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# LABOR CONTRACTS AND THE TAFT-HARTLEY ACT

CHARLES H. LIVENGOOD, JR.\*

## I

### NEW IMPORTANCE OF THE COLLECTIVE BARGAINING AGREEMENT

Whatever else it does, the Taft-Hartley Act<sup>1</sup> places new emphasis on the collective bargaining agreement. Emotional polemics as to whether the Act is an instrument of "enslavement" or "emancipation" and fulminations over its peripheral details have hogged the spotlight. The effect has been to obscure the fact that the new statute clings to the concept of private collective bargaining as the most acceptable answer to the demand which gave rise to this legislation—the public desire for minimization of labor disputes.<sup>2</sup>

A glance at the Act will disillusion any who cherish the idea that "the labor problem" was solved outright by those who successfully insisted that "there ought to be a law." It is true that the new statute goes far beyond the Wagner Act,<sup>3</sup> which simply undertook to remove from industrial disputes the closely related issues of the right of employees to organize and to bargain collectively. In contrast, the new Act not only (1) seeks to eliminate additional issues from the area of private controversy; it also (2) undertakes in various respects to control the procedures and effects of bargaining, (3) proscribes the use of certain weapons in the bargaining process, and (4) supplements private bargaining with provisions for voluntary and compulsory mediation.<sup>4</sup>

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<sup>1</sup> Labor Management Relations Act, 1947, Pub. L. No. 101, 80th Cong., 1st Sess. (June 23, 1947), 61 STAT. —, 29 U. S. C. A. §141 *et seq.* (Supp. 1947).

<sup>2</sup> A Fortune survey conducted shortly before the Eightieth Congress convened indicated that of those questioned 59 per cent favored a bill to prohibit strikes in companies taken over by the government, 56.2 per cent would prohibit general area strikes, 30.2 per cent favored compulsory arbitration of labor disputes involving large manufacturers, and 27.9 per cent wished to outlaw all strikes whatsoever. Fortune, Nov. 1946, pp. 10, 14. According to a contemporaneous Gallup poll, 66 per cent favored new statutory controls over labor unions. Washington Post, Nov. 10, 1946, §B, p. 1, col. 4.

<sup>3</sup> National Labor Relations Act, 49 STAT. 449 (1935), 29 U. S. C. §151 *et seq.* (1940).

<sup>4</sup> For example: (1) The closed shop, featherbedding and union-controlled welfare funds are abolished as legitimate objects of economic pressure. §§8(a)(3), 8(b)(2), 8(b)(6), 302. (2) Notice and a cooling period in status quo are required for termination or amendment of collective agreements, and damage suits are authorized in the event of contract breach. §§8(d), 301. (3) Certain types

The fact remains, however, that in rejecting the various other proposals for dispute settlement which were embodied in the rash of bills before it,<sup>5</sup> Congress reaffirmed the Wagner Act's reliance on voluntarism as the most acceptable machinery for economic peace.<sup>6</sup>

This renewed confession of faith in the ultimate effectiveness of collective bargaining—by a Congress generally considered hostile to organized labor—in itself suggests a reappraisal of the function and content of union agreements. For up to now there has been something less than universal acceptance of free collective bargaining as a desideratum rather than an affliction.

There are a number of other factors which lend new significance to labor contracts. Thus the circumscription of self-help<sup>7</sup> and the virtual prohibition of union security clauses<sup>8</sup> will inevitably lead to demands on the part of organized labor for more specific and extensive protection in the labor contract itself, with respect to working conditions and organizational activities.

Pointing in the same direction is the prospect of reduced participation by the National Labor Relations Board in the orderly adjustment of labor disputes. There are several circumstances which indicate that peaceful adjustments of many disputes heretofore settled by the Board will now depend more upon the terms and machinery of the collective agreement. Among these is the unions' distrust of the new NLRB and their fear that it will be the puppet of an unsympathetic Congress.<sup>9</sup> The of strikes and boycotts are prohibited. §§8(b)(4), 303. (4) Conciliation and mediation procedures are elaborated, and are mandatory in disputes found to imperil the national health or safety. Title II.

<sup>5</sup> Bills pending before Congress would have established authoritative fact-finding in various forms, set up machinery for compulsory arbitration, and created an elaborate system of labor courts. These proposals are summarized in Forsythe, *The Settlement of Contract Negotiation Disputes: A Comparison of Proposed Legislation*, 12 LAW & CONTEMP. PROB. 330 (1947).

<sup>6</sup> Title I, which rewrites the National Labor Relations Act, nevertheless retains undisturbed the recital in §1 that it is the national policy to eliminate obstructions to commerce by encouraging collective bargaining. Title II, §201 reiterates that "it is the policy of the United States that . . . the advancement of the general welfare . . . and of the best interests of employers and employees can most satisfactorily be secured . . . through the processes of conference and collective bargaining between employers and the representatives of their employees." The over-all declaration of policies in §1(b) of the Act was taken from the House bill (H. R. 3020), but significantly omits the policy recited by the House bill to encourage the peaceful settlement of labor disputes affecting commerce by giving the employees themselves a direct voice in the bargaining arrangements with their employers. H. R. REP. NO. 510, 80th Cong., 1st Sess. 30 (1947).

<sup>7</sup> See, e.g., the classification of certain strikes, boycotts and other union activities as unfair labor practices in §8(b) of the Act.

<sup>8</sup> See heading IV, The Union Security Clause, *infra*.

<sup>9</sup> General Counsel Denham's reputed "It will be a privilege, sir," in reply to an inquiry whether he would consult with the Senate-House Labor Committee in interpreting the Act, bids fair to become as notorious in union-halls as was the legendary "Clear it with Sidney" in management circles of the New Deal era. See 20 LAB. REL. REP. (Labor-Management) 209 (1947). President Truman promptly reminded NLRB personnel that they were responsible to the executive and not the legislative branch of government. 20 *id.* at 252.

effect of this lack of confidence is aggravated by the prerequisites upon which the Act conditions resort to the Board.<sup>10</sup> As a result, it has been freely predicted that the major unions will boycott the Board and rely upon their own resources to insure collective bargaining and enforce the terms of their contracts.<sup>11</sup> While there have been recent indications of some retreat from such complete self-confidence, the tendency to by-pass the Board is likely to make itself felt, and will probably be accelerated by the statutory slow-down of Board proceedings. President Truman's prediction in his veto message that the Act will impose the equivalent of a five-year backlog of election cases on the Board may prove inaccurate because of the unions' trend toward self-reliance. It is obvious, however, that the many new types of proceedings which the Board will be obliged to process,<sup>12</sup> the confusion implicit in a dual system of adjudication created by the various provisions for resort to the courts,<sup>13</sup> and the lowered efficiency incident to the numerous re-

<sup>10</sup> Before any union can avail itself of any rights granted by the Act, as by bringing representation or complaint proceedings, the union and any national or international labor organization of which it is an affiliate must file with the Secretary of Labor detailed information regarding their internal organization, together with complete financial statements, and annual reports keeping these data up-to-date. §§9(f), 9(g). All officers of the union and of such parent organizations must also have filed non-Communist affidavits within the preceding year. §9(h).

<sup>11</sup> The United Steelworkers (CIO), United Automobile Workers (CIO) and International Typographical Union (AFL) have gone on record with a policy of ignoring the NLRB; and as of October 1, 1947, no major union had qualified to use the facilities of the Board. 20 LAB. REL. REP. (Labor-Management) 200, 201, 240 (1947). Former NLRB General Counsel Van Arkel predicts, "Unions, rather than submitting their problems to a governmental agency as in the past, will seek to avoid those governmental processes wherever possible and may eventually boycott them altogether." 20 *id.* at 196.

<sup>12</sup> The NLRB is now charged with processing unfair practice charges against unions as well as employers, with its General Counsel cast in the role of Janus-faced prosecutor. §§3(d), 8(b), 10(a). Its duties are also extended to several new types of election cases, including enlarged provision for employer petitions for certification of bargaining agent, mandatory run-off elections, employee and union petitions for decertification, referenda for craft and professional employees on the issue of separate representation, and ballots on granting and rescinding the authorization of union-shop contracts. §§9(b), 9(c)(1), 9(c)(3), 9(e). Other new functions are the adjudication of jurisdictional disputes, and referenda on the employer's last offer in national disputes. §10(k), 209(b).

