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A SURVEY OF THE IMPACT OF THE TAFT-HARTLEY ACT ON EMPLOYER UNFAIR LABOR PRACTICES†

KEITH W. BLINN*

WITH the passage of the Labor Management Relations Act, 1947,¹ many problems were posed concerning its effect on the extensive body of decisional law established through twelve years of administration of the predecessor Wagner Act.² While it is virtually assumed that the Taft-Hartley Act will be amended, in almost all quarters there is a measure of agreement that some of the changes effected in the Wagner Act by the amendments were justified as the result of the experience gained in administering the Wagner Act. Even the most severe criticism from "labor" is primarily directed toward the newly established union unfair labor practices. The scope of this article is not to analyze in detail but rather to survey the impact of the Taft-Hartley Act upon the employer unfair labor practices.

While the basic philosophy of the law remains unchanged, certain of the fundamental premises have been qualified and altered including the finding that industrial strife is not solely attributable to the denial by employers of the right of employees to organize and the refusal of employers to accept the procedures of collective bargaining but that "experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce through strikes and other forms of industrial unrest"³ The Taft-Hartley Act also expressly recognizes that employees have the ". . . right to refrain from any and all . . . [concerted activities]."⁴

† This article was published in *Marq. L. Rev.*, Dec. (1948).

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¹ Labor Management Relations Act, 1947, Pub. L. No. 101, 80th Cong. 1st Sess., 61 Stat., 29 U.S.C. § 141 *et seq.* (1947 Supp.).

² National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C. § 151 *et seq.* (1940).

³ § 1 of the National Labor Relations Act, as amended. All citations to sections refer to the amended Act unless otherwise specified.

⁴ § 7.

A. COVERAGE OF THE TAFT-HARTLEY ACT.

Despite suggestions from certain quarters that the Board's jurisdiction be restricted so that a greater area might be left for State action, the Taft-Hartley Act like the predecessor Wagner Act is based upon unfair labor practices and questions of representation "affecting commerce."⁵ This latter term is broadly defined as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led to or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."⁶ These provisions were held as broad as the constitutional power of Congress.⁷ Section 10 (a) was amended to provide "that the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provisions of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith." This has served to clarify some "... overtones of meaning that regardless of the consent of the National Board, . . . [a State board] . . . is excluded from enforcing rights of collective bargaining in all industries within its borders as to which Congress has granted opportunity to invoke the authority of the National Board,"⁸ which resulted from the Supreme Court opinion in the *Bethlehem* case. Accordingly, it is now possible for the National Board to make working agreements with State boards so that the latter may dispose of a large number of employer-employee disputes where hearing otherwise might be indefinitely postponed by the N. L. R. B. due to budgetary limitations or the pressure of a large backlog of cases⁹ providing the State legislation is consistent with the federal legislation and is interpreted con-

⁵ § 10(a).

⁶ §§ 2(6) and (7).

⁷ N.L.R.B. v. Fainblatt, 306 U.S. 601 (1939).

⁸ *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767 (1947) concurring opinion of Justice Frankfurter at page 778.

⁹ It is clear that the Board intends to continue to exercise its administrative discretion by refusing for administrative reasons to take jurisdiction in certain cases. In *Matter of Duke Power Co.*, 77 N.L.R.B. No. 103 (1948).

sistent with it.¹⁰ A limitation in the coverage of the Taft-Hartley Act has been effected by defining the term "employee" as expressly excluding supervisory employees,¹¹ thus bringing to a close a rather long and bitter struggle within the Board itself. The Board's administrative policy on supervisory employees had been vacillating;¹² however, starting with the *Packard* case¹³ the Board had started to re-establish the status of supervisory employees as "employees within the meaning of the Act" thus permitting them to constitute a unit appropriate for the purposes of collective bargaining. The effect of the new definition of "employee" is to reverse the court approved administrative construction of the Wagner Act¹⁴ and finally settle the controversy so that supervisory employees cannot be included within a bargaining unit or constitute a separate unit by themselves. The Board in considering a representation case¹⁵ under the amended Act determined that the statutory definition of "supervisory employee" merely continued the Board's previous policy in determining at what point an employee becomes *managerial* or *supervisory*. The Board pointed out that the problem is "to some extent necessarily a matter of degree of authority exercised . . . [and includes those] who formulate and effectuate management policies by expressing and making operative the decisions of their employer" Thus, there was a heavy reliance upon the statutory requirement that for the position to be supervisory, it must require "the use of independent judgment." A further limitation in the coverage of the Act was effected through the specific exclusion of any individual having the status of an independent contractor from the term "employee."¹⁶ In the *Hearst* case¹⁷ the Supreme Court considered the status of newsboys as employees and speaking through Justice Rutledge it was held

¹⁰ For a detailed analysis see, Smith *The Taft-Hartley Act and State Jurisdiction over Labor Relations* 46 MICH. L. REV. 593 (1948).

