierct if goods or services are furnished directly to the employer from outside the state wherein he is located, and is indirect if goods or services originated outside the employer's state but were purchased by him from a seller within the state.

$250,000, or outflow or inflow, direct or indirect, is $50,000; (2) the standard for non-retail concerns is met, namely a yearly outflow or inflow, direct or indirect, of $50,000.

(f) *Transit systems, except taxicabs* — if the gross yearly volume of business is $250,000.

(g) *Taxicab firms* — if the standard for retail concerns is met, i.e., a gross yearly volume of $50,000.

(h) *Newspapers* — if the gross yearly volume of business is $200,000 and the newspapers subscribes to interstate wire services, publishes nationally syndicated features, or advertises nationally sold products.

(i) *Communications systems (radio, television, telegraph and telephone)* — if the gross yearly volume of business is $100,000.

(j) *National defense* — if there is a substantial impact on national defense.

(k) *Hotels and motels (except residential)* — if the gross yearly volume of business is $500,000.[41]

Labor disputes involving business falling outside the above categories are presently subject to the jurisdiction of the state of North Dakota. It will be observed that as a practical matter many of the listings above possess a considerable significance for this state, since — as an illustration — it seems doubtful there are many hotels or retail establishments in this area grossing $10,000 per week, which is the approximate average required for invocation of NLRB authority.

IV. NORTH DAKOTA CONSTITUTIONAL PROVISIONS

In considering problems of labor law the existence of certain provisions of the state constitution should not be overlooked. Broadly speaking, the regulation of labor relations by statute is an exercise of the state's authority to legislate for the protection of the public health, welfare, safety and morals,[42] and the basic constitutional justification of the North Dakota Labor-Management Relations Act would appear to rest on that ground. In this connection it should be borne in mind that while the federal government is possessed of *delegated* powers the state governments are governments of *reserved* powers.[43] Hence the relevant inquiry from the standpoint

41. A residential hotel or motel is one in which at least 75 per cent of the guests resided therein for a month or more during the preceding year. CCH Lab. L. Guide ¶ 1022.

42. 11 Am. Jur., Constitutional Law § 345, citing numerous authorities.

43. Martin v. Tyler, 4 N.D. 278, 288, 60 N.W. 392, 395 (1894): "He who would challenge a legislative enactment must be able to specify the particular constitutional provision that deprived the legislature of the power to pass the enactment."

of state constitutional law is not whether a constitution *authorizes* a given enactment, but whether the constitution *prohibits* it.[44]

At the North Dakota Constitutional Convention of 1889 there were adopted constitutional provisions safeguarding the right to obtain and hold employment freely and without malicious interference, forbidding certain forms of child labor, allowing the establishment of special tribunals of conciliation to deal with labor disputes, and prohibiting the practice of black listing.

Of these various provisions, it is undoubtedly § 23 of the North Dakota Constitution which is of the greatest interest, inasmuch as § 2 of the North Dakota Labor-Management Relations Act utilizes at least some language of a broadly analogous character. As originally submitted to the Convention, § 23 of the Constitution was broadly aimed at the practice of black listing. The section was offered by Mr. Parsons of Morton County, a delegate active in labor matters on behalf of railroad workers, and originally provided that:

"Every citizen of this state shall be free to obtain employment wherever possible, and any person, corporation or agent thereof keeping a black list, interfering or hindering in any way a citizen from obtaining or enjoying employment already obtained, from any other corporation or person, shall be deemed guilty of conspiracy against the welfare of the state, which offense shall be punished as prescribed by law."[45]

Vigorous objection was promptly made. "Every town in the country," declared a delegate speaking in opposition, "has its black list. Every merchant has his black list, and they post one another as to who is entitled to credit and who is not. All through this land there are black lists, and it seems to me that while we hold railroads and other corporations liable for the damage they may do, I cannot see why they should not be entitled to warn one another against all the dangerous men that they have had experience with."[46] Speaking to the same point, other delegates were equally vigorous. "When a railroad company has found that one of its employees is inefficient, incompetent or a habitual drunkard, is it not right to put him on a list and say to its own managers and the managers of every other railroad corporation — this man we have found to be a habitual drunkard, or he is color blind, and cannot safely act as an engineer?"[47]

44. State *ex. rel.* Rausch v. Amerada Petroleum Corp., 78 N.D. 247, 49 N.W.2d 14 (1951); Stark v. City of Jamestown, 76 N.D. 422, 37 N.W.2d 516 (1949).
45. Debates, North Dakota Constitutional Convention 365 (1889).
46. *Id.* at 366.
47. *Id.* at 368.

This was sufficient to indicate that the proposal was in for some heavy going. Nevertheless, the proponents of the measure won the day temporarily on the plea that incompetency was not the true reason for the existence of the black list. "Nothing in this clause," asserted Parson, "interferes with or trammels the right of the employer to write or inquire all over the United States as to the character of the applicant, but it is intended to make the circulation of the black list a crime, and most of the names on these black lists are there for political offenses. It has become tyrannical . . ."[48] But although this sufficed to get the proposal past its first reading before a sparsely-attended session,[49] the opposition had the votes when the measure once again reached the floor and were, in addition, armed with an adverse report on the proposal from the committee to which it had been commended. The argument made against the section was that since a workman whose name was wrongfully inscribed on a black list had the right to sue for libel, the section was in conflict with other provisions of the Constitution dealing with the right to recover for defamation.[50] This view impressed the Convention, and Parsons' original proposal was defeated by a substantial margin. At that point a substitute was offered by William Lauder of Wahpeton, an attorney:

> "Every citizen of this State shall be free to obtain employment wherever possible, and any person, corporation or agent thereof interfering or hindering in any way a citizen from obtaining or enjoying employment already obtained from any other corporation or person shall be deemed guilty of a misdemeanor and shall be punished as shall be perscribed by law."[51]

This served to provoke an intriguing parliamentary encounter as well as to provide what is probably the most relevant portion of the provision's legislative history. A motion was promptly made to lay Lauder's substitute on the table, whereupon Lauder, apparently ignoring the point that the motion to table was not debatable, rose to debate it anyway.

"It seems to me," Lauder declared, "that there is a disposition here to enforce a sort of gag rule. I hope every member of this convention will study this section — look it over carefully, and see, satisfy yourselves, if you can, that there is nothing wrong about it. It provides that every citizen shall be free to obtain employment

48. *Id.* at 369.

49. "It seems to me that this is one of the most important articles we have had under consideration, and I am very sorry that it comes up now that the House is so empty." *Id.* at 366.

50. *Id.* at 533.

51. *Id.* at 537.

wherever possible. That protects a man who is seeking employment from interference by those who are on strike, or who would prevent it. 'Any person, corporation or agent thereof, interfering or hindering in any way a citizen,' and so on. That protects the man who is seeking employment from being hindered and if there is anything wrong about that I would like to have it pointed out to me."[52]

Burleigh Spalding of Fargo, an attorney, then moved to amend Lauder's proposal by inserting the word "maliciously" before "interfering" and deleting the reference to punishment.[53] As so amended the proposal, notably lacking any reference to the black list, was then carried. The foes of the black list, however, were not so readily discouraged. Three days later they again raised the issue, presumably after an appropriate amount of lobbying, and offered a new proposal in the form of a simple declaration: "The exchange of black lists between corporations shall be prohibited."[54] There was a surprisingly brief flurry of additional argument — "If this is adopted they will be able then to get up red lists and then blue lists. Men who want to can get around these things without any trouble" — but it was of relatively apathetic character; and both § 23 and § 209 of the North Dakota Constitution had thereby won adoption.

The prohibition against black listing appears to have proved innocuous and has never been judicially construed,[55] though it should be noted that black listing by a labor union constitutes an unfair labor practice under the North Dakota Labor-Management Relations Act.[56] Section 23 of the Constitution, however, is a potential source of uncertainty in the law. The major question arising from its broadly generalized language — at the moment purely theoretical, since the point is unequivocally settled by statute[57] — is whether it amounts to a constitutional prohibition of the closed or the union shop. It has been argued that requiring an employee to join a labor organization as a condition of retaining his employment, which is the basic feature of the union shop, amounts to "hindering" him from "enjoying employment already obtained." Mr. Justice Grimson came extremely close to employing this precise construction in *Minor v. Building & Construction Trades Council* as re-

52. *Ibid.*
53. *Ibid.*
54. *Id.* at 626; this is now N.D. Const. § 209.
55. The same thing is true of N.D. Cent. Code § 34-01-07, a statutory re-enactment of the section.
56. N.D. Labor-Management Relations Act § 3 (2) (h).
57. N.D. Cent. Code § 34-01-14.
58. 75 N.W.2d 139 (N.D. 1956).

cently as 1956, and the terminology of the section — it prohibits "interfering or hindering *in any way*" — is certainly not inconsistent with such a reading.