<sup>13</sup> Section 303(b) authorizes private damage-suits based upon the strikes and boycotts defined as unfair practices by §8(b)(4). Thus the several trial courts will be passing upon the same issues which are presented to the NLRB in complaint cases. It is improbable that the social and economic philosophies of the judge will invariably lead to the same conclusions as the expertise of the Board. The contrast is likely to be even more sharply drawn by §10(1), making it mandatory upon NLRB agents to apply to the district courts for injunctive relief in §8(b)(4) cases before the Board has passed upon the issues. Moreover, §10(c) provides that if no objections are filed to the NLRB trial examiner's interim report and order in complaint cases, such order shall become the definitive order of the Board, suggesting the possibility that a party so desiring might by-pass the Board completely by withholding objections and petitioning for review in the circuit court of appeals. There is obviously inherent in all these provisions the potential development of parallel and inconsistent lines of authority on labor dispute issues. As pointed out in the conference report, deletion of the word "exclusive," from the definition of the Board's jurisdiction over unfair practices in

strictions placed on the Board's procedure,<sup>14</sup> will all reduce the prospects of a speedy administrative solution and increase the importance of satisfactory contract procedures as the main hope for peaceful adjustment of labor-management frictions.

A further major consideration contributes to the new importance of the collective bargaining agreement. It is the impetus which the Act lends to the concept of such agreements as commercial contracts, binding upon unions, employers and employees, and enforceable in the courts by established forms of legal remedy.

So much has been said with respect to the general orientation of the collective agreement under the Act because some degree of perspective is essential even to the utter pragmatist in labor law practice. The lawyer or other negotiator who seats himself at the bargaining table with the intention of simply giving as little as possible, and getting as much as may be, is likely to end up an embittered man. So long as our federal labor relations laws place their primary reliance upon the principle of collective bargaining—and this the Taft-Hartley Act demonstrably does—the aim of all participants must be a fair and efficient working agreement. Any other purpose steers squarely against the current of expressed national policy and must sooner or later come to practical grief on the shoals of government sanctions. The draftsmen who prepare the collective agreement must have some conception of its significance, in the plant and in the national economy, or they will be hopelessly deluded in trying to anticipate the treatment their contract will receive at the hands of arbitrators, administrative tribunals and the courts. Finally, any but the most myopic management and unperceptive union must recognize that basically their respective interests, as well as the interests of the public, lie not merely in reaching an agreement, but in reaching an agreement which, because it is equitable and workable, will minimize the possibility of costly disagreements.

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§10(a) indicates that "when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies." H. R. REP. NO. 510, 80TH CONG., 1ST SESS. 52 (1947).

<sup>14</sup> While it remains to be seen whether particular amendments to the NLRA will materially change previous Board practice, the cumulative effect is unquestionably toward formalization and rigidity. Section 4(a) prohibits the expediting of complaint cases by delegation of preliminary processing of trial examiners' reports to the review section and trial examining division, for reasons detailed in the report of the Senate committee, which deemed existing usage "unjudicial." SEN. REP. NO. 105, 80TH CONG., 1ST SESS. 8-10 (1947). Additional restrictions on unfair practice proceedings are imposed by §10, which require that Board rules of evidence conform so far as feasible with the federal rules of civil procedure, that NLRB orders be based upon a "preponderance of the testimony," and that the Board discard such convenient rules of thumb as that of ordering disestablishment of non-affiliated unions only. Similarly, amendments in §9, relating to representation proceedings, require discard of the cross-check as a quick substitute for elections, elimination of pre-hearing elections, direction of elections by the Board itself instead of the regional director, and observance of various statutory standards as to the appropriate bargaining unit and eligibility to vote.

## II

## CONTRACT LIABILITY UNDER THE ACT

Among the most vocal demands for new labor legislation last winter was the insistence upon greater union responsibility. This demand Congress undertook to meet in the new Act by providing, among other things, for damage suits against unions as well as employers for breach of collective agreements. Unions within the coverage of the Act are endowed with status as legal entities for the purpose of law-suits, the federal courts are provided as an available forum without regard to diversity of citizenship or the amount in controversy, and enforcement of money judgments is authorized against unions and their assets.<sup>15</sup>

It was strongly urged in the Congressional debates that unions could already be sued as an entity in most states, and that there was therefore no reason to increase the workload of the already overburdened federal courts.<sup>16</sup> It is true that in some jurisdictions a union can clearly sue or be sued as an entity.<sup>17</sup> In others, however, it seems almost as clear that the common law rule prevails, requiring that all members of an unincorporated association be made parties to a suit against it.<sup>18</sup> In the great majority of states a considerable amount of uncertainty exists as to just what procedural steps are necessary to bring a union before the court and what assets are subject to any judgment which might be obtained.<sup>19</sup> Whether or not a substantial technical change has been effected

<sup>15</sup> §301. It should be noted that, contrary to a widespread impression, the Act does not expressly authorize injunctions at the suit of private parties for breach of contract, nor in any other case except that of prohibited payments by employers to a representative of employees. §302(e); see 93 CONG. REC. 5065, 5074 (May 9, 1947).

<sup>16</sup> 93 CONG. REC. 4153, 4154 (April 25, 1947).

<sup>17</sup> *Deeney v. Hotel and Apartment Clerks' Union*, 57 Cal. App. 2d 1023, 134 P. 2d 328 (1943); *United Brotherhood of Carpenters and Joiners of Amer. v. McMurtrey*, 179 Okla. 575, 66 P. 2d 1051 (1937). A statutory basis ordinarily supports such decisions, but a like result has been reached in its absence. *Busby v. Electric Utilities Employees Union*, 147 F. 2d 865 (App. D. C. 1945). In the federal courts, the rule has been that the capacity of unincorporated associations, including labor unions, to sue or be sued is determined by the law of the state where the action is brought unless a substantive federal right is being enforced, in which event suit can be maintained in the common name. FED. R. CRV. P., 17(b).

<sup>18</sup> *Hallman v. The Wood, Wire and Metal Lathers' Int. Union*, 219 N. C. 798, 15 S. E. 2d 723 (1941); *Smith v. International L. G. W. Union*, 58 Ga. App. 26, 197 S. E. 349 (1938); *Wilson v. Airline Coal Co.*, 215 Iowa 855, 246 N. W. 753 (1933). For the suggestion that an opposite result should now obtain in North Carolina because of 1943 statutory changes, see Note, 25 N. C. L. REV. 319 (1947).

<sup>19</sup> The minority report on the Senate bill took the position that the laws of at least twenty-five states now provide for suits against the union in its common name and that at least ten other states allow representative suits against the union members, so that in "only 13 states, at most, are there presented difficulties in reaching the assets of the unions." SEN. REP. No. 105, Pt. 2, 80th Cong., 1st Sess. 15 (1947). However, many of the pertinent statutes are ambiguous and open to various constructions; thus in Minnesota it was held that the union could be sued in its common name, but only on a showing that it was engaged in commercial

in the legal status of unions, the psychological effect is almost certain to be a considerable increase in litigation. The mere element of uncertainty was a significant factor in discouraging suits against labor organizations.

In making express provision for contract liability of unions, Congress did not pause to quibble over such niceties of contract law as the issues of how a satisfactory legal theory for collective agreements is to be constructed, or which provisions of the typical agreement are mere conditions and which are enforceable covenants, or what covenants can be enforced against whom and by whom, or where the mutuality of consideration normally essential to a binding contract can be found, or whether union agreements dealing with broad human relationships can properly be forced into the mold of orthodox commercial contracts. To a large extent, these questions must still be threshed out by the courts. It can at least be anticipated, however, that the foreseeable increase in volume of litigation will expedite the evolution of answers.

As a part of what has been called their "rigid" attitude toward labor,<sup>20</sup> the courts in earlier days raised substantial doubt as to whether the collective bargaining agreement had any legal status at all.<sup>21</sup> While it is questionable that such decisions retain much vitality, the variety of opinions expressed in more recent cases, as to the nature of the contract and the rights it creates, leaves considerable confusion. Thus, aside from the decisions which have enforced union contracts without legal rationalization, the courts have variously applied at least three different theories: (1) the operative usage theory,<sup>22</sup> (2) the agency theory<sup>23</sup> and (3) the third-party beneficiary theory.<sup>24</sup> No one of these is adequate to

business. *Bowers v. Grand Int. Brotherhood of Locomotive Engineers*, 187 Minn. 626, 246 N. W. 362 (1933). For compilations and discussion on the suability of unincorporated labor unions, see Witmer, *Trade Union Liability: The Problem of the Unincorporated Corporation*, 51 YALE L. J. 40 (1941); Cole, *The Civil Suability, at Law, of Labor Unions*, 8 FORD. L. REV. 29 (1939).