¹¹ Supervisor is defined as ". . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires independent judgment." § 2(11).

¹² 11 N.L.R.B. ANN. REP. 30-35 (1945); Note (1947) 32 IOWA L. REV. 595.

¹³ In Matter of Packard Motor Car Company, 61 N.L.R.B. 4 (1945).

¹⁴ Packard Motor Car Company v. N.L.R.B., 330 U.S. 485 (1947).

¹⁵ In Matter of Palace Laundry Dry Cleaning Corporation, 75 N.L.R.B. 320 (1947).

¹⁶ § 2(3).

¹⁷ N.L.R.B. v. Hearst Publications, Inc., 322 U. S. 111 (1944).

that the economic facts such as the inequality of bargaining power and the dependency of the newsboys on the company for daily earnings was such that it made the relationship more nearly one of employment than of an individual business enterprise and in view of the social purpose underlying the legislation such a classification might outweigh a technical legal classification. The Senate report indicates a clear legislative policy to override Board policy by stating . . . "The legal effect of the amendment therefore is merely to make it clear that the question whether or not a person is an employee is a question of law, since the term is not meant to embrace persons outside that category under the general principle of the law of agency."¹⁸

B. EMPLOYER'S RESPONSIBILITY

Under the Wagner Act the employer was responsible for ". . . any person acting in the interest of an employer, directly or indirectly . . ." ¹⁹ while the Supreme Court consistently reiterated that the question is not one of legal liability in damages or for penalties on principles of agency or respondeat superior, but only whether the Act condemned such activities as unfair labor practices so far as the employer gained advantages in the bargaining process; ²⁰ nevertheless, the actual decided cases did not fall far beyond the pale of the technical rules of agency. Within the recognized principles of agency, the agent, acting within the sphere of his apparent authority, may subject his principal to liability by acts done in violation of secret instructions or limitations which were unknown to the third person. ²¹ However, the employer definition was amended to include ". . . any person acting as an agent of any employer directly or indirectly . . ." ²² Bearing directly on the problem is the newly added definition of the term "agent" which provides "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or sub-

¹⁸ 93 Cong. Rec. 6441 (1947).

¹⁹ § 2(2) of the Wagner Act.

²⁰ *International Association of Machinists v. N.L.R.B.*, 311 U.S. 72 (1940), rehearing denied 311 U.S. 729 (1941); *H. J. Heinz Company v. N.L.R.B.*, 311 U.S. 514 (1941).

²¹ RESTATEMENT, AGENCY § 160 (1933); Cox, *Some Aspects of the Labor Management Relations Act*, 1947, 61 HARV. L. REV. 1 pp. 8-12 (1947).

²² § 2(2).

sequently ratified shall not be controlling.”²³ Regardless of the extent of change actually achieved by the change in language, it seems unquestionably the intent of Congress to abrogate any effects of the *I. A. M.* case²⁴ beyond the sphere of established agency principles as Senator Taft stated “[it] restores the law of agency as it has been developed by common law.”²⁵

C. THE “FREE SPEECH” CLAUSE.

Until the passage of the Taft-Hartley Act, “free speech” in unfair labor practice cases was evaluated and protected on the basis of a constitutional guarantee and the Supreme Court in stating “The mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative power. In determining whether the Company actually interfered with, restrained, and coerced its employees, the Board has the right to look at what the company has said, as well as what it has done”²⁷ Thus, the propriety of the “*totality doctrine*” was firmly established. However, section 8 (c) expressly provides that “The expression of any views, arguments, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of any unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.” The direct impact of this amendment is upon the *totality doctrine* since the speech cannot be *evidence* of an unfair labor practice unless, standing alone, it is violative of the Act by containing a threat of reprisal or force or promise of benefit. It is worthy of note that while the former General Counsel of the National Labor Relations Board, Gerhard P. Van Arkel, concurs in this interpretation of section 8 (c)²⁸ there are others who feel that the Board should continue to apply the *totality doctrine*.²⁹ During debate on this section Senator Taft illustrated his view by agreeing with Senator Pepper that if on Monday an em-

²³ § 2(13).

²⁴ *International Association of Machinists v. N.L.R.B.*, 311 U.S. 72 (1940) rehearing denied 311 U.S. 729 (1941).

²⁵ 93 Cong. Rec. 6859 (1947).

²⁶ Sinsheimer, *Employer Free Speech—A Comparative Analysis*, 14 U. OF CHI. L. REV. 617 (1947).

²⁷ *N.L.R.B. v. Virginia Electric & Power Co.*, 314 U.S. 469, 478 (1941).

²⁸ Van Arkel, *An Analysis of the Labor Management Relations Act, 1947* pp. 23-26, Practising Law Institute (1947); C.C.H. Lab. L. Course ¶ 1546 (1947).