On the other hand, the merits of the closed or union shop were — as the preceding discussion of the debate at the Convention indicates — not the topics which the delegates had in mind when they were discussing § 23. Morever, it should be noted that it is not just hindrance or interference with employment which the section prohibits. The action must be taken *maliciously,* an extremely important requirement susceptible of numerous varying constructions.[59] The *Restatement of Torts,* for instance, adopts the position that so long as union membership is open to an employee on reasonable terms his fellow employees are privileged to secure his dismissal for non-membership as a legitimate method of advancing their own economic interests.[60] This position has, however, not been accepted without vigorous dissent and the issue seems reasonably open in terms of the case law.[61]

Another factor bearing upon the question involves the problem of whether § 23 is self-executing. It should be noted that while violation of the section is declared by its language to be a misdemeanor, Spalding's amendment deleted any reference to punishment and thus left the extent of the penalty to be imposed subject to legislative determination. Some evidence that contemporary opinion did not regard these sections as being of self-executing character is to be found in the circumstances that both § 23 and § 209 of the Constitution — which were obviously part of the same general proposal and initially sponsored by the same delegate — were re-enacted as a part of the statutory law of this state shortly after the Constitution became effective.[62] If this is an accurate reading of the history and purpose of the section, then it may be suggested further that its effect was intended to vary according to the legislative amplification it receives, i.e., that an act is malicious if it breaches a statutory policy of the state of North Dakota regarding freedom of employment but is not malicious within the meaning of the Constitutional provision if in accord with the statutes. Such an interpretation would render any reasonably relevant statute cal-

59. In the context of North Dakota criminal law, the words "malice" and "maliciously" are defined to "import a wish to vex, annoy, or injure another person, *or* an intent to do a wrongful act, established either by proof or presumption of law." N.D. Century Code § 12-01-04 (4) (emphasis supplied). On the basis of this statute alone, at least three constructions of the term "maliciously" are possible.

60. Restatement, Torts § 810 (1939); Prosser, Torts 1001 et seq. (1941).

61. Eskin, *The Legality of "Peaceful Coercion" in Labor Disputes,* 85 U.Pa.L.Rev. 456 (1937).

62. N.D. Cent. Code §§ 34-01-06, 34-01-07.

culated in the judgment of the Legislative Assembly to promote employment permissible under the terms of § 23; and whether the union shop helps or hinders this objective seems appropriately a matter for legislative judgment.

The legislative history of § 120 of the North Dakota Constitution also indicates a connection with labor problems, although it is believed that the final outcome was of little practical contemporary significance. Section 120 provides:

> "Tribunals of conciliation may be established with such powers and duties as shall be prescribed by law, or the powers and duties of such may be conferred upon other courts of justice; but such tribunals or other courts when sitting as such, shall have no power to render judgment to be obligatory on the parties, unless they voluntarily submit their matters of difference and agree to abide the judgment of such tribunals or courts."

While the Debates are silent upon the origin of this provision, it appears to have been a modified version of a section of the Michigan Constitution of 1850.[63] The understanding which the delegates had of its meaning is indicated by a debate which occurred on the thirty-sixth day of the convention when William Lauder offered a resolution providing that "Laws shall be passed by the Legislative Assembly providing for the amicable settlement of differences between employers and employes by arbitration."[64] The following colloquy then occurred on the floor of the Convention:

> "Mr. STEVENS. I desire to know if that is not already covered in the provision which provides for boards of conciliation.
>
> "Mr. LAUDER. No, that is not provided for. The boards of conciliation provided for in the judicial report simply provide for the settlement of differences that may arise without a law suit. It doesnot provide for the settlement of differences that arise between employers and employees. This provides for an entirely different thing and I hope it will pass."[65]

After discussion of the question whether Lauder's proposal amounted to authorizing compulsory arbitration of labor disputes — something Lauder denied — Stevens read the text of § 120 to the Convention and continued:

> "Now, unless the conciliatory measures to be adopted as a

63. "The legislature may establish courts of conciliation with such powers and duties as shall be prescribed by law." Mich. Const. Art. 6, § 23 (1850). Pursuant to the provisions of this section, Michigan did in fact establish a tribunal known as the "state court of mediation and arbitration" to aid in the settlement of labor disputes. The operation of this court is interestingly described in Renaud v. State Court of Mediation and Arbitration, 124 Mich. 648, 83 N.W. 620 (1900), which suggests that the orignal inspiration for the establishment of such tribunals came from a Norwegian statute enacted in 1824.

64. Debates, North Dakota Constitutional Convention 523 (1889).

65. *Id.* at 524.

Board of Arbitration (sic) conform to this section, it would be in conflict with this section, and if it does conform, it is covered by this section, and these courts could settle differences between employer and employee as well as differences between any other parties. It seems to me that the matter is fully covered by this section, and any other board to be established would be in conflict with this section."[66]

Although Lauder continued to maintain that his proposal provided for "an entirely different thing," the position taken by Stevens that § 120 allowed the State to do everything Lauder wanted to do struck the majority of the delegates as sounder, and Lauder's proposal was ultimately tabled.[67] Since § 120 is permissible in character and merely grants permission to the State to do something which it would be authorized to do anyway in the absence of a constitutional provision, it has been of little practical significance since its adoption.

As noted previously, the Convention also took up the problem of child labor. The initial proposal was to prohibit the labor of children under 15 in "mines, factories, and work shops,"[68] this last stipulation being obviously designed to permit the employment of minors in occupations of other types, e.g., agriculture. But on the floor of the convention the proposal encountered difficulties and in the end emerged with the age limit lowered to 12 years. That this was a meaningless and inconclusive outcome is apparent from the fact that the first session of the Legislative Assembly, meeting within three months of the adjournment of the Constitutional Convention, raised the limit to 14 years and broadened the proscription against child labor to include mercantile establishments, though making the statute effective only during school hours.[69] Since that time, the significant laws reating to child labor have been found on the statute books rather than in the Constitution. If it does anything, the child labor amendment does little more than demonstrate graphically the point that it is unrealistic to attempt to regulate the relationship between employers and employees by fixed Constitutional provisions and that such matters are far better handled by statute.

V. THE STATUTORY PATTERN

It has been remarked that the law of labor must be viewed as the outgrowth of an evolutionary process — the transformation of an agrarian society into an industrial one — which began with the

66. *Ibid.*
67. *Id.* at 526.
68. *Id.* at 506.
69. N.D. Laws 1890, c. 62, § 143.

Industrial Revolution and is still going on.[70] Considered in this light the development of North Dakota's labor statutes furnishes an interesting subject of investigation.

The earliest statutes relating to the employer-employee relationship in this jurisdiction were originally derived from the California version of the Field Code. Appearing in the 1887 edition of the Dakota Civil Code under the title "Service,"[71] they were of a rather basic character[72] and represented little more than a logical amplification of fundamental principles of the law of contracts as directed toward the master-servant relationship. While the care with which they were drafted was noteworthy, it is fairly plain that the essence of these early enactments — which currently constitute the bulk of chapters 34-01 through 34-04 of the Century Code — lay in an implicit recognition of laissez-faire principles of economics as expressed in law. The statutes contemplated a bargain between an *individual* employer and an *individual* employee, and it was sufficient for their purpose if the hirer and the hired, whatever their actual disparity in economic bargaining power, had come to an agreement the law could regard as voluntary. The idea that society had an interest (or, at least, very much of an interest) in the terms and conditions of the bargain nowhere appears in the early statutes;[73] and equally notable by its absence was the concept that bargaining between employers and employees could involve groups, i.e., that there could be a process of *collective* bargaining.[74]

This was a situation which, in the light of contemporary economic development, could not be expected to endure indefinitely. Indeed, the growing acceptance of the point that the public has a legitimate concern with the consequences of contracts of employment, and the steady shift in emphasis to the more realistic modern view that most significant employment relationships are the result of a collective

70. Plock, *Methods Adopted by States for Settlement of Labor Disputes Without Original Recourse to Courts*, 34 Iowa L. Rev. 430 (1949).

71. Dak. Civ. Code §§ 1128-1207 (1887).

72. It is interesting to note that these early enactments dealt with the topic of shipmasters, mates, seamen and ships' managers more extensively than with any other subject, undoubtedly in deference to the prevalence of water transportation along the Missouri. Dak. Civ. Code §§ 1173-1205 (1877).

73. The closest they came to imposing any serious restrictions on the freedom of the parties to set any terms they wished was to provide that the time of a servant belonged to the master only to the extent of ten hours per day; and even this provision was qualified by an exception in the case of domestic servants, whose entire time was stipulated to belong to the employer. Dak. Civ. Code § 1161. As to who is a master and who a servant, see Restatement, Agency § 220, Comment *a* (1933).

74. At one time, of course, any combination between working men to improve their wages or conditions of work was punishable as a conspiracy; but this ancient rule of the common law has never prevailed in this state.

bargaining process appear to furnish the two main channels of the law's development.

But for all of that, it was a slow process. Additional regulation of child labor did not come until 1909.[75] It was not until 1919 that statutes prescribing the maximum hours of work and rates of pay for women and children were adopted in North Dakota,[76] or that workmen's compensation was introduced.[77]

It was not until as recently as 1935 that the first of the genuinely contemporary statutes found its way onto the books. In that year the North Dakota Legislative Assembly, moved by considerations ably set forth in a preceding issue of the *North Dakota Law Review*,[78] enacted a substantially verbatim version of the Norris-La-Guardia Act and thereby attempted to curb the use of the injunction as a weapon in labor disputes.[79] The anti-injunction act was, for the time being, a high water mark in the field and was followed by a period of relative quiescence.