<sup>20</sup> See dissenting opinion of Clark, J., in *NLRB v. Newark Morning Ledger Co.*, 120 F. 2d 262 (C. C. A. 3d 1941).

<sup>21</sup> *Young v. Canadian Northern Ry.*, [1931] A. C. 83; *Wilson v. Airline Coal Co.*, 215 Iowa 855, 246 N. W. 753 (1933); see *Clay v. Louisville & N. Ry.*, 254 Ky. 271, 276, 71 S. W. 2d 617 (1934); Fuchs, *Collective Labor Agreements in American Law*, 10 ST. LOUIS L. REV. 1, 7 (1925).

<sup>22</sup> *Yazoo & M. V. R. R. v. Webb*, 64 F. 2d 902 (C. C. A. 5th 1933); *Hudson v. Cincinnati, N. O. & T. P. Ry.*, 152 Ky. 711, 154 S. W. 47 (1913). According to this theory, the collective bargaining agreement merely establishes a usage or custom which may be expressly or impliedly incorporated in individual contracts of employment. As to the effect of operative usages generally, see RESTATEMENT, CONTRACTS §§246-249 (1932).

<sup>23</sup> *Barnes & Co. v. Berry*, 169 Fed. 225 (C. C. A. 6th 1909); *Mueller v. Chicago & N. W. Ry.*, 194 Minn. 83, 259 N. W. 798 (1935). This theory views the union as simply an agent for the employees and not itself a party to any contract; it presents obvious logical difficulties in the event of attempted modification of the agreement by employer and union without ratification by the individual employees. See Anderson, *Collective Bargaining Agreements*, 15 ORE. L. REV. 229, 239 (1936).

<sup>24</sup> *Yazoo & M. V. R. R. v. Sideboard*, 161 Miss. 4, 133 So. 669 (1931); *Gulla v. Barton*, 164 App. Div. 293, 149 N. Y. Supp. 952 (3d Dept. 1914); *Huston v.*

explain and give direction to the intricacies of relationship implicit in the multi-partite labor agreement. Thus, the first two theories lead to the conclusion that the only actual contract is that between the employer and the individual employee, ignoring any enforceable relationship between the employer and the union. Similarly, the third-party beneficiary theory fails adequately to explain the employee-employer and the employee-union relationships.<sup>25</sup>

It might have been helpful if the Taft-Hartley Act had spelled out the nature of the collective contract for violation of which it provided remedial procedures. But this much is clear: the Act adopts as federal law the view—often expressed but as yet thinly authenticated<sup>26</sup>—that collective agreements are in some respects mutually enforceable by employer and union, through orthodox contract remedies, subject to the limitations of anti-injunction statutes such as the Clayton and Norris-LaGuardia Acts.<sup>27</sup> In this respect, the Taft-Hartley Act departs radically from the Wagner Act, which in terms and application could be interpreted to give considerable support to the agency theory of collective agreements.<sup>28</sup> Whatever the terminology which may evolve, the

Washington Wood and Coal Co., 4 Wash. 2d 449, 103 P. 2d 1095 (1940). Under this theory, the union is a contracting principal and employees within the scope of the agreement have the status of third-party beneficiaries.

<sup>25</sup> This theory hardly explains a holding that the employer can claim damages for breach of the collective agreement as against one of the beneficiary-employees. Compare *Whiting Milk Cos. v. Grondin*, 282 Mass. 41, 184 N. E. 379 (1933), with *Donovan v. Travers*, 285 Mass. 167, 188 N. E. 705 (1934). Nor to take account of the complexities inherent in the question whether an employee can be required to accept the "benefit" of a contract or modification which he elects not to adopt. Compare *Hartley v. Brotherhood of Ry. & S. C.*, 283 Mich. 201, 277 N. W. 885 (1938), with *Piercy v. Louisville & N. Ry.*, 198 Ky. 477, 248 S. W. 1042 (1923) and *Huston v. Washington Wood & Coal Co.*, 4 Wash. 2d 449, 103 P. 2d 1095 (1940).

<sup>26</sup> It has been held that employers are entitled to relief for union breaches of collective agreements. *American-Hawaiian S. S. Co. v. Sailors Union of the Pacific*, 37 F. Supp. 828 (N. D. Cal. 1941); *Nederlandsch A. S. M. v. Stevedores' & Longshoremen's Benev. Soc.*, 265 Fed. 397 (E. D. La. 1920); see *Schlesinger v. Quinto*, 201 App. Div. 487, 498, 194 N. Y. Supp. 401, 409 (1st Dept. 1922). Conversely, unions have been granted relief against employer breaches. *Mississippi Theatres Corp. v. Hattiesburg Local Union No. 615*, 174 Miss. 439, 164 So. 887 (1936); *Dubinsky v. Blue Dale Dress Co.*, 162 Misc. 177, 292 N. Y. Supp. 898 (1936); *Harper v. Local Union No. 520*, 1 B. E. W., 48 S. W. 2d 1033 (Tex. Civ. App. 1932). However, the divergence of views as to the suability of unions and the theory of collective agreements amply justifies the conclusion, "The law as to the enforcement of collective labor agreements by judicial action is not yet fully developed. Until that law is fully developed, self-help by concerted action may sometimes be the only remedy for breach of such an agreement." *RESTATEMENT, TORTS* §789 (1939).

<sup>27</sup> 38 STAT. 738 (1914), 29 U. S. C. §52 (1940); 47 STAT. 70 (1932), 29 U. S. C. §101 (1940); see note 15 *supra*. It would appear that strikes, boycotts and picketing none the less involve a "labor dispute" when carried on in violation of a collective agreement, and therefore are subject to the Norris-LaGuardia Act. *Wilson & Co. v. Birl*, 105 F. 2d 948 (C. C. A. 3d 1939); cf. *United States v. Hutcheson*, 312 U. S. 219 (1941).

<sup>28</sup> The Wagner Act speaks throughout in terms of employees' exercising *their* rights through *representatives*, which is to say agents. *E.g.*, §§7, 8(5), 9(a). The



Act supports a realistic tendency to recognize such an agreement as a multiple-party contract under which employer, employees and union can each enforce their respective interests as against the appropriate party.<sup>29</sup> In the light of the new emphasis upon litigation of collective agreements it may seem expedient to the contracting parties to try to indicate expressly in the agreement which covenants shall be enforceable by and against individual employees, and which by and against the union.

Presumably, it will still be necessary to find consideration in any given labor agreement; it is unlikely that the Act will be interpreted as vitiating elementary contract law. But, in contrast to earlier attitudes, it may be anticipated that the courts will be inclined to import consideration, when appropriate, in the form of an implied undertaking by the union to assist in good faith in uninterrupted operations under the agreement.<sup>30</sup>

One exception, the proviso in §8(3) that nothing in the act "shall preclude an employer from making an agreement *with a labor organization*" (italics added) for a closed shop, can be regarded as simply emphasizing the status of employees as principals to the contract in other respects. The NLRB appears to have been guided by this concept in administering the act. The question is raised in acute form in cases involving an interim change of bargaining agent, where the Board has said:

"... the contract does not constitute a bar to a present determination of representatives. It is not, however, our intention to invalidate the contract or to disturb it in any respect. The election which we shall hereinafter direct is for the purpose of determining the representative who shall administer the contract." *Harbison-Walker Refractories Co.*, 43 N. L. R. B. 1349, 1352 (1942).

And, in another case: "It must always be remembered that labor organizations are merely the agent of the employees in an appropriate unit." *Mill B, Inc.*, 40 N.L.R.B. 346, 351 (1942). Even where a closed-shop clause was involved, it was the Board's view that the contracting union retained no rights when a new union was designated as bargaining representative prior to expiration of the contract. *M & M Wood Working Co.*, 6 N. L. R. B. 372 (1938), *rev'd*, 101 F. 2d 938 (C. C. A. 9th 1939). The Board's result is favored over that of the Court in *Note*, 48 *YALE L. J.* 1053, 1063 (1939).