²⁹ Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1 pp. 15-20 (1947).

ployer said to his employees: "I hate labor unions, and I think they are a menace to the country!" nevertheless this remark would not be competent evidence to determine whether a union steward discharged by the same employer shortly thereafter was fired for union activity.³⁰ If Senator Taft's illustration is to be applied literally, it would restrict the use of evidence in labor board cases more than ordinarily applied in our courts. The Board in at least one case has indicated an adjustment to this interpretation of section 8 (c).³¹ In the *Bailey* case the Trial Examiner prior to the amendment found that the respondent had violated section 8 (a) (1) by engaging in an unlawful course of conduct including the distribution of certain "anti Union circulars and notices." The Board considered the case after the amendments and in concurring that respondent had violated the said section stated "Our finding in this respect, however, is based solely upon the promises of economic benefits made by the respondent to its employees immediately proceeding the election. We do not, as did the Trial Examiner, predicate our unfair labor practice finding upon the statements contained in the circulars and notices distributed by the respondent, for although they clearly indicate the respondent's antipathy toward the Union and its leaders and the respondent's preference for individual bargaining, they appear to be only such expressions of opinion as are protected by the constitutional guarantee of free speech. . . . We do not base our 8 (1) finding on a course of conduct theory."³²

³⁰ 93 Cong. Rec. 6604; Mulroy, *The Taft-Hartley Act in Action*, 15 U. OF CHI. L. REV. 595, 611 (1948) in which the writer quoting N.A.M. General Counsel Smethurst states, "obviously, this construction would impose a harsher rule of evidence even than existed under common law rules in criminal cases."

³¹ In *Matter of The Bailey Company*, 75 N.L.R.B. 941 (1948); also see In *Matter of Fulton Bag and Cotton Mills*, 75 N.L.R.B. 883 (1948).

³² In H. R. Rep. No. 510, 80th Cong. 1st Sess., the house conference managers reported "Both the House bill and the Senate amendment contained provisions designed to protect the rights of both employers and labor organizations to free speech. The conference agreement adopts the provisions of the House bill in this respect with one change derived from the Senate amendment. . . . The practice which the Board has had in the past of using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose gave rise to the necessity of this change in the law. The purpose is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination." U.S. Cong. Serv.—80th Cong., 1st Sess., p. 1151 (1947).

D. LIMITATIONS UPON PARTY FILING UNFAIR LABOR PRACTICE CHARGE.

The amended Act provides that the Board's facilities shall not be available to a labor organization until it has filed certain information concerning the organization³³ and its officers have executed "non-communist affidavits."³⁴ The Congressional objective of the latter requirement was to remove Communist Party members and persons affiliated with the Party from official positions in the unions.³⁵ As the result of General Counsel Denham's interpretation that section 9 (h) required the officers of the parent body such as the A. F. of L. and the C. I. O. to execute non communist affidavits before any of their local unions could use the facilities of the N. L. R. B., there was a virtual boycott of the N. L. R. B. until the Board itself reversed this ruling on the ground that section 9 (h) was ambiguous and that the purpose of the law would be better realized through a policy not requiring the officers of the parent body to execute these affidavits.³⁶ In view of the fact that "any person"³⁷ may file a charge alleging that an employer has engaged in an unfair labor practice affecting commerce and section 9 (h) is applicable only to labor organizations, it is obvious that through the use of charges filed by indi-

³³ § 9(f) and (g).

³⁴ § 9(h) provides ". . . and no complaint shall be issued pursuant to a charge made by a labor organization . . . unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not the member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

³⁵ H. R. Rep. No. 245, 80th Cong., 1st Sess., states "At least 11 great national unions and a large number of local unions seem to have fallen into the hands of Communists, although in every case Communists appear to compose only a very small minority of the membership. In most of these cases the rank and file object to communistic influence in their unions. By the bill of rights set forth in section 8 (c), the bill helps them to rid themselves of communistic control. Section 9(f) (6) makes it incumbent upon the union leaders who now tolerate Communist infiltration in their organizations, affiliates, and locals, and temporize with it, to clean house or risk loss of the rights under the new act." For a discussion of the problems concerning the constitutionality of this provision see, Note (1948) 48 COL. L. REV. 253. Compare: *National Maritime Union of America v. Herzog*, 78 F. Supp. 146 (D.C. D.C. 1948).

³⁶ In *Matter of Northern Virginia Broadcasters, Inc., Radio Station WARL*, 75 N.L.R.B. 11 (1947). For a criticism of this case see, Note (1947) 27 NEBR. L. REV. 120.