With the conclusion of World War II, however, it became apparent that legislative attention was focusing on problems of labor relations more strongly than ever. In common with a good many other western and southern states,[80] North Dakota enacted in 1947 legislation broadly regulating union activities.[81] Vigorously opposed

75. N.D. Laws 1909, c. 153. Since that time the statutes have gradually evolved to their present form by a process of successive amendment. Testimony before the Special Committee to Study Labor Laws indicates that the child labor provisions now on the statute books are often disregarded and that the procedures for issuance of an employment certificate are excessively cumbersome. The Special Committee accordingly recommended simplification of the current statutes, but the draft legislation was tied to the unsuccessful statute creating a separate deparment of labor and the failure of the later statute ended the prospect of success. The relationship between state and federal law in this area should be noted. The Fair Labor Standards Act of 1938 provides generally that the labor of children under 16 shall not be used in establishments producing goods for shipment in interstate or foreign commerce. 52 Stat. 1067 (1938), 29 U.S.C. § 212 (1958). But this does not apply to agricultural employment outside of school hours. 52 Stat. 1067 (1938), 29 U.S.C. § 213 (c) (1958). There are, in addition, further regulations prescribed in the case of sugar beet workers. 70 Stat. 220 (1956), 7 U.S.C. § 1131 (a). Senator McNamara of Michigan has declared that "In 1957, the last year for which complete figures are available, more than 227,000 children between the ages of 10 and 13 were classified as paid farm-workers. One-third of these children put in a workweek of 35 hours or more. We have no accurate figures on how many workers were younger than 10; but there is evidence that the number is large. There is also evidence to indicate that a large number of youngsters between 14 and 16 are full-time paid workers during a good part of the year." Cong. Rec., June 9, 1959, 9230. There are national figures and no figures have been located indicating the number of children employed in agricultural labor in North Dakota.

76. N.D. Laws 1919 c. 174.

77. N.D. Laws 1919, c. 162.

78. Kerian, *Injunctions in Labor Disputes: The History of the Norris-LaGuardia Act*, 37 N.D. L. Rev. 49 (1961).

79. N.D. Cent. Code c. 34-08.

80. "In a considerable number of predominantly agricultural states in the West and South, in which the growth of industry and of labor unions has been greatly stimulated by war conditions, the rising tide of anti-union sentiment has brought about the enactment of labor legislation which is predominantly anti-union in character." Dodd, *Some State Legislatures Go to War — on Labor Unions*, 29 Iowa L. Rev. 148, 150 (1943).

81. N.D. Laws 1947, c. 242.

by the state's labor organizations, the measure was referred to a vote of the people at the 1948 election but passed quite handily. The effect of this legislation was to impose extensive reporting requirements upon labor organizations,[82] to place restrictions on picketing,[83] and to prohibit entirely the use of boycotting, secondary boycotting, and sympathy strikes as weapons in labor disputes.[84] The state also elected, at this time, to join the ranks of those jurisdictions possessing "right-to-work" laws,[85] and thus banned both the closed and union shop.[86]

However, the influence of contemporary developments in other fields of labor law also made itself felt. In 1951 there was introduced into the Legislative Assembly a measure embodying the substance of the Minnesota labor relations act, but the proposal failed to gain approval. This was followed two years later by a bill establishing a labor dispute board with limited powers, its function being primarily that of conciliation, which was enacted.[87] The 1953 session also repealed the reporting requirements imposed on unions

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82. N.D. Laws 1947, c. 242, §§ 2-5.

83. As it currently appears on the statute books, having been amended in 1953, the secton provides that "In any strike in this state it shall be illegal for any person other than an employee of the particular establishment against which such strike is called or a local resident member of the union representing the employees of such establishment to picket in aid of such strike. Picketing in violation of this section is hereby declared to be unlawful and against the peace and dignity of the state and shall be subject to restraint by the district court of the county where such picketing occurs." N.D. Cent. Code § 34-09-12. In AFL v. Swing, 312 U.S. 321, 324-26 (1941), Mr. Justice Frankfurter declared: "We are asked to sustain a decree which asserts as the common law of a state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him. Such a ban on free communication is inconsistent with the guarantee of freedom of speech . . . A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." See also Shiland v. Retail Clerks, 259 Ala. 277, 66 So.2d 146 (1953).

84. "Boycotting, secondary boycotting and sympathy strikes are hereby declared to be against the public policy and against the peace and dignity of the state of North Dakota and shall be subject to restraint by the district courts of the state of North Dakota as well as suits for damages therein." N.D. Cent. Code § 34-09-13. *Compare* Ex Parte Blaney, ,30 Cal.2d 643, 184 P.2d 892 (1947); Simons Brick Co. v. United Brick, Tile & Clay Workers, 32 Cal.2d 156, 194 P.2d 696 (1948); Weston v. Superior Court, 31 Cal.2d 866, 189 P.2d 9 (1948; Butte v. Distillery Workers Int. Union, 31 Cal.2d 687, 189 P.2d 9 (1948), *with* Hotel & R.E.I. Alliance v. Wisconsin Employment Relations Board, 236 Wis. 239, 294 N.W. 632, 295 N.W. 634 (1941).

85. There are 19 such states. See Ala. Code, Tit. 26, § 375(1)-(7) (1940); Ariz. Rev. Stat. §§ 23-1301 — 23-1307 (1955); Ark. Const. Amend. 34; Fla. Const. § 12; Ga. Laws 1947, c. 140; Ind. Laws 1957, c. 190; Iowa Code §§ 736A.1 — 736A.8 (1958); Kan. Const., Art. 15 § 12; Miss. Code §§ 6984.5 — 6995.5 (1942); Neb. Const., Art. 15 §§ 13-15; Nev. Rev. Stat. §§ 613.230, 613.300; N.D. Cent. Code § 34-01-14; S.C. Laws 1954, S.B. 443 §§ 1-2; S.D. Code §§ 17.1101 — 17.9914 (Supp. 1952); Tenn. Code § 11412.8 (1932); Tex. Laws 1955, c. 45 §§ 1-6; Utah Laws 1955, c. 85; Va. Code § 40-7402. Louisiana has repealed its general right-to-work law but has kept it for agricultural labor. La. Laws 1956, c. 16 and 397. New Hampshire repealed its statute in 1949. N.H. Laws 1949, c. 57.

86. Minor v. Building & Construction Trades Council, 75 N.W.2d 139 (N.D. 1956).

87. N.D. Cent. Code c. 34-10.

in 1947, apparently on the ground their validity was questionable.[88]

The labor dispute board established in 1953 was the first North Dakota agency specifically charged with responsibility for overseeing the conduct of labor disputes. However, its record was not impressive[89] and the restricted character of its authority was so apparent that it failed to halt further proposals for amplification of the state's labor statutes. In 1957 the proposal to adopt legislation following the Minnesota model was once again put forward, though once more without success. After being extensively amended the measure was not passed.

This served as a prelude to the 1959 session, which witnessed a notable effort to enact a comprehensive labor relations statute. The measure in question, denominated the "North Dakota Labor Peace Act,[90] was patterned after statutes found in Wisconsin, Utah, and Colorado. Carefully drafted on the basis of extensive research, the chances for its enactment appeared promising. However, the measure was a lengthy one, was presented late in the legislative session, and contained an appropriation. As a result it ran afoul of a parliamentary rule requiring a two-thirds majority for enactment, which it had no prospect of obtaining. This incident undoubtedly had a bearing on the legislation enacted in 1961, since the defeat of the bill was promptly followed by passage of a resolution authorizing the appointment of a special committee to study the subject of labor legislation.[91] The ultimate outcome was that the Special Committee to Study Labor Laws recommended the current measure. It is thus apparent that while the North Dakota Labor-Management Relations Act breaks new substantive ground it has a substantial legislative history behind it, and fits quite readily into the general evolutionary pattern previously mentioned.

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88. But see AFL v. McAdory, 246 Ala. 1, 18 So.2d 810, *app. dismissed* 325 U.S. 450 (1945), upholding such requirements. It should be noted that N.D. Labor-Management Relations Act § 12 designates the Commissioner of Agriculture and Labor as the official to receive copies of all reports made by labor organizations to the Secretary of Labor of the United States.

89. Labor representatives before the Special Committee to Study Labor Laws took the position it had failed to resolve any labor disputes whatever. It should be noted that the board's personnel changed from dispute to dispute, thus depriving the board of continuity, and that it lacked power to do more than make public recommendations and findings.

90. H.B. 859, N.D. Legislative Assembly (1959).

91. N.D. Laws 1959, House Concurrent Resolution G-2. The resolution provided that: "Whereas, it is the desire of the Legislative Assembly to examine the labor laws of the state of North Dakota; and whereas, it is extremely difficult during a hurried sixty-day session to properly study and examine this field and to prepare comprehensive legislation upon this subject; Now, therefore, be it resolved by the House of Representatives of the State of North Dakota, the Senate concurring therein: That the governor is hereby authorized to appoint a special committee consisting of members of the legislative assembly, the general public, and such other persons as the governor may determine to study and examine the labor laws of the state of North Dakota during the 1959-61 biennium and to make its report and recommendations to the governor and to the thirty-seventh legislative assembly."

VI.

THE RIGHT TO ORGANIZE AND BARGAIN COLLECTIVELY

It is probable that in no other area of labor law do the states vary so widely as in respect to their legislation regarding the right of employees to organize for the purpose of collective bargaining. These provisions are usually the crux of state labor legislation and normally determine the practical effectiveness or ineffectiveness of the various state enactments.

Since the North Dakota Labor-Management Relations Act basically follows the federal pattern in this regard, some understanding of the point of view embodied in the National Labor-Management Relations Act of 1947 is desirable. The federal statute is premised on the view that from the standpoint of employees the right to organize and bargain collectively is essentially the equivalent of the right possessed by employers to associate together in corporations, partnerships, and associations, and is entitled to protection for much the same reasons.[92] That employees need the right of self-organization and that it is socially desirable is widely recognized. Thirty-eight states out of 50 have declared in favor of freedom of organization either as a matter of policy or of explicit law, and no state affirmatively forbids its exercise.[93] The most widely-copied enactment in the field is § 7 of the National Labor-Management Relations Act of 1947,[94] which provides that:

> "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 other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by § 8 (a) (3) of this Act."