In *J. I. Case Co. v. NLRB*, 321 U. S. 332 (1944), Mr. Justice Jackson talked first in terms of the usage theory (at 335: "the agreement may be likened to . . . utility schedules of rates and rules for service, which do not of themselves establish any relationships"), and then resorted to the language of the beneficiary theory (at 336: "an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary"). However, neither theory seems to have been essential to the decision.

<sup>29</sup> "A collective bargaining agreement is the joint and several contract of the members of the union, made by the officers of the union as their agents. It is enforceable by or against individual members of the union in matters which affect them peculiarly, and it is enforceable by or against the union in matters which affect all the members alike, or large classes of members, for instance, those who are employees of the other party to the contract." *Christiansen v. Local 680 of M. D. & D. E. of N. J.*, 126 N. J. Eq. 508, 512, 10 A. 2d 168, 171 (1940). For similarly realistic approaches, recognizing that certain rights and obligations may inhere in the union, and others in individual employees, see *Milk Wagon Drivers Union v. Associated Milk Dealers*, 42 F. Supp. 584 (N. D. Ill. 1941); *Comment*, 41 *YALE L. J.* 1221, 1225 (1932).

<sup>30</sup> An obligation upon the union not to strike, and to exercise its full powers to prevent its members from acting in derogation of the contract, has frequently been

The prospect of the establishment of a sound legal theory for union contracts, and of the principle that such agreements give rise to reciprocally binding rights and obligations, should probably be welcomed, for collective agreements can create stability only if they command confidence. On the other hand, the suit for damages is not appealing as a device for industrial harmony. However, the answer to that objection may be the development of more expeditious and flexible remedies, by improvement of grievance and arbitration procedures, within the collective agreement itself.

### III

#### THE NO-STRIKE CLAUSE

The most immediate repercussions of the Act in collective bargaining circles related to the effect of the union-liability provisions of Title III on no-strike clauses of union contracts. There were declarations by various union leaders that no-strike clauses would be deleted from all future contracts, and the status of such clauses became at once a major issue in labor-management negotiations and in the press.<sup>31</sup>

There are several factors behind this prompt show of concern by the unions. The most obvious is the uncertainty as to their financial responsibility for acts of agents which they have neither authorized nor ratified. With reference to union as well as employer liability for breach of contract, the Act provides that

"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 subsequently ratified shall not be controlling."<sup>32</sup>

Whatever the practical effects of this provision may prove to be, it was unquestionably intended to modify the policy that ordinary principles of corporate agency do not apply in labor disputes, stated in 1932 by

recognized by implication. *Nederlandsch A. S. M. v. Stevedores' & Longshoremen's Benev. Soc.*, 265 Fed. 397 (E. D. La. 1920); *McGlohn v. Gulf & S. I. R. R.*, 179 Miss. 396, 174 So. 250 (1937); *Harper v. Local Union No. 520, I. B. E. W.*, 48 S. W. 2d 1033 (Tex. Civ. App. 1932). But see note 21 *supra*.

<sup>31</sup> AFL and CIO general counsel have advised their organizations to avoid further no-strike commitments. 1 P-H LABOR EQUIP. ¶3.1 (1947). The Executive Boards of two major CIO internationals; United Steelworkers and United Automobile Workers, promptly adopted resolutions on July 2, 1947 and July 16, 1947 respectively, instructing their locals to omit no-strike clauses from future contracts. 20 LAB. REL. REP. (Labor-Management) 198, 201 (1947). The prospect that the Act would discourage no-strike agreements was a matter of concern to employer representatives attending a seminar on the new statute held by the Commerce and Industry Association of New York on July 29-30, 1947. 20 *id.* at 221. For standard examples of no-strike clauses, see B. L. S. Bull. No. 686, *Union Agreement Provisions* 162 *et seq.* (U. S. Dept. Labor 1942).

<sup>32</sup> §301(e); *cf.* §2(13).

the Norris-LaGuardia Act and recently confirmed by the Supreme Court.<sup>33</sup>

The policy as stated in the Norris-LaGuardia Act was the outgrowth of alleged abuses of agency doctrines by courts hostile to the organization of labor;<sup>34</sup> and the unions insist that, particularly in the prevailing anti-labor atmosphere,<sup>35</sup> there is no reason to assume that such union-busting judicial attitudes will not be revived.

Aside from any question of judicial abuse, the unions have obvious reason to feel that they may have to rely more and more on self-help in the form of strikes and other economic pressures. Labor disputes are highly volatile phenomena, and legal remedies available to the parties must be quick-acting if they are to serve any useful purpose. Not only have no new judicial or administrative procedures been set up to supplement the notoriously ponderous processes of the courts, but NLRB proceedings themselves have been so bound up in red-tape as to raise serious questions about their efficacy to afford relief to the contending parties.<sup>36</sup>

Moreover, the freely avowed purpose of the Act to weaken the control of the union over its members<sup>37</sup> will inevitably give the organization pause in undertaking contract obligations which may render it liable for the acts of individuals and groups, agents and locals, whom the union can discipline only within circumscribed limits. The unions have long contended that their loosely knit organization could not properly be subjected to the same rules of *respondeat superior* which are applicable to the highly integrated corporation.<sup>38</sup> Weight is lent to the argument by the manifest intent of the Act to prohibit within the union anything approaching the absolutism which is characteristic of a well-managed business concern.

Finally, the provisions of the Act which take away or limit the use of economic weapons heretofore considered legitimate by the unions will make them chary of imposing any unnecessary limitations on themselves by voluntary agreement. Being deprived by statute of the use of primary and secondary boycotts, strikes and perhaps picketing under

<sup>33</sup> 47 STAT. 70, 71 (1932), 29 U. S. C. §106 (1940); *United Brotherhood of Carpenters and Joiners of Amer. v. United States*, 330 U. S. 395 (1947).

<sup>34</sup> See 93 CONG. REC. 6608 (June 5, 1947); *Hearings before Subcommittee of the Committee on the Judiciary on S. 1482*, 70th Cong., 2d Sess. 763 (1929); FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* 74, 75 (1930).

<sup>35</sup> See notes 2, 31 *supra*.

<sup>36</sup> See note 14 *supra*.

<sup>37</sup> Cf. §§1(b), 7, 8(b)(1), 8(b)(2), 8(b)(5), 9(a), 9(c)(1)(ii), 9(e)(2), 302; see, e.g., SEN. REP. No. 105, 80th Cong., 1st Sess. 6, 7, 21 (1947).

<sup>38</sup> In support of the Act, Senator Taft argued with equal facility that unions were, and that they were not, analogous to corporations, as the occasion demanded. Compare 93 CONG. REC. 4491 (May 1, 1947) with 93 *id.* at 4142 (April 25, 1947) and 93 *id.* at 5060 (May 9, 1947).

circumstances as yet vaguely defined,<sup>39</sup> the unions will presumably agree only with reluctance to any further disarmament.

Whatever the legal or moral force of these considerations, they unquestionably afford some practical arguments to the union in resisting or at least limiting no-strike clauses. And practical arguments carry considerable weight at the bargaining table. This explains in part the readiness with which—to the surprise of the general public—various big employers have acceded to curtailment or omission of the no-strike covenant.<sup>40</sup> Another and more important factor, widely overlooked, is that management is normally more interested in securing harmonious industrial relations and continuous production through effective grievance and discipline procedures than in obtaining an inchoate right to damages for contract-breach which, like other damage-claims, could not possibly be pressed to collection for many months. As one management group has pointed out to employers faced with refusals to renew no-strike clauses:

"A smoothly operating grievance procedure and education of supervisors and employees in its use may, after all, be the best 'no-strike' insurance, and a careful examination of the matter, apart from its mere legal aspects, should be made."<sup>41</sup>

Union efforts to avoid, or at least limit, contract liability for work-interruptions have already taken a variety of forms. Agreements reached or proposed since passage of the Act range in complexity from mere omission of the usual no-strike clause, to detailed specifications of the steps which unions shall take to terminate "wildcat" stoppages in order to avoid liability therefor. These new clauses can be grouped in some four broad categories:

1. *Agreements not to sue.*<sup>42</sup> Such clauses typically provide that the parties shall not bring any proceedings with respect to the contract or

<sup>39</sup> §8(b). According to the conference report, "it is apparent that many forms and varieties of concerted activities which the Board, particularly in its early days, regarded as protected by the act will no longer be treated as having that protection." H. R. REP. No. 510, 80th Cong., 1st Sess. 40 (1947).