³⁷ Rules and Regulations Series 5—§ 203.9 provides "A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person." C.C.H. Fed. Adm. Proc. p. 37,503.

viduals, a labor organization may evade section 9 (h); however, in the case of a refusal to bargain charge under section 8 (a) (5) it appears that the union must have complied with the filing provisions before the board will issue a remedial order under this section.³⁸ This view has been reinforced by a statement of policy made by N. L. R. B. Associate General Counsel Brooks in advising that while the Board will continue to process discrimination charges filed by individuals, it will not permit non complying labor organizations to evade the filing requirements through the subterfuge of individual filed charges in refusal to bargain cases.³⁹ However, upon a charge filed by an employer, the Board may find that the union, although a non-complying union, has refused to bargain with the employer in violation of section 8 (b) (3); but the Board carefully noted, however, that this does not amount to a certification of the non-complying union and it is ordered to bargain with the employer upon request.⁴⁰

Under the Wagner Act, the Board has consistently maintained that no doctrine of laches was applicable to it when issuing a remedial back pay order despite the fact that it might reach back over a substantial period and thus there was no limitation of time within which a charge might be filed or the complaint might be issued.⁴¹ However, the Board considered circumstances which seemed to justify limiting the period for which back pay would be ordered such as inexcusable delay in filing charges⁴² and delay in issuing the complaint.⁴³ During the legislative discussion of the Taft-Hartley Act the House bill recommended that "no complaint should issue stating a charge of an unfair labor practice that occurred more than six months before the charge was filed, or based on a charge that was filed more than six months before the complaint was issued."⁴⁴ In the joint conference it was agreed to accept the Senate amendment which provided ". . . no com-

³⁸ In *Matter of Marshall and Bruce Company*, 75 N.L.R.B. 90 (1947).

³⁹ C.C.H. Lab. L. Serv. Rep. Letter No. 386, p. 11 (Feb. 19, 1948).

⁴⁰ In *Matter of National Maritime Union of America*, 78 N.L.R.B. No. 137 decided August 17, 1948.

⁴¹ In *Matter of Baker Manufacturing Co.*, 75 N.L.R.B. 1012 (1948); In *Matter of Gibbs Corporation*, 74 N.L.R.B. 1182 (1947).

⁴² In *Matter of Kalamazoo Coaches, Inc.* 66 N.L.R.B. No. 14 (1946); In *Matter of Chas. E. Austin, Inc.*, 49 N.L.R.B. 1048 (1943).

⁴³ In *Matter of Louisville Railway Company*, 69 N.L.R.B. 691 (1946).

⁴⁴ H.R. Rep. No. 510, 80th Cong., 1st Sess.; U.S. Cong. Serv.—80th Cong. 1st Sess. p. 1159 (1947).

plaint should issue based upon any unfair labor practice occurring more than six months before the filing of the charge and the service of a copy of the charge upon the person against whom the charge is made”⁴⁵ Hence cases may be delayed after the charge is filed as the result of either administrative carelessness or justifiable administrative difficulty during which the respondent may have no relief; but, the respondent may be assured that “stale” discriminatory discharge cases where charges are not filed and of which he has no notice will not continue to plague him after the running of the six month period of limitation.⁴⁶

E. RULES OF EVIDENCE AND REVIEW OF BOARD ORDERS.

The Board formerly was freed of the technical common law rules of evidence under the statutory authority that in connection with the hearings before the Trial Examiner in unfair labor practice cases “. . . the rules of evidence prevailing in courts of law or equity shall not be controlling”⁴⁷ This flexible rule of admitting evidence coupled with the provision that the Board’s findings of facts “. . . if supported by evidence, shall be conclusive [upon the reviewing court] . . .” which was interpreted by the Supreme Court as meaning “substantial evidence,”⁴⁸ in the opinion of the House, gave too great a latitude in choosing the evidence that it would believe and use as the basis of its findings and too great an effect to the findings that rest on such evidence.⁴⁹ Thus, when the House report referred to certain court decisions describing the results as “shocking injustices,” “overwhelmingly opposed by the evidence,” and findings that “strain our credulity,” it concluded that the reviewing courts under the Supreme Court interpreta-

⁴⁵ § 10(b). Rules and Regulations Series 5 — § 203.14 provides “Upon the filing of a charge, the charging party shall be responsible for the timely and proper service of a copy thereof upon the person against whom such charge is made. The Regional Director will as a matter of course, cause a copy of such charge to be served upon the person against whom the charge is made, but he shall not be deemed to assume responsibility for such service.” C.C.H. Fed. Adm. Proc. p. 37,504.

⁴⁶ In *Matter of California Metal Trades Ass’n, et al*, decided by N.L.R.B. Nov. 3, 1948.

⁴⁷ § 10(b) of the Wagner Act.

⁴⁸ *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197 (1938).