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92. Thus, one justification cited for the enactment of the Norris-LaGuardia Act was that "under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor . .." 47 Stat. 70 (1932), 29 U.S.C. § 102 (1958). And the Taft-Hartley Act itself declared that "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association . . . tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." 61 Stat. 136, (1947), 29 U.S.C. § 151 (1958). See NLRB v. Cleveland-Cliffs Iron Co., 133 F.2d 295, 301 (6th Cir. 1943).

93. See footnotes 100-102, *infra*.

94. 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).

This provision has been described as "the heart of the National Labor Relations Act."[95]

Although the North Dakota Labor-Management Relations Act does not adopt this language verbatim (this is a consequence of the fact the federal statute leaves the status of the closed and union shops optional with the states whereas North Dakota prohibits them) the resemblance between the two statutes is extremely close. Section 2 of the North Dakota statute provides that:

> "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 other lawful concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities and shall be free to decline to associate with their fellows and shall be free to obtain employment wherever possible without interference or being hindered in any way."

Interference with rights conferred by § 2 is explicitly made an unfair labor practice by a succeeding section of the North Dakota act.[96]

Recognition of the right of self-organization is, of course, not unknown in prior North Dakota statutes.[97] However, the earlier laws have simply provided that it is the *policy* of the state to permit organization for the purpose of collective bargaining, without attempting to provide mechanisms whereby the policy could be made *enforceable.* This is the fundamental difference.

As a practical matter the administration of statutes of the foregoing type often presents the advocate with difficult evidentiary problems, since interference with the right of employee self-organization can take many forms. A study made in 1942 listed as illustrative examples of attempts to evade the statute cases in which employees (a) are discharged outright because of membership in, or activity on behalf of, a labor organization opposed by the employer; (b) are locked out discriminatorily following a strike because of union activity; (c) are rehired after a lockout only to be discharged for apparent good cause; (d) are laid off on false grounds of inefficiency; (e) are laid off ostensibly because of a reduction in force, shutdown of a department, work shortage, etc.,

95. Youngdahl, *Federal Limitations on State Jurisdiction Over Labor-Management Relations,* 12 Ark. L. Rev. 354, 368 (1958).

96. N.D. Labor-Management Relations Act § 3 (1) (a).

97. See N.D. Cent. Code §§ 34-08-02, 34-09-01. Even § 34-01-14, N.D. Cent. Code, provides that "the right of persons to work shall not be denied or abridged on account of *membership* . . . in any labor union . . ."

when in fact discrimination because of unionism is involved, as shown by less competent or less experienced persons being retained or transferred or rehired; (f) are rehired after a strike but harassed until the employment becomes unbearable and the affected employee is forced to quit; (g) are discharged because of keeping union literature in a locker or wearing union buttons; (h) are transferred to less remunerative employment, or to work entailing other disadvantages, because of the employer's opposition to a union; or (i) are refused employment because the applicant is a union member or has been active in union matters.[98]

Under current federal law each of the foregoing actions would be subject to restraint as an unfair labor practice on the ground they interfered with the right of self-organization by "discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization."[99] The same result is contemplated under the current North Dakota enactment.

This is an advanced position on a matter concerning which the states, as previously noted, have enacted widely varying provisions. Since this is a key area of contemporary labor law the various state enactments are by no means uniform, and it is sometimes not easy to classify a state or determine the category into which it falls. The American states, however, appear to fall roughly into four general classifications:

1. *States in which the right of self-organization is protected by a labor relations act.* While the terms of the enactments vary, this listing includes Colorado, Connecticut, Hawaii, Massachusetts, Michigan, Minnesota, New York, North Dakota, Pennsylvania, Rhode Island, Utah, and Wisconsin, as well as Puerto Rico.[100]

2. *States in which the right of self-organization is legally protected but not administratively implemented.* In this category fall California, Florida, Kansas, Kentucky, Louisiana, Maine, Nevada, and North Carolina.[101]

3. *States in which the right of self-organization is merely favored as a matter of public policy.* This group includes Alabama, Ark-

98. Bowman, Public Control of Labor Relations 77-78 (1942).
99. 65 Stat. 601 (1951), 29 U.S.C. § 158 (a) (3).
100. See Colo. Rev. Stat. c. 80-5 (1953); Conn. Gen. Stat. § 31,105 *et seq.* (1958); Mass. Gen. Laws, c. 150a; Mich. Comp. Laws, c. 423 (1948); Minn. Stat. Ann. § 179.08 *et seq.* (1957); N.Y. Consol. Laws § 700-716; Purdon's Pa. Stat. Ann., Tit. 43, §§ 211.1 — 211.13; R.I. Laws 1941, c. 1066; Utah Code § 34-1-1 *et seq.* (1953); Wis. Stat. §§ 111.1-111.9 (1957).
101. Cal. Labor Code §§ 920-923; Fla. Stat. §§ 447.03, 447.09 (1959); Kan. Gen. Stat. Ann. § 44-803 (1949); Ky. Rev. Stat. § 336.130 (1956); La. Rev. Stat. §§ 23.8222, 23.824 (1950); Me. Rev.' Stat. c. 30, § 15. (Supp. 1959); Nev. Rev. Stat. §§ 614.090 (1), 604.111; N.C. Gen. Stat. § 95-83.

kansas, Idaho, Illinois, Indiana, Iowa, Maryland, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Texas, Washington, and Wyoming.[102]

4. *States in which the right of self-organization is not declared by statute.* These states are Alaska, Arizona, Delaware, Georgia, Mississippi, Montana, South Carolina, South Dakota, Tennessee, Virginia, and West Virginia.

VII. UNFAIR LABOR PRACTICES

A. *Employers*

Most of the practices which the North Dakota Labor-Management Relations Act defines as unfair when engaged in by an employer center about the rights conferred upon employees by § 2 of the Act. Thus the broad principle underlying many of the provisions of § 3 (1) of the Act, which defines unfair labor practices on the part of employers, is one of securing to employees effective freedom of choice in making the decision whether to join a labor organization by insulating them as far as reasonably possible from legal or economic pressure or coercion on the part of employers.[103] For this reason, § 3 (1) (a) of the Act stipulates generally that it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their rights under § 2. Similarly, § 3 (1) (c) provides that it is unfair for an employer to encourage or discourage membership in a labor organization by "discrimination in regard to hire or tenure of employment".

While the language of § 3 (1) is closely copied from the comparable provisions of the National Labor-Management Relations Act of 1947, at least one significant amendment found its way into the statute during the course of its preparation. Section 3 (1) (b) of the North Dakota Act makes it an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." This was a provision fundamentally intended in the

102. Ala. Code, Tit. 26, § 383 (1940); Ark. Stat. § 41-4124 (1947); Idaho Code § 44-701 (1947); Ill. Rev. Stat., c. 48, § 2b (1957); Burns Ann. Ind. Stat. § 40-502 (1933); Iowa Code § 553.11 (1958); Md. Ann. Code, Art. 100, § 63 (1951); Mo. Const. Art. 1, § 29 Neb. Laws 1959, c. 231, § 4; N.H. Rev. Stat., c. 589, § 11 (1955); N.J. Const., Art. 1, § 19; N.M. Laws 1959, c. 26, § 1; Okla. Stat., Tit. 21, c. 52, § 126.11 (1951); Ore. Rev. Stat. § 662.040; Tex. Rev. Civ. Stat. § 5152 (1948); Wash. Rev. Stat. § 49.32.020; Wyo. Comp. Stat. § 54-501 (1945).

103. "The trend of the statutes is toward a point at which domination of an individual, a group, a union, or a business, by use of force, bribery, coercion, or other phyisical or economic means, will no longer be tolerated. American ideals of freedom and fair play are effective in declarations that such domination is out of bounds." Plock, *supra* note 70, at 478.

federal enactment to furnish protection against the so-called "company union."[104] However, the North Dakota statute adds to the language of § 3 (1) (b) the further proviso that its language is not to be construed to "prohibit an employer from conferring with employees or their bona fide representatives and including, but not by way of limitation, explaining the position of management in connection with the internal problems of the employer during working hours without the loss of pay."

This amendment raises a thoroughly sensitive issue. At the root of the problem is the thorny question of when the exercise of the right of free speech passes the dividing line between advocacy and interference. It is, of course, perfectly ligitimate for an employer to freely express and advocate opposition to employee organization.[105] He may do so, as the preceednts make plain, in thoroughly vigorous fashion.[106] Both the Federal and North Dakota statutes contain a provision dealing with this precise matter:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."[107]

Adjudications under the Federal Act, however, have drawn a sharp distinction between *argument* on one hand *and coercion* on the other.[108] It has been recognized that the economic power over employees normally possessed by employers often makes statements on the part of employers far more significant in terms of their effect upon employee conduct than similar statements would be if made by a third party.[109]

In connection with this problem the NLRB has evolved what is known as the "captive audience" doctrine. With an election to determine the statute of his plant as union or non-union impending, an employer is privileged to assemble his workers for a pre-election campaign speech on company time and on the company premises.[110]

104. See Dixie Bedding Manufacturing Co. v. NLRB, 268 F.2d 901 (5th Cir. 1959).
105. NLRB v. Armco Drainage & Metal Products, Inc., 220 F.2d 573 (6th Cir. 1955), *cert. denied*, 350 U.S. 838 (195).
106. Thus, "appeals to reason," as well as characterization of unions as "outlaw," "wildcat," and "off-breed," or admonitions to "stay out of trouble" have been held priviledged. CCH 1960 Guidebook to Labor Relations § 603.
107. 65 Stat. 601, 29 U.S.C. § 158 (c) (1958); N.D. Labor-Management Relations Act § 8 (3).
108. NLRB v. Salant & Salant, Inc., 183 F.2d 462 (6th Cir. 1950); NLRB v. Sidran, 181 F.2d 671 (5th Cir. 1950).
109. CCH 1960 Guidebook to Labor Relations § 603.
110. Livingston Shirt Corporation, 107 NLRB 400 (1953); NLRB v. American Tube Bending Co., 205 F.2d 45 (2d Cir. 1953).