<sup>40</sup> E.g., RCA Victor-United Electrical Workers (CIO) agreement. 20 LAB. REL. REP. (Labor-Management) 287 (1947). Ford Motor Company-United Automobile Workers (CIO) agreement. 20 *id.* at 243. Bituminous Coal Operators-United Mine Workers (AFL) agreement. 20 *id.* at 165.

<sup>41</sup> Commerce and Industry Association of New York. 20 LAB. REL. REP. (Labor-Management) 188 (1947).

<sup>42</sup> Such contracts are reported to have been recently executed by RCA Victor Division with United Electrical, Radio and Machine Workers (CIO), and by Ainsworth Tool & Die Co. with United Automobile Workers (CIO). 20 LAB. REL. REP. (Labor-Management) 251, 287 (1947). The prototype of this approach to the problem is found in the Ford Motor Co.-UAW (CIO) negotiations. Mr. Ford announced that the company would agree not to sue provided the union agreed that the issue whether it had taken reasonable steps in regard to "illegal" strikes should be submitted to the Ford-UAW umpire. The interim settlement finally reached was that no suits should be brought pending further study of union-liability by a joint labor-management committee. 20 *id.* at 216, 243.

its breach before the courts and the NLRB; or, conversely, that all such disputes shall be settled exclusively by grievance procedure, arbitration and collective bargaining. Such clauses may or may not attempt to define the extent of potential liability in case of private adjudication.

2. *Agreements denying obligation.*<sup>43</sup> This type includes provisions that the union signs only as agent for employees and not as a principal; that nothing in the contract shall be construed to limit the right to strike; that employees shall be free to cease work singly or jointly at any time; that the contract terms shall be effective only so long as the employees are "able and willing to work"; or that the employer expressly waives any claim for damages against the union and his sole recourse for breach of contract shall be disciplinary measures against the individual employees.

3. *Agreements for limited liability.*<sup>44</sup> This category includes such proposals as these: that in case of breach, liability of the parties shall be limited to liquidated damages of from \$50 in small plants to \$500 in large ones; that the parent union approves the contract as to form only (so that any recovery for breach shall be limited to the assets of the local); or that the contracts shall terminate and negotiations reopen on 60 days notice (so as to limit the duration of any breach).

4. *Agreements for conditional liability.*<sup>45</sup> Such clauses include the following: that the union shall be liable only for stoppages authorized,

<sup>43</sup> The pattern for this sort of clause was promptly set in the Bituminous Coal Operators-United Mine Workers (AFL) agreements, which omitted the customary no-strike clause and substituted a provision that employees should work so long as "able and willing to work." 20 LAB. REL. REP. (Labor-Management) 165 (1947). The policy adopted by the Executive Boards of the United Steelworkers (CIO) and United Automobile Workers (CIO) calls for a stipulation that neither the international nor the local shall be liable for breach of contract, and that the employer's sole recourse shall be discipline of individual employees. 20 *id.* at 198, 201. This attitude assumes its most extreme form in the contention of the International Typographical Union (AFL) that it can flatly refuse to enter any contract at all, and simply prescribe unilateral conditions of work. 20 *id.* at 240.

<sup>44</sup> The contract of Dravo-Doyle Co. with International Union of Operating Engineers illustrates a device for insulating the international by limiting its participation to approval of form alone. 20 LAB. REL. REP. (Labor-Management) 252 (1947). AFL General Counsel Padway was an exponent of the proposal that nominal liquidated damages be specified. 20 *id.* at 208. The latter and other forms of limited liability have been suggested, as preferable to complete deletion of the no-strike clause, by the Commerce and Industry Association of New York. 20 *id.* at 188.

<sup>45</sup> Typical recent contracts in this classification are: Maurice Everett Sportswear Co.-International Ladies' Garment Workers (AFL), Potash Company of America-Mine, Mill and Smelter Workers (CIO), American Paper Goods Co.-General Service Employees Union, Local 73 (AFL). 20 LAB. REL. REP. (Labor-Management) 251, 288, 289. This type of agreement appears to have recommended itself most widely. The general counsel of the National Association of Manufacturers has agreed that it seems consistent with the spirit of the Act to try to define liability so as to exclude violations beyond the control of the parties. 20 *id.* at 251. Illustrative of the detail which can be employed, in outlining the steps which the union must take to avoid responsibility for strikes, is the International Harvester Co.-United Automobile Workers (CIO) contract. 20 *id.* at 288.

instigated or condoned by the local and parent organization; or, conversely, that it shall not be liable for any wildcat strikes unauthorized by specifically listed agents; that the union shall not be liable provided it takes certain detailed steps to try to terminate any stoppage; or that liability shall mature only when an umpire or arbitrators shall have determined that the union failed to adopt all reasonable measures to prevent and terminate the strike.

It would be sheer bravado to try to forecast the reception which the fifteen-odd clauses just described (not to mention their infinite variations and combinations) may expect in the courts. In the first place, many of them are open to considerable interpretation. For example, it may be argued that the already-classic "able and willing to work" clause does no more than restate the unquestioned right of any employee to quit work at will, and in no wise affects the implied obligation of the contracting union (a) to cooperate in maintaining production so long as the employer observes the contract, and (b) to resort to grievance procedure and arbitration rather than economic sanction in the event of breach.<sup>46</sup>

If the collective bargaining agreement, in unambiguous terms, purports to relieve the union of any liability for strikes, the question arises whether there is any contract at all—for the reason that the union then furnishes no consideration. If a binding contract can nevertheless be spelled out, some of these clauses will obviously be subjected to attack under such venerable maxims as the rule that attempts to deprive the courts of jurisdiction are void as against public policy.<sup>47</sup> It is difficult, however, to find a vulnerable spot in many of these clauses unless it is created by a policy arising from the provision for liability in the Taft-Hartley Act itself.

But if industrial harmony is the fundamental objective, the important question is not whether clauses limiting union liability are tech-

<sup>46</sup> This interpretation is espoused by Jesse Freidin, former general counsel and public member of the National War Labor Board. 20 LAB. REL. REP. (Labor-Management) 216 (1947). Similarly, the general counsel of the Brotherhood of Boilermakers (AFL) advances the opinion that omission of a no-strike clause will not destroy the employer's right to damages for a strike by a union which is party to a contract of definite duration or providing for arbitration of disputes. 20 *id.* at 240. And *cf.* cases cited note 30 *supra*. On the other hand, CIO General Counsel Pressman insists that even a no-strike pledge, in the absence of express assumption of liability, is at most a condition precedent to the employer's obligation to perform. 20 *id.* at 198. *Cf.* cases cited note 21 *supra*.

<sup>47</sup> It is hard to extract useful principles from the welter of authorities as to when an agreement to specify the forum, to waive liability or not to sue will be upset. See cases collated in 6 WILLISTON, CONTRACTS §§1722, 1725 (Rev. ed. 1938). When the employer-employee relation was involved, the employer has heretofore frequently been deemed the dominant party as against whom public policy required protection of the employee. 6 *id.* §1751D. *Quaere* whether the Ford Motor Co., for example, under the policies of the Taft-Hartley Act, is now to be deemed a public ward which must be protected against itself when it makes an agreement not to sue. See note 42 *supra*.

nically valid. The important thing—to employer, employee, union and the public—is the loss of the psychological and moral value of the no-strike/no-lockout clause in collective agreements. While there may be merit in union contentions that their liability should be adequately particularized and conditioned in the contract, proposals to eliminate completely the no-strike clause, whether by direction or indirection, do not commend themselves to the disinterested spectator.