⁴⁹ H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947) which cites as examples *Wilson & Co. v. N.L.R.B.*, 126 F. (2d) 114, 117 (C.C.A. 7th 1942); *N.L.R.B. v. Columbia Products Corp.*, 141 F. (2d) 687 (C.C.A. 2nd 1944); and *N.L.R.B. v. Union Pacific Stages, Inc.*, 99 F. (2d) 153 (C.C.A. 9th 1938).

tion of the statute were powerless to correct the Board's abuses.

The first criticized portion was corrected by providing that ". . . any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States . . ." ⁵⁰ thus leaving to the Board and the reviewing court the determination whether it was impracticable to conform to the district court rules of evidence and if error was committed whether it resulted in a *substantial error*. In rectifying the second basis of criticism, reference is still made to the Board's findings of fact as being conclusive is supported by substantial evidence but it is carefully qualified by the phrase ". . . on the record considered as a whole . . ." ⁵¹ The report of the joint conference committee expressly states that the new language of the judicial review section will very materially broaden the scope of the courts' reviewing power and while it is not intended to provide a trial de novo, it will prevent the alleged abdication of the courts to the Board. In this connection the amended Act requires that the Board in making findings of fact must base them ". . . upon the preponderance of the testimony taken . . ." ⁵² Under the newly granted power of review it is intended that the courts have a duty to see that the Board observes this limitation and that it not infer facts not supported by evidence or that it concentrate on one element of proof and ignore other proof without some adequate explanation of its reasons for disregarding it.

F. INTERFERENCE, RESTRAINT AND COERCION.

Section 8 (a) (1) of the Act remains unchanged in language and still forbids the employer from "interfering with, restraining or coercing employees" in the exercise of their rights of self organization guaranteed in section 7 of the Act. It is significant that while it was assumed that the right to self organization also included the right to "refrain from such activity" the Act now gives express recognition of this right. ⁵³ Excluding the derivative violations of this section undoubtedly the greatest bulk of the cases involving independent inter-

⁵⁰ § 10(b).

⁵¹ § 10(e) and (f).

⁵² H.R. Rep. No. 510, 80th Cong., 1st Sess. U. S. Cong., Serv. — 80th Cong., 1st Sess. p. 1161-3 (1947).

⁵³ Footnote 4, *supra*.

ference, restraint and coercion arise out of either oral or written statements. Accordingly, the previously discussed new interpretations of employer responsibility and free speech will have the greatest impact upon this unfair labor practice. Subject to these qualifications conduct previously proscribed by this section including espionage and surveillance,⁵⁴ economic coercion,⁵⁵ anti-union statements,⁵⁶ unduly restrictive non-solicitation rules,⁵⁷ questioning employees concerning union membership,⁵⁸ and various other activities will continue to fall within the ban of this unfair labor practice.

G. DOMINATION OF OR INTERFERENCE WITH A LABOR ORGANIZATION.

While the substance of section 8 (a) (2) remains unchanged and continues to declare it to be an unfair labor practice for the employer to interfere with the employee's right of self organization by means of the so-called company dominated union and forbids the employer from "dominating or interfering with the formation or administration of any labor organization,"⁵⁹ amendments made by section 10 (c) and 9 (c) (2) seek to wipe out a long standing disparity of treatment accorded non-affiliated dominated unions which has been the subject of much criticism. Thus, in connection with the proposed House bill the House report comments "A second change forbids the admitted practice of the old Board of discriminating against independent unions, simply because they are independent, by ordering with respect to them more drastic penalties that it orders for unions affiliated with the A. F. of L. or the C. I. O. in similar circumstances. . . ." ⁶⁰

Congress found that this disparity took the form in the case of affiliated unions in permitting "employers to provide bulletin boards in their plants for the union's use, to give

⁵⁴ N.L.R.B. v. Collins and Aikman Corp., 146 F. (2d) 454 (C.C.A. 4th 1945); In Matter of Sohio Pipe Line Company, 75 N.L.R.B. 858 (1948).

⁵⁵ N.L.R.B. v. East Texas Motor Freight Lines, 140 F. (2d) 404 (C.C.A. 5th 1944); In Matter of O'Keefe and Merritt Mfg. Company, 75 N.L.R.B. 117 (1947).

⁵⁶ N.L.R.B. v. Vincennes Steel Corp., 107 F. (2d) 169 (C.C.A. 7th 1941); CF. In Matter of Atlanta Metallic Company, 75 N.L.R.B. 208 (1947).

⁵⁷ Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793 (1945); Daykin, *Employees' Right to Organize on Company Time and Property* 42 ILL. L. REV. 301 (1947).

⁵⁸ In Matter of Ames Spot Welder Company Inc., 75 N.L.R.B. 352 (1947).

⁵⁹ 12 N.L.R.B. ANN. REP. 27-28 (1947); N.L.R.B. v. J. H. Mathews & Co., 156 F. (2d) 706 (C.C.A. 3rd 1946).