However, he must give the union an opportunity to reply if union solicitation on his premises, during the employees' free time, is not permitted.[111] On the other hand, if the employer permits such union solicitation, no opportunity to reply to statements made by the employer at a meeting of his employees called to discuss the question of unionization need be afforded.[112] Coupled with these decisions has been the so-called "24-hour rule". The NLRB has ruled that neither employer nor union may make speeches to massed assemblies of employees within 24 hours of a plant election, though this proscription does not apply where attendance at a meeting is voluntary and is held off company premises on the employees' own time.[113] The employee thus has at least 24 hours to consider his decision and cast a calm and reflective vote, a not-inconsiderable privilege in an era marked by the prevalence of high-powered propaganda. How far the amendment to § 3 (1) (b) affects these interpretations given to the federal act is uncertain. It is, of course, apparent that the amendment does not authorize the use of coercion, since the statute retains the rule that the expression of views is not privileged if such expression contains threats or reprisal, force, or the promise of benefit. On the other hand, the dividing line between a conference and a meeting is as best a metaphysical one, and no time limit is set in the statute for the holding of such a conference. While it is believed the amendment can not be interpreted in such a manner as to infringe the right of employees to make a free and unfettered choice, it is nevertheless apparent that enforcement of the captive audience doctrine and the 24-hour rule in this jurisdiction will present some extremely close and difficult question.

Section 3 (1) (d) of the North Dakota Act makes it an unfair practice to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act, and § 3 (1) (e) makes it an unfair practice to refuse to bargain collectively with employee representatives. These are identical to federal provisions on the same subject.

B. *Labor Organizations*

As initially drafted the North Dakota Labor-Management Relations Act adhered closely to the federal provisions regarding un-

111. Bonwit Teller, Inc. v. NLRB, 197 F.2d 640 (2d Cir. 1952); but see Livingston Shirt Corporation, 107 NLRB 400 (1953). As to the general duty to permit solicitation, see Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
112. Bonwit Teller, Inc. v. NLRB, 197 F.2d 640 (2d Cir. 1952).
113. Peerless Plywood Co., 107 NLRB 427 (1953).

fair labor practices on the part of both employers and labor organizations. However, during the course of committee discussion the section of the Act relating to unfair labor practices by labor organizations underwent some expansion. As ultimately passed the Act therefore defines as an unfair practice some types of union conduct not so listed in the Federal Act.

In keeping with the fundamental philosophy that the choice of a bargaining representative by employees is a matter in which the employees are entitled to freedom from outside interference, the Act surrounds the rights given to employees by § 2 with protection from the effects of union as employer activities. Thus it is an unfair labor practice for a union to restrain or coerce employees in the exercise of their freedom to organize and bargain collectively, either directly[114] or — as sometimes happens — by causing an employer to do so.[115] While this broad principle of freedom from restraint or coercion is applicable to a wide variety of situations, its primary thrust in the case of labor organizations is normally directed against violence or the threat of violence in connection with representation elections and labor disputes.[116] It thus serves as a device for keeping union activities peaceful in character.

In drafting the North Dakota Act, some difficulty was encountered in adapting the so-called "hot cargo" and "secondary boycott" provisions of the Federal Act to local purposes. As a reading of these portions of the National Labor-Management Relations Act will make clear, the sections in question are of a lengthy and complex character and by no means represent a triumph of federal legislative draftsmanship.[117] A North Dakota statute[118] enacted in 1947 already prohibited the practice of secondary boy-

114. "It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce employees in the exercise of rights guaranteed in § 2 of this Act . . ." N.D. Labor-Management Relations Act § 3 (2) (a).

115. "It shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to case an employer to discriminate or restrain or coerce employees in the exercise of the rights set forth in § 2 of this Act." N.D. Labor-Management Relations Act § 3 (2) (b).

116. The fundamental intention of the Act is to place employers and labor organizations under an identical disability to interfere with the freedom of employees to choose their bargaining representatives. However, as a moment's consideration will indicate, there is an intrinsic difference in the position of the employer and the labor organzation with respect to the employee. Hence certain forms of conduct which are illegal in the case of the employer are permissible in the case of the labor organization, and vice versa. The use of force or violence is, of course, the clearest example of a union violation of the freedom of employees to make their own choice of a bargaining representative. See Progressive Mineworkers v. NLRB, 187 F.2d 298 (7th Cir. 1951). Equally, however, as in the case of employers, the North Dakota Act will be susceptible of use against more subtle forms of coercion. Note the statement made in Aaron and Levin, *The Labor Injunction in Action*, 39 Calif. L. Rev. 42, 64 (1951): "All unions know, and some will admit, that a degree of intimidation is often a vital ingredient in a successful organizational drive."

117. 73 Stat. 542 (1959), 29 U.S.C.A. § 158 (b) (4).

118. N.D. Cent .Code § 34-09-13.

cotting in this state, and one potential solution to the difficulty would have been to omit any reference to the matter from the Labor-Management Relations Act altogether, thus leaving it to be regulated exclusively by the earlier enactment. However, the 1947 enactment failed to define the term "secondary boycott," and case law from other jurisdictions indicates that enforcement of the statute may thus encounter constitutional difficulties arising from uncertainty as to the precise meaning of the term.[119] In consequence the North Dakota act was ultimately framed to include a simplified version of the Federal statute, intended to include the basic policy of the Federal law without necessarily incorporating all its technical ramifications. Even as thus reframed, the statute is complex enough. It provides, in § 3 (2) (e), that it is an unfair labor practice for a labor organization or its agents:

> "To engage in, or to induce or encourage any employee to engage in, a strike or a refusal in the course of his employment to use or work on any goods, articles, materials or commodities, or to perform any services, or to threaten, coerce or restrain any person for the purpose of forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor ,or manufacturer, or to cease doing business with any other person, or forcing or requiring any employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization as the representative of his employees unless such labor organization has been certified as the representative of his employees under the provisions of section 5 of this Act; but nothing in this subsection shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing, and nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer, other than his own employer, if the employees of such other employer are engaged in a lawful strike."

A study of the federal statute has pointed out that the comparable provision of the National Labor-Management Relations Act of 1947 condemns three things: (1) an actual work stoppage or refusal to work; (2) inducing or encouraging of a work stoppage or refusal to work; (3) threats, coercion, or restraint of any person engaged in a business covered by the Federal Act, *where an object of such action is forcing or requiring any person to cease dealing or doing business with any other person.*[120] For this reason the Federal Act has been said not to amount to a general prohibition

119. See footnote 84, *supra*.
120. CCH 1960 Guidebook to Labor Relations § 1105.

of secondary boycotting, but only to a prohibition of it where carried on for purposes inconsistent with the National Labor-Management Relations Act.[121]

Since a literal reading of this section would outlaw picketing,[122] the Federal Act specifically includes language intended to negative such a reading. This feature of the statute is also included in the North Dakota Act, since a reading of the section under discussion will indicate that the refusal of an employee to cross a picket line surrounding another employer's place of business is permissible under its terms. Refusal to cross a picket line is, in any event, a deep-rooted tradition of the trade union movement and a statute which attempted to deny the custom would undoubtedly prove difficult to enforce.

The North Dakota Labor-Management Relations Act also provides, in common with the National Labor-Managament Relations Act, that it is an unfair labor practice

> "To require of employees as a condition for (union) membership the payment of fees found by the commissioner to be excessive or discriminatory."[123]

This is one of the few provisions regulating the internal affairs of labor organizations found in the statute. It should be noted that § 3 (2) (a) specifically provides that "a labor organization may prescribe its own rules for the acquisition and maintenance of membership in said labor organization." In this connection, however, it should be noted that the Labor-Management Reporting and Disclosure Act of 1959 contains extensive provisions designed to regulate the rights of union members with respect to their organizations.[124]

Most of the remaining subsections dealing with unfair labor practices on the part of labor organizations go somewhat beyond the provisions of the National Labor-Management Relations Act. In common with the federal statute, the North Dakota Act prohibits as an unfair labor practice causing or attempting to cause an employer to pay an exaction for services which are not performed or not to be performed.[125] But in addition the North Dakota Act provides that it is an unfair labor practice for a labor organization

> "h. To make, circulate, or cause to be circulated, a blacklist;
> "i. To coerce or intimidate an employee in the enjoyment of

121. Carpenters' Union v. Labor Board, 357 U.S. 93 (1958).
122. CCH 1960 Guidebook to Labor Relations § 1105.
123. N.D. Labor-Management Relations Act § 3 (2) (f).
124. See Orban, *The 1959 Labor Law: Rights and Remedies of the Union Member*, 37 N.D. L. Rev. 37 (1961).
125. N.D. Labor-Management Relations Act § 3 (2) (g).

his legal rights, or to intimidate his family or any member thereof, picket his domicile, or injure the person or property of such employee or his family or any member thereof;

"j. To hinder or prevent by unlawful picketing, threats, inmidation, force or coercion of any kind, the pursuit of any lawful work or employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports or other ways of travel or conveyance."[126]