There seem to be strong grounds for arguing that while the union can insist upon reasonable conditioning and definition of its liability for strikes during the contract period, it cannot arbitrarily demand a total release from responsibility without committing an unfair labor practice. To do so is to refuse the employer the only substantial consideration he receives,<sup>48</sup> and it is difficult to see how the union can make such refusal and still fulfill its duty to bargain collectively in good faith.<sup>49</sup> If the trend away from no-strike clauses continues, it may be that the remedy lies in unfair labor practice proceedings before the NLRB.<sup>50</sup>

#### IV

##### THE UNION SECURITY CLAUSE

Among the focal points of the deep-rooted controversies which prefaced the passage of the Taft-Hartley Bill were the closed shop and related forms of union security. The public propaganda and Congressional debates on the subject were, for the most part, concerned with selected "horrible examples" rather than any attempt at analytical approach to the problem.<sup>51</sup> Advocates of the closed shop castigated government prohibition as un-American and a denial of freedom of contract; opponents found no difficulty in employing the self-same phrases to support their views.

Even more dispassionate observers, however, have been unable to convince one another as to the relative merits and demerits of the closed shop. Typical arguments against it are that it is monopolistic in concept, invites dictatorial abuse, invades "management prerogatives," and stifles incentive and efficiency. Vis-a-vis, its proponents contend that these arguments are not supported by the facts, that the closed shop is shown by experience to promote harmony, efficiency and stability.<sup>52</sup>

<sup>48</sup> Cases cited note 30 *supra*; see Fairweather and Shaw, *Minimizing Disputes in Labor Contract Negotiations*, 12 LAW & CONTEMP. PROB. 318 (1947).

<sup>49</sup> §§8(b)(3), 8(d).

<sup>50</sup> Two NLRB proceedings involving §8(b)(3) charges were promptly instituted against the International Typographical Union on grounds, *inter alia*, of refusal to negotiate with respect to contract responsibility. N. Y. Times, Oct. 1, 1947, p. 24, col. 5; see note 43 *supra*.

<sup>51</sup> See *e.g.*, 93 CONG. REC. 4490-4493 (May 1, 1947); 93 *id.* at 5087-5089 (May 9, 1947); SEN. REP. NO. 105, 80th Cong., 1st Sess. 5-7 (1947); *id.* Pt. 2, at 8.

<sup>52</sup> The views of William Green and Walter Reuther pro, and those of Ernest

Furthermore, they say, the closed shop demonstrably benefits management because it eliminates plant friction between dues-paying union-members and "free-riding" non-members, and relieves the pressure on labor organizations to make extreme demands in order to prevent employer-discrimination and to get and hold members.<sup>53</sup> It must be conceded, however, that although these arguments have been advanced to management for some years now, there was no appreciable rush of employers<sup>54</sup> to oppose the deluge of anti-closed-shop laws which were a legislative phenomenon of the past winter.<sup>55</sup>

Whatever the ultimate merits of the question, the Taft-Hartley Act seems pretty effectively to "outlaw" the closed shop and any other form of union security which makes union membership a prerequisite—or even a facility—for employment. As the amended NLRA now reads, not only the closed shop, but the preferential shop, the union hiring hall, the

Weir and Reuben Robertson con, are contrasted in N. Y. Times Mag., Aug. 2, 1942, p. 7. See Slichter, *Union Policies and Industrial Management*, c. III (1941); Newman, *The Closed Union and the Right to Work*, 43 COL. L. REV. 42 (1943).

<sup>53</sup> See Slichter, *op. cit. supra* note 52, at 95-97.

<sup>54</sup> It was represented to the Senate that management opinion is divided on the closed-shop issue. 93 CONG. REC. 4492 (May 1, 1947).

<sup>55</sup> At least sixteen of the 1947 state legislatures passed statutes designed to outlaw, or severely restrict, closed shop agreements; and in all of these states except Maine, the statute appears to affect union and membership-maintenance clauses also. ARIZ. LAWS 1947, c. 81; ARK. ACTS 1947, No. 101; DEL. LAWS 1947, H. B. 212; GA. LAWS 1947, c. 440; IOWA LAWS 1947, S. B. 109; ME. LAWS 1947, c. 395; MASS. LAWS 1947, c. 657; NEB. LAWS 1947, L. B. 344; N. H. LAWS 1947, c. 195; N. M. LAWS 1947, H. J. R. 15; N. C. LAWS 1947, c. 328; N. D. LAWS 1947, H. B. 151; S. D. LAWS 1947, S. B. 224; TENN. LAWS 1947, c. 36; TEX. LAWS 1947, c. 74; VA. LAWS 1947, c. 3. The New Mexico act merely proposes a constitutional amendment which will be submitted to popular vote; operation of the Arizona and North Dakota statutes has been suspended pending action on referendum petitions. 20 LAB. REL. REP. (Labor-Management) 213, 270 (1947).

A total of some twenty-three states have thus undertaken to ban or regulate union security agreements, inasmuch as seven states had so provided by statute or constitutional amendment prior to 1947. ALA. CODE, tit. 26, §383 (Supp. 1943); COLO. STATS. ANN., c. 97, §94(6)(1)(e) (Supp. 1946); FLA. CONST., DECL. RIGHTS §12; KAN. GEN. STAT. §44-809(4) (Supp. 1945); LA. GEN. STAT. §4379.6 (1939); MD. ANN. CODE, art. 100, §65 (1939); WIS. STAT. §111.06(1)(c) (1945).

Most of these statutes flatly prohibit union agreements which make membership a condition of employment, and some specify penalties of diverse severity. However, the Alabama, Delaware, Louisiana and Maryland legislation appears at most to make closed and union shop arrangements, unenforceable as contrary to public policy; the Kansas, Wisconsin and Colorado statutes permit union security contracts provided they are approved by specified proportions of the employees affected; and the Massachusetts act is directed more toward insurance of an open union than direct restriction of the closed shop.

The validity of such state legislation has not been definitively determined. However, the decisions to date have unanimously upheld it. *E.g.*, *American Federation of Labor v. Watson*, 60 F. Supp. 1010 (S. D. Fla. 1945), *rev'd on other grounds*, 327 U. S. 582 (1946); *International Brotherhood of Papermakers v. Wisconsin Employment Relations Board*, 249 Wis. 362, 24 N. W. 2d 672 (1946). But *cf.* *Hill v. Florida*, 325 U. S. 538 (1945); see *A Survey of Statutory Changes in North Carolina in 1947*, 25 N. C. L. REV. 376, 448 (1947).



work-permit system, and the like, all seem to be beyond the pale of fair labor practice.<sup>56</sup>

On the other hand, the Act purports to sanction union security clauses which make membership merely a condition subsequent; that is to say, union-shop and membership-maintenance clauses which do not require employees to join the union for at least 30 days after hiring. Sponsors of the Act placed great store by the argument that this represented a happy compromise, providing the stability of a union-security clause while returning to the employer exclusive control over hiring.<sup>57</sup> However, continued authorization of union security is more apparent than real.

To begin with, the contracting union must not only be the duly selected representative of a majority of the employees in the appropriate bargaining unit, but the NLRB must have certified that a majority of such employees eligible to vote (not merely a majority of those voting) voted in the most recent election to authorize the union to make the union-security agreement.<sup>58</sup> To obtain such a vote, of course, the union is required to have furnished financial reports to all its members and to have filed such reports, together with copies of its constitution, by-laws and detailed information on its internal affairs, as well as the much-discussed, non-Communist affidavits of all officers of the union and its affiliates.<sup>59</sup> Having cleared these hurdles, the union must still sell the union-security clause to the employer, who is free to accept or reject it.<sup>60</sup>

If by these processes the union obtains agreement to a permitted type of security clause, what does it have to show for its pains? When the pertinent sections of the Act are read together, it appears that the employer and the union can bring about the discharge of an employee, only if he has failed to pay uniform union initiation fees or dues.<sup>61</sup> Discharge pursuant to a union-shop or membership-maintenance clause for any other reason will not only expose the employer and the union to cease and desist orders, but either or both of them may be charged with the back wages of the discharged employee.<sup>62</sup> Moreover, if the union

<sup>56</sup> §8(a)(3), which in the original NLRA excepted closed shop agreements by proviso to the definition of discrimination as an unfair labor practice, now permits discrimination to encourage or discourage union membership only, among other limitations, to the extent called for by a union agreement "to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later." As to the various forms of union security clauses, see B. L. S. Bull. No. 686, *Union Agreement Provisions*, c. 2 (U. S. Dept. Labor 1942).