⁶⁰ H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947) which cites hearings by the Special House Committee to Investigate the N.L.R.B., part 9, pages 1867, 1908-9, 2052-3 Part II page 2242 and others.

union officials preferred treatment in laying off workers and calling them back, and to allow shop stewards without losing pay to confer not only with the employer but with the employees as well, and to transact other union business in the plant . . . [while not permitting] the employer to do the same things for non-affiliated unions”⁶¹ There was also a disparity of treatment in connection with the type of remedial order issued.⁶² The Taft-Hartley Act now makes it mandatory on the Board to apply the same rules of decision irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope.⁶³

H. DISCRIMINATION IN REGARD TO HIRE OR TENURE OF EMPLOYMENT.

In the basic wording of section 8 (a) (3) there has been no change in the unfair labor practices which forbids an employer from discriminating “. . . in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization” But again another section of the amended Act has a serious impact in that it is provided that “no order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.”⁶⁴ While the Board has consistently maintained that in administering this section of the Wagner Act it does not seek to interfere with the normal exercise by an employer of his rights to select or discharge his employees for any reason other than those forbidden by the Act, it did normally find discriminatory treatment violative of the Act if the action was prompted even *in part* by a desire or effort to interfere with the free right of self organization although there might exist concurrently a valid reason for such treatment of the employee.⁶⁵

The original House bill provided “No order of the Board shall require the reinstatement of any individual as an em-

⁶¹ H.R. Rep. No. 510, 80th Cong., 1st Sess.; U.S. Cong., Serv. — 80th Cong. 1st Sess. p. 1146 and 1160-1161 (1947).

⁶² Compare the Board's Order in the following cases: In *Matter of Bradford Machine Tool Company*, 44 N.L.R.B. 759 (1942) and In *Matter of Hancock Brick and Tile Company*, 44 N.L.R.B. 920 (1942).

⁶³ § 10(c).

⁶⁴ § 10(c).

⁶⁵ 11 N.L.R.B. ANN. REP. 37 (1946).

ployee who has been suspended or discharged, or the payment to him of any back pay, unless the weight of the evidence shows that such individual was not suspended or discharged for cause."⁶⁶ In the House report on this bill there is a reference to the *Wyman Gordon case* which it describes as typical of the Board's attitude since that case involved the problem of double motivation for discharge and the Board in ordering reinstatement with back pay admitted that the employee was guilty of misconduct but inferred that because he was a member or an official of a union, that the latter and not the misconduct was the reason for his discharge.⁶⁷ While the language suggested by the House was not finally incorporated in the amended Act, the joint conference committee clearly indicated that the "suspended or discharged for cause" of section 10 (c) was intended to rectify the alleged abuse of inferring an unlawful motive in the employer's action.⁶⁸ It has been previously discussed in subdivision E of this article, *supra*, that under the Taft-Hartley Act, the Board's findings of fact can no longer be based merely upon some credible evidence, but must be grounded upon a preponderance of the testimony in the whole case.

A substantial change has been made in the proviso of section 8 (a) (3) which formerly permitted various types of contracts providing union security clauses. The amended Act authorizes only contracts which (a) require membership as a condition of employment on or after the thirtieth day of employment; and (b) after a majority of the employees within the appropriate unit covered by such contract have authorized the union to negotiate for such an agreement.⁷⁰ Section 9 (e) (1) provides the procedures for such elections while section 9 (e) (2) makes provision for elections to rescind the union's authority to negotiate for such an agreement. Since it was

⁶⁶ H.R. 3020 as passed by the House of Representatives April 17, 1947.

⁶⁷ In *Matter of Wyman-Gordon Company*, 62 N.L.R.B. 561 (1945).

⁶⁸ H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947). For a study of the history of the Taft-Hartley Act indicating a restriction of the protected area for strikers' collective activity see Blinn, *Rights and Obligations of Strikers Under the Taft-Hartley Act* 13 Mo. L. Rev. 1 (1948).

⁶⁹ The conference committee report states that "... The conference agreement omits the 'weight of evidence' language, since the Board, under the general provisions of section 10 must act on a preponderance of the evidence, ..." H.R. Rep. No. 510, 80th Cong., 1st Sess.; U. S. Cong., Serv.—80th Cong., 1st Sess. p. 1161 (1947).

⁷⁰ § 8(a) (3).

a recognized fact that many States had enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal, Congress in seeking to accommodate this Act to the State policy provided in section 14 (b) that nothing in the Taft-Hartley Act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement in any State where the execution of such an agreement was contrary to State policy.⁷¹ The Board has interpreted this as prohibiting it from conducting a union shop election in those States thus making the State law controlling⁷² since there can be no valid union security clause without the union shop election.