Originally proposed by management representatives on the Special Committee to Study Labor Laws, the foregoing amendments were quite readily accepted by labor representatives during committee deliberations. Subsection (h) merely duplicates a restriction already placed on management in this state.[127] Subsection (i) is in many respects an implicit duplication of § 3 (2) (a) and in effect defines in specific language types of conduct which would be subject to restraint under § 3 (2) (a) in any event. Subsection (j), however, initially drew some adverse labor reaction because it referred to picketing generally, rather than illegal picketing. The result was that it was finally amended to make clear that no new substantive restrictions on the right to picket were contemplated by the section, through inserting the word 'unlawful" before the word "picketing".[128]

VIII. THE DUTY TO BARGAIN COLLECTIVELY

Since the new Act makes it an unfair labor practice for either an employer or a labor organization to refuse to bargain collectively, the provisions of the Act with regard to this subject deserve attention. Section 4 provides:

"1. For the purposes of this Act, to bargain collectively means the performance of the mutual obligations of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation or renegotiation of an agreement, or any question thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

"2. Where there is in effect a collective bargaining contract, the duty to bargain also shall mean that no party to such contract shall terminate or modify such contract at the conclusion of its term until sixty days after either of them mails notice of a desire to terminate or to modify. A strike or lockout

126. N.D. Labor-Management Relations Act § 3 (2) (h) (i) (j).
127. See discussion of North Dakota Const. § 209, text to footnote 54, *supra*.
128. See footnote 83, *supra*.

for economic purposes shall be unlawful until the end of the sixty-day period. The duty to bargain collectively shall continue despite termination of a collective bargaining contract unless the employee bargaining representative has lost its majority status."

Although this statutory lauguage may at first glance appear formidable, it is believed that consideration of its operation and effect will lead most observers to conclude that in practice it constitutes one of the most practical and beneficial portions of the new statute. The section could be called a "let's-talk-it-over" provision. What it means, in down-to-earth terms, is that when a labor dispute arises, and assuming that the question of representation has been settled, both labor and management have an obligation to sit down across the bargaining table and make a reasonable effort to come to an agreement.[129] As its language makes plain, the statute does not compel either side to agree to an unacceptable proposal. Similarly it does not require indefinite negotiation.[130] The requirement is merely that the possibility of reaching an acceptable agreement be seriously explored.

This is little more than what a reasonable businessman or labor representative would do in any event. However, no such duty to participate in the collective bargaining process has been imposed by prior North Dakota legislation, and although the requirement is a very mild one its omission in the past has occasionally produced unfortunate consequences. There have been instances in which labor disputes have continued for several years without serious attempts at negotiation between the parties. It may be pointed out additionally that in some cases, particularly where feelings are running high, § 4 will be of practical advantage to the attorney attempting to work out a solution of a labor dispute through compromise, since as a practical matter there are occasions when it is far more difficult to induce the parties to sit down together than it is to bring them to agreement when once they have done so.

The requirement of § 4 is that collective bargaining must be conducted in good faith. While the term "good faith" describes a state of mind, its presence or absence is by no means impossible

129. The NLRB has defined the scope of the duty to bargain collectively in some detail. "The employer's duty to bargain includes the obligation to seek in good faith to reach an understanding on wages, hours, or other conditions of employment. Negotiation of individual grievances alone is not enough." NLRB Annual Report 49 (1942); CCH Lab. L. Guide ¶ 2341; CCH 1960 Guidebook to Labor Relations § 1203.

130. "If after a genuine attempt to reach agreement, an impasse has been reached, the employer is not required to continue futile negotiations. Should the situation change, however, the employer must on request resume collective bargaining." NLRB Annual Report 49 (1942), cited in CCH Lab. L. Guide ¶ 2341.

of determination. The term has been construed to mean that a negotiator must bargain with an open mind and a sincere purpose to reach agreement if it is possible to do so.[131] Whether this purpose is present can usually be determined by the objective acts and conduct of the parties, since these acts and conduct usually furnish concrete evidence on the point.[132] As might be expected, the extent of negotiation required by the good-faith provision is fundamentally determined by the facts of each case.[133]

Section 4 (2) amplifies the collective bargaining requirement by providing that where a collective bargaining agreement is already in existence, 60 days' notice must be given of a desire to terminate or modify it. This requirement is applicable even where the contract specifies a termination date, i.e., the notice should be given 60 days prior to the termination date specified in the contract.

IX. REPRESENTATION, ELECTIONS, BARGAINING UNITS

The provisions of the North Dakota Labor-Management Relations Act regarding the election of a union to act as a bargaining representative for employees were the subject of warm discussion at the committee sessions which framed these portions of the statute. These sections actually deal with a number of closely related problems.

Since the duty to bargain collectively extends only to employees in "appropriate" bargaining units, determination of that unit is of obvious importance. This is dealt with in § 6 of the Act, which allows the administering official to determine whether "the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." On this subject there is available a considerable backlog of NLRB decisions.[134] However, it is believed that few of the problems encountered in the administration of the federal statute will be duplicated in North Dakota, for the basic reason that any business enterprise of sufficient size to produce a difficult question in this

131. A good discussion of the legislative history of the Taft-Hartley Act provision is found in NLRB v. American Ins. Co., 343 U.S. 395, 401-04 (1952).

132. "The problem is essentially to determine from the record the intention or the state of mind of respondents in the matter of their negotiations with the Union. In this proceeding, as in many others, such a determination is a question of fact to be determined from the whole record. Evidence was offered and received as to the details of the negotiations, a portion of which covered a period of time prior to six months before the charge was filed. This evidence was principally admissable as a history and as a background for the evaluation of evidence of events and occurrences within such six months' period." NLRB v. National Shoes, 208 F.2d 688, 691-92 (2d Cir. 1953).

133. CCH 1960 Guidebook to Labor Relations § 1204.1.

134. See Daykin, *Determination of Appropriate Bargaining Unit by the NLRB: Principles, Rules, and Policies*, 27 Fordham L. Rev. 218 (1958).

regard will also be large enough in most cases to fall under NLRB jurisdiction. Indeed, one experienced North Dakota attorney commenting on this provision of the statute during committee deliberations observed that in most cases determination of the appropriate bargaining unit will amount to little more than checking the payroll. If problems of greater complexity are encountered, of course, the statute is sufficiently flexible to allow the commissioner to meet them.

The procedure which a union must follow in gaining status as a bargaining representative under the Act are set forth in § 7. This section deals fundamentally with the topic of elections. It provides that an election may be called either upon the petition of 30 per cent of the employees in an appropriate bargaining unit or upon the petition of the employer. In the case of a petition filed by employees the petition must assert that their "employer declines to recognize their representative . . . or . . . that the individual of labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative . . . ."[135] The employer is authorized to request an election when "one or more individuals or labor organizations have presented to him a claim to be recognized" as the bargaining representative of his employees.[136]

While most of § 7 deals with elections for the purpose of determining a bargaining representative, the section also makes the requirement that an election be held when a strike is to be called by the bargaining representative.[137] While other states have similar provisions,[138] judicial opinion has not been unanimous concerning their validity. Alabama has held that a statute requiring a majority vote for a strike was unconstitutional, the Court stating that "Each individual employee has a right to strike for a legally justifiable purpose, and such a right, of course, rests upon a minority as well as a majority."[139] Wisconsin, however, has ruled otherwise on the ground that where a union has been certified as the bargaining representative of an appropriate collective bargaining unit the principle of majority rule may be validly applied.[140] On balance this last view seems to embody the sounder result, both for practi-

135. N.D. Labor-Management Relations Act § 7 (1) (a).
136. N.D. Labor-Management Relations Act § 7 (1) (b).
137. N.D. Labor-Management Relations Act § 7 (3).
138. E.g., Colo. Rev. Stat. § 80-5-6 (1953).
139. Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 So.2d 810, 827 (1944), *app. dismissed*, 325 U.S. 450 (1945).
140. Hotel & E.R.I. Alliance v. Wis. Employment Relations Board, 236 Wis. 329, 294 N.W. 634 (1941).

cal and theoretical reasons. From the practical standpoint, a strike not supported by a majority of employees will normally have little chance of success. And while it is true that in North Dakota not all employees will automatically be union members, and hence that a substantial minority of employees often will not participate in the making of union decisions, the requirement of an election is applicable only when the strike is to be called "by the bargaining representative *certified* to represent employees." Thus the theoretical right of a minority of employees to strike despite the opposition of a majority still persists here — so long, at least, until the minority does not consist of members of the union certified as the bargaining agent.

When once an election has been won by a union, the result is prescribed by § 5 of the Act:

> "Repesentatives designated or selected for the purpose of collective bargaining . . . shall be exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment."