<sup>57</sup> See 93 CONG. REC. 5087 (May 9, 1947); SEN. REP. No. 105, 80th Cong., 1st Sess. 6 (1947).

<sup>58</sup> §§8(a)(3), 9(e).

<sup>59</sup> §§9(f), 9(g), 9(h).

<sup>60</sup> See 93 CONG. REC. 5078, 5081 (May 9, 1947).

<sup>61</sup> §§8(a)(3), 8(b)(2), 8(b)(5).

<sup>62</sup> *Ibid.*; §10(c).

enters into a union security contract, it thereby subjects its fees to review by the NLRB and is liable to unfair practice sanctions if the Board should determine that the fees on which membership is conditioned are excessive or discriminatory.<sup>63</sup> Apparently the union, even though it obtained a union security clause, could not lawfully cause the discharge of an employee who failed to meet the union's uniform standards as to skill and experience, or engaged in violence or Communistic activities contrary to the union's regulations, or undertook to sabotage the organization at the instance of a rival union or a hostile employer.<sup>64</sup>

With these restrictions, union-shop and membership-maintenance clauses seem likely to be less frequently used under the Act. Two additional factors lend support to this conclusion. In the first place, substantially the same result can sometimes be achieved by much simpler means through use of the union check-off clause. Such a clause is permissible under the Act, provided only that the employer receives a written assignment, which shall not be irrevocable for more than a year, from each employee to whose pay-check the deduction of dues is to be applied.<sup>65</sup> In the second place, the Act expressly recognizes and gives precedence to state laws dealing with union security insofar as such laws impose more stringent limitations than the Act itself, which appears frequently to be the case.<sup>66</sup>

It can hardly be assumed, however, that the issue of union security is dead. Many unions will still want a union shop clause to eliminate "free-riding." Some employers and unions will probably consider the mere psychological effect of the union-shop and similar provisions to be of sufficient stabilizing value to justify their retention. More important is the fact that millions of workers have grown accustomed—in some instances over a period of generations—to employment under union security agreements;<sup>67</sup> and it is not to be anticipated that this condition

<sup>63</sup> §8(b)(5).

<sup>64</sup> See 93 CONG. REC. 6656, 6657, 6661 (June 6, 1947); SEN. REP. NO. 105, 80th Cong., 1st Sess. 21, 22 (1947). The provisions, referred to in the Senate report, permitting discharges for dual unionism, were deleted from the bill subsequently.

<sup>65</sup> §302(c)(4). *Quaere* whether it can be effectively agreed that a given assignment shall continue from year to year in the absence of express revocation during an annual escape period. If so, reliance on the check-off in lieu of the vestigial union shop clause permitted by the Act seems even more feasible. Senator Taft's language in debate seems to support such a construction. See 93 CONG. REC. 4876, (May 8, 1947).

<sup>66</sup> §14(b); H. R. REP. NO. 510, 80th Cong., 1st Sess. 60 (1947); see note 55 *supra*. Compare §14(a), dealing with organization of supervisors, which applies the orthodox rule that the federal statute shall supersede conflicting state law in the area of federal jurisdiction.

<sup>67</sup> According to the data received by Congress, 30 per cent or nearly 5,000,000 of the workers affected by collective bargaining agreements were covered by closed shop clauses, about 45 per cent were covered either by a closed shop or by a union shop clause, a total of 77 per cent were covered by some form of union security provision, and some 20,000 to 30,000 collective contracts contained a union security clause. 93 CONG. REC. 4152 (April 25, 1947); 93 *id.* at 4318 (April 29, 1947); 93 *id.* at 4491 (May 1, 1947); 93 *id.* at 6661 (June 6, 1947); SEN. REP. NO. 105,

will be changed overnight by legislative fiat. Devices thus far suggested for escaping the broad restrictions of the Act appear legally questionable,<sup>68</sup> although it is far too soon to suggest that loopholes will not be found. Nevertheless, it is likely that in many cases union security arrangements will simply be driven underground, with the somewhat anomalous result that the stronger and more highly organized unions—whose monopolistic practices the Act was represented as curbing—will be able to maintain *de facto* closed shops by virtue of the simple fact that they control the supply of trained labor, while looser and more democratic labor organizations will encounter the full impact of statutory prohibitions.

## V

## THE GRIEVANCE CLAUSE

It is probably hard to overemphasize the importance of an adequate grievance procedure to the success of a collective bargaining agreement. While legislation removes some issues from the area of potential controversy and the formal agreement may dispose of many others, statute and contract provide at best the mere shell of the management-labor relationship. Tremendous pressures will almost inevitably build up within that shell unless a safety-valve is provided in the form of speedy and reliable means for the adjustment of differences. Even if it were possible, it would obviously be foolhardy to try to provide rigid advance controls for all possible combinations of the volatile human factors affected.

Some sort of grievance clause, commonly including arbitration as the terminal step, has become standard equipment of the union contract.<sup>69</sup> It is closely related to the no-strike/no-lockout clause, and the latter is sometimes conditioned upon the exhaustion of grievance procedures provided by the contract.<sup>70</sup> In broad outline, the grievance procedure ordinarily contemplates the processing of employer-employee disagreements through several successive stages, ranging from two to a

80th Cong., 1st Sess. 6 (1947). Department of Labor statistics, which were generally accepted by the Senate committee, do not seem to sustain the committee's suggestion that union security provisions are peculiarly a post-war phenomenon. It is estimated that in 1941, 4,000,000 workers, or about 40 per cent of all employees under agreement, worked under either closed shop or union shop conditions. Bureau of Labor Statistics, *Extent of Collective Bargaining at Beginning of 1942*, 54 MO. LAB. REV. 1066, 1069 (1942).

<sup>68</sup> It is apparently the policy of the International Typographical Union to seek a closed-shop by stipulating unilateral conditions under which its members will accept employment. This posture is already the subject of unfair labor practice charges under §8(b)(2). N. Y. Times, Oct. 1, 1947, p. 24, col. 5.

<sup>69</sup> See Bureau of National Affairs, Inc., COLLECTIVE BARGAINING CONTRACTS 253-287 (1941); B. L. S. Bull. No. 686, *Union Agreement Provisions* 145 (U. S. Dept. Labor 1942).

<sup>70</sup> B. L. S. Bull. No. 686, *supra* note 69, at 162, 164.

half-dozen or more. For example, it may be provided that the complaint of an employee shall in the first stage be taken up with the appropriate foreman by the individual employee and/or his union steward. If no satisfactory adjustment is there reached, the matter may be "appealed" for negotiations between the plant superintendent and the shop committee. If there is still no agreement, the matter is taken up between the next higher strata of management and union. When all such efforts at settlement fail, there may be a provision for reference to an impartial umpire or board of arbitrators.

The devising of a suitable grievance procedure is a major project in itself, and one which is seldom perfected except by experimentation over a period of years. If there is one guiding principle, it is that the procedure must be tailor-made for the particular circumstances. Stereotyped time limits may prove to be bars which leave disputes to ferment instead of securing their quick adjustment; canned provisions for appeal may be either top-heavy or over-simplified in a given plant. There are significant questions about the stage at which the grievance should be reduced to writing and particularly, about defining the area of issues which are to be subject to the grievance procedure. Employers, fearful of irresponsible third-party usurpation of management prerogatives, often seek to limit grievance-handling to application of the express terms of the contract.<sup>71</sup> Unions traditionally demand a broader concept, insisting that a grievance procedure so limited is only slightly removed from no grievance procedure at all.<sup>72</sup> There is reason behind both positions, and their reconciliation is left by existing law to the processes of collective bargaining.

The Taft-Hartley Act changed existing statutory recognition of the grievance problem by providing that individual employees and groups shall have the right not only to present grievances at any time to their employer—as the Wagner Act likewise provided<sup>73</sup>—but also to have them adjusted without intervention of the bargaining agent, unless the adjustment is inconsistent with an applicable collective agreement, and provided the bargaining agent has been given opportunity to be present at the adjustment.<sup>74</sup> The committee reports indicate that the purpose

<sup>71</sup> See Fairweather and Shaw, *Minimizing Disputes in Labor Contract Negotiations*, 12 LAW & CONTEMP. PROB. 297, 316 (1947); Freidin, *The Public Interest in Labor Dispute Settlement*, 12 *id.* at 367, 381. There would perhaps be less disagreement on this question if it were more generally recognized that arbitration, involving stranger-decision of the issues, is not necessarily coextensive with grievance procedure, insofar as the latter is a form of continuous voluntary bargaining, and that the grievance procedure so limited might therefore be given a wider scope.