Assuming that the above discussed requirements are observed, the next problem posed is the enforcement of the union security clause by the employer upon request by the union. For some time the Board had been attempting to reconcile the apparent conflict between giving full amplification to the underlying philosophy of the right of self organization guaranteed in section 7 of the Act and at the same time observing the private contract rights flowing out of a valid collective bargaining contract containing some form of union security clause. Thus, there was evolved a court approved policy of giving effect, within limits, to the valid union security clauses where dual unionism was the basis of the employee's non-membership in the union which resulted in his discharge or other discrimination against him.⁷³

While it appears that the previous decisional law continues to be applicable in that the employer may not acquiesce in the union's demand to rid the force of employees of those engaging in dual unionism, the amended Act seeks to extend protection to the individual employee from other possible arbitrary action by the union whereby he may be expelled from membership

⁷¹ H.R. Rep. No. 510, 80th Cong., 1st Sess.; U.S. Cong., Serv.—80th Cong., 1st Sess., p. 1166 (1947).

⁷² In Matter of Giant Food Shopping Center, Inc., 77 N.L.R.B. No. 133 (1948).

⁷³ Wallace Corp. v. N.L.R.B., 323 U.S. 248 (1944); N.L.R.B. v. American White Cross Laboratories, Inc., 160 F. (2d) 75 (C.C.A. 2nd 1947); N.L.R.B. v. Portland Lumber Mills, 158 F. (2d) 365 (C.C.A. 9th 1946) writ of cert. dismissed 68 S. Ct. 347 (1948); 12 N.L.R.B. ANN. REP. 49 (1947). Cf. In Matter of Gamble-Skogmo, Inc., 75 N.L.R.B. 1068 (1948).

and his discharge be demanded.⁷⁴ This protection is afforded by the further proviso that “. . . no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition or acquiring or retaining membership.”⁷⁵ It has been suggested that the union by demanding discharge of an employee *before* expulsion would evade this section since it refers only to discrimination for non-membership in a labor organization.⁷⁶ However, such an evasion would only be applicable to cases where the employer assented to the demand of the union which does not seem to be a true evasion since such action would be equally possible absent any union security clause in the collective bargaining agreement. A criticism suggested by Board member, Reynolds, dissenting in the *Lewis Meier* case⁷⁷ that the union should be made a co-responsible in the proceeding seems to be partially answered by an amendment to section 10 (c) that back pay may be required of the employer or the labor organization dependent upon which was responsible for the discrimination.

I. REFUSAL TO BARGAIN.

Section 8 (a) (5) continues the language of a similar section in the pre-existing law which required that employers bargain collectively with the representative of its employees within an appropriate bargaining unit.⁷⁸ Section 8 (b) (3) places a correlative duty on the labor organization which is the employee

⁷⁴ For discussion of numerous alleged abuses through the use of union security clauses against minorities within the union see Senate Report No. 105, 80th Cong., 1st Sess. (1947) pp. 6-7.

⁷⁵ § 8(a) (3). By causing or attempting to cause the employer to discriminate against an employee based upon nonmembership where membership in the union has been denied or terminated other than on these grounds, the labor organization's action will be violative of section 8(b) (2).

⁷⁶ Van Arkel, *An Analysis of the Labor Management Relations Act, 1947* p. 31 Practising Law Institute (1947).

⁷⁷ In Matter of Lewis Meier & Company, 73 N.L.R.B. 520 (1947).

⁷⁸ For a detailed analysis see Weyand, *The Scope of Collective Bargaining Under the Taft-Hartley Act* First Annual Report of New York University Conference on Labor (1948).

representative to bargain collectively with the employer. Newly added section 8 (d) in defining the duty to bargain adopts a substantial portion of the decisional law developed under the Wagner Act.⁷⁹ However, in stating that “. . . such obligation does not compel either party to agree to a proposal or require the making of a concession . . .” was not intended to relieve the bargaining parties from making counterproposals since the word “counterproposal” was removed from an early draft of the bill and the word “concession” substituted based upon an objection raised by the Chairman of the Board.⁸⁰ Thus in re-emphasizing the fundamental federal philosophy of the importance of free collective bargaining⁸¹ one element is removed and one new element added to the area formerly recognized as good faith bargaining. Under the previous decisions the Board has consistently held that the duty to bargain was a continuing one and that the employer was obligated to negotiate with the accredited bargaining agency concerning the modification, interpretation, and administration of the existing contract.⁸² However, section 8 (d) asserts that the duty to bargain “. . . shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period . . .” Thus, the employer is still obliged to continue to confer with the bargaining representative concerning the application and interpretation of the contract during its term but need not confer regarding its modification; the line between modification and interpretation may indeed become obscure.⁸³ Where there is an existing collective bargaining contract, there is added as a part of the duty to bargain under section 8 (d) the require-

⁷⁹ *H. J. Heinz Co. v. N.L.R.B.*, 311 U. S. 514 (1941); *Rapid Roller Co. v. N.L.R.B.*, 126 F. (2d) 452 (C.C.A. 7th 1942) cert. denied. 317 U.S. 650 (1942); *Globe Cotton Mills v. N.L.R.B.*, 103 F. (2d) 91 (C.C.A. 5th 1939).