During the committee deliberations on this portion of the statute, union representatives advanced the proposition that they ought not to be required to represent non-union employees, since such employees made no contribution to the cost of negotiating union contracts and thus ought not to be entitled to benefits under them. While there are elements of equity in this position, it was not pressed very seriously and ultimately the section as drafted won approval. In practice, it should be noted, at least one device — the agency shop — has been developed as a union answer to this problem. The agency shop is an arrangement whereby employees who are not union members but work in an establishment wherein a union has been elected bargaining representatives of all employees in that establishment are assessed, pursuant to the contract between employer and union, a service charge to defray the expense to which the union is put in representing non-members.[141] The Attorney General of North Dakota has ruled that an agency shop provision in a union-management contract does not violate the "right-to-work" law of North Dakota.[142]

When once certification as a bargaining representative has been achieved, the Act provides that no further election may be held for 12 months.[143] One ground upon which a bargaining representative

141. See CCH Lab. L. Guide ¶ 2677.
142. Opinion No. 135, August 24, 1959.
143. N.D. Labor-Management Relations Act § 7 (4).

may lose such status should, however, be mentioned in this connection. In 1959 North Dakota enacted a statute providing that:

> "No person who has been convicted of any crime involving moral turptude or a felony, excepting traffic violations, shall serve in any official capacity or as any officer in any labor union or labor organization in this state. No such person, nor any labor union or labor organization in which he is an officer, shall be qualified to act as a bargaining agent or representative for employees in this state. Such disqualification shall terminate whenever such officer is removed or resigns as an officer in such labor union or labor organization."[144]

Statutes on the same subject are found in Florida, New York and Texas,[145] and the problem is also dealt with by § 504 of the Labor-Management Reporting and Disclosure Act of 1959.[146] The Florida legislation is in terms applicable only to union business agents and denies them a license to act as such if ever convicted of a felony. The Texas legislation applies to any union officer or union organizer, but is inapplicable to persons whose rights of citizenship have been restored. The New York enactment applies to "any officer or agent" of certain waterfront unions, but contains an exemption clause if the affected union officer has been subsequently pardoned or has received a certificate of good conduct from the board of parole to remove the disability of conviction.

Two points may be made in appraising the effect of the North Dakota Union Officer Qualification act. First, no other statute on this subject goes as far as the local enactment. In every other jurisdiction which has passed on this problem the disqualification from holding office is based exclusively on conviction of a felony. In every other jurisdiction save Florida a procedure for removal of the bar is indicated. In view of the language employed in the North Dakota act — "any crime involving moral turpitude or a felony, excepting traffic violations" — relatively minor violations, e.g., a conviction for disorderly conduct in a police magistrate's court, would be as effective as a conviction for armed robbery in imposing such a disqualification.[147] Moreover, no other enactment penalizes the membership of the union as well as the individual officer by terminating the union's status as a bargaining representative for such a circumstance. The North Dakota enactment might

144. N.D. Cent. Code § 34-01-16.
145. Fla. Stat. § 447.04 (1959); N.Y. Waterfront Commission Act of 1953 § 8, McKinney Unconsolidated Laws § 6700a *et seq.;* Tex. Rev. Civ. Stat. § 5154a (4a) (1945).
146. 73 Stat. 536 (1959), 29 U.S.C.A. § 504 (Supp. 1960).
147. Of course the traditional distinction between criminal offenses which are *malum prohibitum* and those which are *malum in se* might be invoked to mitigate the harshness of the statute. But the specific exclusion of traffic offenses from the description of disqualifying offenses would seem to militate against this construction.

thus affect the interests of a number of completely innocent employees at the instant when those interests are most vulnerable, i.e., during the midst of a serious labor dispute.

Second, on a more technical basis the North Dakota statute also invites examination. In *Hill v. Florida,*[148] the Supreme Court of the United States invalidated the Florida enactment relating to the licensing of union business agents on the ground that it infringed the "full freedom" of employees to choose representatives which was secured by § 7 of the National Labor Relations Act. It is clear that this decision, based on the federal doctrine of pre-emption,[149] also applied to the Texas enactment and effectively foreclosed state regulation of the qualifications of union officials.

The most recent case on the point is *De Veau v. Braisted,*[150] decided in 1960 by the United States Supreme Court. Since *De Veau v. Braisted* upheld the New York statute dealing with this subject, an examination of the case seems indicated.

De Veau was secretary-treasurer of Local 1346 of the International Longshoremen's Association. In 1920 he pleaded guilty to grand larceny in New York and received a suspended sentence. He never applied for or received a pardon or certificate of good conduct. In 1956 the district attorney of Richmond County, New York, informed the president of De Veau's union that because of De Veau's conviction the New York statute prohibited any person from collecting dues on behalf of the union. The union then ousted De Veau from office. De Veau brought an action for a declaratory judgment to test the validity of the New York statute, contending the New York act (1) violated § 7 of the National Labor-Management Relations Act, (2) violated the policy of § 504 of the National Labor-Management Reporting and Disclosure Act, (3) was ex post facto, and (4) a bill of attainder. He lost on every point.

Justice Frankfurter's opinion for the majority met the argument based on *Hill v. Florda* and § 7 of the National Labor Relations Act by pointing to the legislative history of the New York statute, which was unique. The legislation in question had been passed by the State of New York pursuant to an interestate compact signed by New York and New Jersey for the purpose of regulating what the Court called a "notoriously serious situation" along the New York waterfront. Pursuant to Art. 1, § 10 of the United States Constitution this compact had been submitted to Congress for ap-

148. 325 U.S. 538 (1945).
149. See footnote 21, *supra.*
150. 363 U.S. 144 (1960).

proval, which it received. At the time this compact was submitted to Congress for approval, New York had already enacted the felony-disqualification section as supplementary legislation to the interstate compact; and the act of Congress approving the compact specifically provided that the consent of Congress "is hereby given . . . to the carrying out and effectuation of said compact *and enactments in furtherance thereof*." Frankfurter commented that "In giving this authorization Congress was fully mindful of the specific provisions of § 8."[151] He added, after a painstaking consideration of the matter, that:

> "The sum of these considerations is that it would offend reason to attribute to Congress a purpose to pre-empt the state regulation contained in § 8. The decision in *Hill v. Florida* . . . in no wise obstructs this conclusion. *An element most persuasive here, congressional approval of the heart of the state legislative program, explicitly brought to its attention, was not present in that case.*"[152]

This language would appear to indicate that *Hill v. Florida* is still effective law and that the National Labor Relations Act of 1947 thus pre-empts state legislation of the type found in North Dakota.

X. ENFORCEMENT PROCEDURES

The greatest difficulty encountered in attempting to adapt the National Labor-Management Relations Act of 1947 to local usage came in connection with the formulation of procedures for administration. On the federal level there exists elaborate machinery for the purpose. North Dakota, however, has not yet developed a unitary administration of its labor statutes, and divides the task of administering them between two separate agencies: the Workmen's Compensation Bureau, which controls the unemployment compensation division, state employment service, and various safety agencies, and the office of the Commissioner of Agriculture and Labor, which collects employment statistics, investigates labor disputes, enforces the child labor laws, and also administers provisions relating to minimum wages and hours of work for women and minors.

At the primary election of 1960 the electorate of the state approved a Constitutional Amendment allowing the establishment of a separate department of labor to be administered by a "public official, who may be either elected or appointed."[153] Implementation of this provision was recommended to the 1961 session of the Legis-

151. 363 U.S. at 151.
152. 363 U.S. at 154-55.
153. N.D. Laws 1959, c. 437.

lative Assembly by the Special Committee to Study Labor Laws, with the thought in mind of vesting administration of the new Act in the newly-created department. However, the draft legislation submitted for this purpose encountered difficulties, and although several substitutes were offered the measure failed to gain approval. The North Dakota Labor-Management Relations Act had been drafted with the possibility of such an outcome in mind, and in consequence was readily susceptible of an amendment which placed initial administration of the Act in the office of the Commissioner of Agriculture and Labor.

A second phase of the problem involved the extent of the authority the administering authority was to possess, and was complicated by an issue relating to the scope of judicial review. North Dakota possesses a well-drafted Administrative Agencies Practice Act,[154] and the initial draft of the North Dakota Labor-Management Relations Act therefore referred most questions of administrative practice to that statute. However, opposition to this solution developed on the ground that it made the findings of fact entered by the Commissioner of Agriculture and Labor in the case of proceedings under the Act conclusive if found by the reviewing court to be supported by substantial evidence.[155] An additional ground of objection lay in the fact that under the Federal Act the NLRB is authorized to enter awards of back pay to employees discharged as the result of an unfair labor practice. The grant of such authority to the Commissioner of Agriculture and Labor was opposed on several grounds, among them being the argument that such jurisdiction would deprive parties of the traditional right of trial by jury and also that it amounted to furnishing counsel at public expense to private litigants.[155A] In consequence the initial draft of the statute was amended to delete language authorizing such awards of back pay on the part of the Commissioner, while a new section was inserted in the Act to provide that "Any person injured in his person or property by reason of the commission of an unfair labor practice as defined in this Act may sue therefor in the district court and shall recover the damages by him sustained and the cost of the suit.[156]

In substance, the argument over these provisions, which was very ably conducted and—from the Committee standpoint—of a critical character, involved a choice between an administrative as opposed

154. N.D. Cent. Code c. 28-32.
155. N.D. Cent. Code § 28-32-19.
155A. See Mont. Rev. Code § 41-1302 (1947).
156. N.D. Labor-Management Relations Act § 11.

to a judicial method of enforcing the provisions of the Act. The argument in favor of reliance upon administrative procedures was based on the factors of informality, speed of adjudication, and the comparative lack of expense customarily associated with administrative methods. The argument in favor of a broad scope of judicial review stressed the greater impressiveness and dignity of the proceedings, the fact legally-trained personnel were available in the district courts, and the greater procedural protection the judicial system affords litigants. In the end, the latter factors were of greatest weight in the judgment of the majority of the Committee, and the procedures for review of decisions entered by the Commissioner of Agriculture and Labor in cases arising under the Act were accordingly broadened.

This outcome, while allowing the use of administrative procedures in connection with a labor dispute and thus permitting comparatively minor disputes to be adjusted rapidly on an administrative basis, nevertheless appears to place the true center of gravity in most serious labor disputes in the district courts. Thus, § 8 of the Act actually gives the Commissioner of Agriculture and Labor a distinctly restricted function. When a charge of unfair labor practice is made to him, he is initially required to make an informal investigation—a provision designed to emphasize the use of conciliatory procedures in labor disputes. If the informal investigation indicates that an unfair labor practice is occurring, the Commissioner, in the language of § 8 of the Act:

> "shall have power to issue and cause to be served . . . a written specification of the issues which are to be considered and determined. If, upon the evidence, the commissioner shall be of the opinion that any person named in the written specifications has engaged in or is engaging in any such unfair labor practice, he shall issue and cause to be served upon such person an order requiring such person to cease and desist from such unfair labor practice. If the order is not obeyed, the commissioner shall have the authority to apply to the appropriate district court for an injunction under the provisions of chapter 32-06."