⁸⁰ Senate Rep. No. 105, 80th Cong., 1st Sess. (1947).

⁸¹ N.L.R.B. General Counsel Denham, *The Taft-Hartley Act* 20 TENN. L. REV. 168, 179 (1948) refers to the collective bargaining process under the Act as “. . . the very heart of the Act. . .” It has been suggested that the legitimate field of collective bargaining has been restricted by limitations imposed by other sections of the Act such as restrictions on union security clauses, §§ 8(a)(3), 8(b)(2) and 9(e), restrictions on check off of union dues and assessments, § 302 (a) and (c), restrictions on featherbedding provisions in contracts, § 8(b)(6) and others. Weyand, *The Scopes of Collective Bargaining Under the Taft-Hartley Act* First Annual Report of New York University Conference on Labor at page 261 (1948).

⁸² In *Matter of Alexander Milburn Company*, 62 N.L.R.B. 482, 510 (1945); 12 N.L.R.B. ANN. REP. 36 (1947).

⁸³ See Senator Taft's remarks 93 Cong. Rec. 6860 (1947).

ment that the party desiring to terminate or modify the agreement must notify the other party in writing sixty days before the expiration of the contract or sixty days before the proposed termination or modification, offer to meet with the other party for the purpose of negotiating a new agreement, notify the various state and federal mediation services within thirty days after the first notice if no agreement has been reached, and continue the existing agreement in effect for sixty days after the first notice or until the expiration of the contract, whichever is later, without restoring to a strike or lockout. As an additional assurance to the observance of this section other than the possible remedial order directing the offending party to bargain, any employee who engages in a strike during this period shall lose his status as an employee for the purposes of the protection of the Act. It would seem, however, that the strike necessarily would have to be one which was associated with a demand for termination or modification of the collective bargaining agreement and not merely one arising out of some unrelated grievance.

Under the Taft-Hartley Act the principle of majority rule continues to exist but in amending the proviso of section 9 (a)⁸⁴ new importance is given to the individual employee's rights within the frame work of a system governed by majority rule.⁸⁵ Under the Wagner Act the Board with court approval⁸⁶ had given the proviso only limited effect thus submerging the rights of the individual employee to the rights of the exclusive bargaining representative; the individual had the right of *presenting* his grievance but the exclusive bargaining representative was given the right to be present and negotiate at every stage of consideration of the grievance. The revised proviso would make it clear that the employee's right to present grievances exists independently of the rights of the bargaining representative and thus the individual in

⁸⁴ § 9(a) "That any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievance adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining contract or agreement then in effect. *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment."

⁸⁵ Torff, *Taft-Hartley Act and Collective Bargaining* 43 ILL. L. REV. 323, 351 (1948).

⁸⁶ N.L.R.B. v. Hughes Tool Co., 147 F. (2d) 69 (C.C.A. 5th 1945); 10 N.L.R.B. ANN. REP. 63-64 (1945).

presenting his grievance may become the dominant figure and the bargaining representative the "silent listener."⁸⁷

CONCLUSION.

Since 1935 the federal labor policy has been charted through the administration of the Wagner Act which dealt primarily with the establishing of a free uncoerced atmosphere for collective bargaining by seeking to dissipate the effect of certain conduct on the part of employers determined to interfere with the employees right of free organization. While the Taft-Hartley Act represents a substantial shift in the federal labor policy by adding restrictions on the conduct of labor organizations thus making both employers and labor organizations amenable to remedial orders of the Board. It must not be overlooked that Title I is, in fact, the National Labor Relations Act, as amended, and that a great bulk of the Wagner Act is retained. As indicated within the scope of this article, many of the amendments affecting the employer unfair labor practices were dictated by twelve years experience in the administration of the Wagner Act and not without careful consideration should they be discarded automatically in a general antipathy toward an Act bearing the approval of the 80th Congress.

Sound labor relations cannot be established by litigation; neither can sound labor relations be fostered and promoted as the result of extremes and various "trends." Rather, harmonious labor relations flow from a well established policy accepted by the parties coupled with the cooperation of the parties through mutual trust and respect. While changes in policy are not to be condemned, in as much as amendments to this Act are almost a certainty, moderation and understanding must be the keynote. Accordingly, the primary purpose of this article is to survey the underlying reason and resulting effect of some of the amendments upon the employer unfair labor practices, thus aiding in an informed consideration of the direction of any proposed change in our current labor policy.

⁸⁷ Senate Rep. No. 105, 80th Cong. 1st Sess. (1947).

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