The point to be remembered is that on appeal the Commissioner's findings of fact are open to re-litigation. Section 10 of the Act provides explicitly that the findings of the commissioner on appeal "shall not be entitled to affirmative weight."[157] Thus, while the de-

157. In every other respect, administrative proceedings under the act are governed by N.D. Cent. Code c. 28-32. Thus, although it is the Commissioner of Agriculture and Labor who issues the written specification of the issues to be considered and determined in an unfair labor practice proceeding, under N.D. Cent. Code § 28-32-08 the complaining party is regarded as a party in interest, *In re* Wheatland, 77 N.D. 194, 42 N.W.2d 321 (1950), and hence entitled to appeal. N.D. Cent. Code § 28-32-15.

cision of the Commissioner will undoubtedly often be effective in settling disputes, serious cases are open to wide judical re-examination; and where it is anticipated that an appeal will be taken the proceedings before the Commissioner will be of less importance than the subsequent district court hearing. Moreover, the importance of the judicial system in the enforcement of the Act is further emphasized by the fact that, as already noted, the Act incorporates a general right of suit for damages resulting from a breach of its provisions. Coupled with the provisions relating to equitable relief,[158] this is believed to be adequate to ensure effective and meaningful enforcement of the statute.

XI. CONCLUSION

While the new statute represents a striking development in the labor law of this state, a few more generalized comments appear desirable.

It should be pointed out that the Act was designed to deal with genuinely serious situations: the case wherein one side overreached the other in a truly significant fashion. Thus in the far more prevalent case where employer and employees are engaged in working out a bargain about wages, hours, and working conditions in reasonable fashion, making a genuine attempt to reach agreement, the Labor-Management Relations Act will have little application. Thus it may be suggested that the decision to file an unfair labor practice charge on behalf of a client should be carefully considered. A lawsuit is rarely an adequate substitute for a voluntary agreement, too technical an approach to the problems of labor-management negotiations may well be self-defeating, and the standard authorities in the field urge patience, restraint, and an understanding of the other fellow's point of view.[159]

The Act also has some notable omissions. A few of them may be pointed out:

1. The six-months period for filing an unfair labor practice charge prescribed by the Federal Act is not incorporated in the North Dakota Act. Thus the conventional statutes of limitation apply to judicial proceedings in which enforcement of the Act is sought. Where equitable relief is sought, it is believed that the potential applicability of the defense of laches should be noted in the event proceedings have been unduly delayed.

158. Observe that it is the Commissioner of Agriculture and Labor who possesses the authority to ask for injunctive relief under N.D. Cent. Code c. 32-06, rather than the employer of the union. As to the latter parties, N.D. Cent. Code c. 34-08 is applicable.
159. See Plock, *supra* note 70, at 476-77.

2. The Act does not contain any declaration of policy. This was, it should be noted, an intentional omission. No less than three declarations of public policy are incorporated in the labor statutes of North Dakota already,[160] the Act conforms to these in a general fashion, and the Committee preferred to concentrate on provisions of more direct substantive character.[161]

3. The Act is not applicable to agricultural labor. While the Special Committee to Study Labor Laws investigated this subject, particularly so far as it involved migratory workers, it was apparent that the probems of agricultural employment were in many respects of a fundamentally different character from those encountered in the case of urban workers.

It should be noted that recent studies have indicated a serious need for remedial action in this field.[162] The situation of many migratory agricultural employees is such that they often lack adequate educational opportunities, housing, and income.[163] This is a problem which crosses state boundaries and is thus not entirely susceptible of remedy on the state level. However, progress in some areas would nevertheless appear feasible. To illustrate, at the present time workmen's compensation for farm workers is optional with the individual farm employer in North Dakota.[164] Yet agriculture is

160. N.D. Cent. Code §§ 34-08-02, 34-09-01, 34-10-01. Several other sections in c. 34-09 of the Code make use of the "public policy" terminology also.

161. It is worth noting that when the current edition of the North Dakota Code was being prepared in 1960, the committee on revision deleted as obsolete a good many declarations of public policy which had found their way into the 1943 revision. However, no such action was taken in the case of the statutes dealing with labor.

162. See Migratory Labor: Hearings Before the Subcommittee on Migratory Labor of the Committee on Labor and Public Welfare, United States Senate, 86th Cong., 1st Sess., on S. 1085, S. 1778, S. 2141, and S. 2498, Bills Relating to Migratory Labor; Committee Print, *The Migrant Farm Worker in America*, Prepared for the Subcommittee on Migratory Labor of the Committee on Labor and Public Welfare, United States Senate, 86th Cong., 1st Sess.; Educational Assistance to Migrant Agricultural Employees and Their Children: Hearings Before the Subcommittee on Education of the Committee on Labor and Public Welfare, United States Senate, 86th Cong., 1st Sess., on S. 2864, A Bill to Provide Certain Payments to Assist in Providing Improved Educational Opportunities for Children of Migrant Agricultural Employees, and S. 2865, A Bill to Provide Grants for Adult Eduation for Migrant Agricultural Employees.

163. The average income per migrant laborer family was recently reported as $2,208 as compared to the median average income of all U.S. households of $4,873. Reporting on the United States Department of Labor's position regarding enactment of federal legislation to aid in education of children of migratory agricultural workers, The Acting Secretary of Labor stated in 1960: "Under the best of conditions the education migrant children receive at present is piecemeal, lacking in continuity and orderly development. The exact proportions of the educational problems with regard to these children is difficult to assess, since migrant children aften are not carried on school district census rolls . . . Another indication of the nature of this problem is found in a recent study by the Wage and Hour and Public Contracts Division of this Department, of the educational attainment of 1,673 migrant children under the age of 16 found working during school hours contrary to the Fair Labor Standards Act. This report showed that 68 percent were enrolled in grades below normal for their ages. A comparison of the education of these children by age indicates that the percentage retarded educationally increases as the age increases. For example, 87 percent of the 15-year-olds in the survey were in grades below normal for their age, while 40 percent of the 8-year-olds were behind in the grade in which they would normally be expected to be enrolled."

164. See N.D. Cent. Code §§ 65-01-02 (4) (a), 65-04-29.

the third most hazardous occupation in the United States, only slightly less dangerous than construction work or farming.[165] When a farm worker in this state sustains a personal injury it is thus uncertain whether he will be able to obtain workmen's compensation for it. If he fails to do so the normal outcome will often be a personal injury action against the employer which will cost substantial damages if the employee wins,[166] and leave the employee in many cases a public charge if he loses.[167] For this reason it would seem that extension of workmen's compensation coverage to farm employment on a full-scale basis would be readily justifiable. In addition it would constitute direct and immediate protection to life and limb.

The Act does not deal with problems of racial and religious discrimination in employment. North Dakota is a state wherein such problems appear to be relatively few. Neverthless, the state contains a substantial Indian population and it is apparent that at least some prospect of the full political integration of this group into the state's legal system exists.[168] Consideration of their potential future needs might readily make such protection desirable.[169]

Situations such as the foregoing are not actually instances wherein the interests of labor and management are embroiled in conflict of the traditional nature. It is thus apparent that there are many cases in which the men on both sides of the bargaining table have a joint opportunity to work toward the mutually advantageous goal of making the state a better place in which to live. This, it is submitted, is the true significance of the new legislation in North Dakota.

165. Committee Print, *The Migrant Farm Worker in America, supra* note 162, at 70.
166. See Rosebear v. Anderson, 143 F.Supp. 721 (D.N.D. 1956).
167. Since the public welfare statutes in this state require a year of continuous residence before assistance may be given, most migratory agricultural workers fall outside their scope. See N.D. Cent. Code § 50-10A-03 (3).
168. N.D. Const. § 203 was amended in 1958 to allow the state legislature to accept a federal grant of jurisdiction over Indian reservations in North Dakota. N.D. Laws 1959, c. 430.
169. Eighteen states plus Puerto Rico have adopted such legislation in the past two decades. Alaska Comp. Laws Ann., Tit. 43, c. 5; Cal. Labor Code §§ 1410-1432; Colo. Rev. Stat., Art. 24, c. 80 (1953); Conn. Gen. Stat., Tit. 31, c. 563 (1958); Burns Ind. Stat. Ann., Tit. 40, c. 23 (Supp. 1959); Kan. Gen. Stat. c. 44, Art. 10 (Supp. 1959); Mass. Gen. Laws, c. 6, § 56, c. 151b §§ 1-10; Mich. Pub. Acts 1955, c. 251; Minn. Stat. Ann., c. 363; N.J. Stat., Tit. 18, c. 25; N.M. Stat., c. 59, Art. 4 (1953); N.Y. Consol. Laws, c. 18, Art. 15; Ohio Rev. Code §§ 4112.01-4112.99; Ore. Rev. Stat. §§ 659.010-659.115, 659.990; Purdon's Pa. Stat. Ann., Tit. 43, c. 17; R.I. Gen. Laws, Tit. 28, c. 5; Wash. Rev. Code c. 49.60; Wis. Stat., C. 111, sub-chapter II; Puerto Rico Laws, Tit. 29, § 146. The Alaska statute is a simple and apparently workable one.

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