<sup>72</sup> See Katz, *Minimizing Disputes through the Adjustment of Grievances*, 12 LAW & CONTEMP. PROB. 249, 257 (1947); Selekmán & Selekmán, *Reducing Friction in Employer-Employee Relationships*, 12 *id.* at 232, 241.

<sup>73</sup> 49 STAT. 453 (1935), 29 U. S. C. §159(a) (1940).

<sup>74</sup> §9(a). The proviso that the individual adjustment shall not be inconsistent

was to insure more personal control of individual claims than had been recognized under the old statute;<sup>75</sup> and this objective has a certain appeal in the light of well-publicized racketeering by some union leaders.

It should be recognized, however, that some fairly profound issues are involved. Suppose, for example, a question arises as to whether given types of activity are to be compensated as working time at given contract rates. The majority union is concerned because, if the employer can definitively adjust this question with individual employees or minority unions, the union contract is obviously anchored in shifting sands. The employer is concerned because, although he may prefer a quick and simple settlement with the union instead of a multiplicity of individual claims, there is the risk that individual employees may at some future time decide to upset the settlement. Individual employees are concerned because, if management induces a weak-sister to settle his poorly presented claim at a nominal figure, a precedent may thereby be set which will take dollars from the paycheck of every man in a similar position. All three groups—management, the union, and individual employees—are concerned because a dual system of adjustment inevitably means confusion, inconsistencies and reduced chances of a speedy settlement.

The change in the statute does not alleviate, and may substantially aggravate, this fundamental problem of dualism,<sup>76</sup> which was also en-

with the union contract is obviously pregnant with controversy. Supervisors may undertake to settle grievances in the early stages, unaware of the deeper implications of the individual adjustment and failing to appreciate its deviation from the union contract and conflict with group interests. In such cases, the union could conceivably upset the adjustment at a later date through one of several remedies: by filing its own grievance, by suing for breach of contract, or by entering unfair practice charges under §8(a)(5) since the duty to bargain collectively is a continuing one. Cf. *Medo Photo Supply Corp. v. NLRB*, 321 U. S. 678 (1944); *Hughes Tool Co. v. NLRB*, 147 F. 2d 69 (C. C. A. 5th 1945).

<sup>75</sup> "The Board has not given full effect to this right as defined in the present statute since it has adopted a doctrine that if there is a bargaining representative he must be consulted at every stage of the grievance procedure, even though the individual employee might prefer to exercise his right to confer with his employer alone. The current Board practice received some support from the courts in the *Hughes Tool case* (147 F. 2d 756), a decision which seems inconsistent with another circuit court's reversal of the Board in *NLRB v. North American Aviation Company* (136 F. 2d 898). The revised language would make it clear that the employee's right to present grievances exists independently of the rights of the bargaining representative, if the bargaining representative has been given an opportunity to be present at the adjustment, unless the adjustment is contrary to the terms of the collective-bargaining agreement then in effect." SEN. REP. NO. 105, 80th Cong., 1st Sess. 24 (1947). See also, H. R. REP. NO. 245, 80th Cong., 1st Sess. 7, 34 (1947); H. R. REP. NO. 510, 80th Cong., 1st Sess. 46 (1947).

<sup>76</sup> It has been suggested that a more satisfactory amendment would have been elimination of the grievance proviso altogether from the grant of exclusive bargaining rights in §9(a): "It is said that this [proviso] protects the rights of individuals against labor unions. It would seem to be sufficient answer to say that it does no such thing, and that its underlying purpose should be accomplished by more effective means, as by democratizing the internal affairs of labor unions. Few employers under contract with unions are favorably inclined to the presentation of grievances independent of the collective agreement by non-conforming individuals." TELLER, A LABOR POLICY FOR AMERICA 162 (1945).

countered by the National War Labor Board,<sup>77</sup> and still persists in proceedings under the Railway Labor Act.<sup>78</sup> It is hard to discern the practical effects of the change in language. Under the Wagner Act, it was recognized that the right of individual employees to "present" grievances meant something more than merely calling them to the attention of the employer. However, the "old" NLRB adopted the policy that where the individual elected to prosecute his own grievance, disposition thereof would still require agreement of the collective bargaining representative as well as the employer and employee.<sup>79</sup> The new Act, it is true, eliminates the union from such tripartite adjustment since the employer can decide that the adjustment is not inconsistent with the contract; but after the claim is adjusted as to the individual employee, it seems that the union could usually still press any matter of precedent or principle involved, either by adopting the grievance as its own or by instituting proceedings before the Board or a court. However, it will be under the obvious handicap of trying to upset an already-made settlement.

It is probable that the statutory change will have little effect on the terms of grievance procedure clauses. Obviously, grievance procedure is a proper subject for collective bargaining.<sup>80</sup> And the exclusive bargaining representative can therefore appropriately continue to provide for the handling of grievances through its agents. Probably no wording of the grievance clause can effectively deprive non-union employees of the statutory right to present their own grievances, if they so elect, because they are not signatory parties to the collective agreement and the statute precludes the union from acting as their agent on this issue. But the unions will undoubtedly undertake to establish exclusive authorization to exercise the grievance rights of their members, as a matter

<sup>77</sup> Under WLB practice, the employee was allowed a choice at the first step in the grievance procedure whether to present his own grievance. See *Aluminum Co. of America*, 12 War Lab. Rep. 446, 454 (1943); *Celanese Corp. of America*, 17 War Lab. Rep. 510 (1944).

<sup>78</sup> *Elgin, Joliet & E. Ry. v. Burley*, 325 U. S. 661 (1945), *aff'd on rehearing*, 327 U. S. 661 (1946). The Supreme Court held that the bargaining power which the Railway Labor Act confers on the majority representative does not include power to settle or submit to the National Railroad Adjustment Board accrued wage claims of employees arising from alleged breach of the union contract, and that individual workers could collaterally attack a settlement made by the union, by subsequent suit on their claims, provided that they had not in fact authorized the union to act for them. On rehearing, granted upon a showing that the Adjustment Board had been forced to suspend operations because of the instability created by this decision, the Court stuck by its ruling but hinted broadly that the individual employees would find it impossible to sustain the burden of proving that they had not at least tacitly "authorized" the union to act.

<sup>79</sup> *Hughes Tool Co.*, 56 N. L. R. B. 981 (1944). Such recognition of the union's interest was inferentially approved by the courts. *Elgin, Joliet & E. Ry. v. Burley*, *supra* note 78; *Hughes Tool Co. v. NLRB*, 147 F. 2d 69 (C. C. A. 5th 1945). *But cf.* *NLRB v. North American Aviation, Inc.*, 136 F. 2d 898 (C. C. A. 9th 1943).

<sup>80</sup> *Atlantic Coast Line Ry. v. Pope*, 119 F. 2d 39 (C. C. A. 4th 1940). Note that §§2(5), 8(d) of the Act expressly contemplate grievance handling by the collective bargaining representative.

of internal administration. It is at least questionable that the statutory language is strong enough to preclude express or implied waiver of individual grievance rights.<sup>81</sup>

It has been suggested that control of grievances through individual settlements is a sufficient weapon to break any union.<sup>82</sup> Present union strength perhaps takes some force from the suggestion; but certainly the tendency of individual handling is to imperil stability, impair union discipline and impede expeditious adjustments. It may be that the change in statutory language will inspire a new counter-attack on union gains. But a careful consideration of the potentialities of the grievance procedure as a strike-preventive should precede any decision to convert it to a weapon of offense.

## VI

### OTHER CLAUSES

The terms of the Taft-Hartley Act call for reconsideration of various other clauses commonly included in the collective bargaining agreement, although the extent to which the Act will bring about changes in them is far from clear. There are still many nebulae in the ambit of the Wagner Act, even after twelve years of interpretation; this suggests how remote is any real concept of the new statute in its far more complex impacts. Only the more obvious questions which will face labor and management negotiators are indicated here.

#### A. "Featherbedding"

That provision of the Act whose ostensible purpose was perhaps most widely approved, seems likely to present one of the thorniest problems. Section 8(b)(6) makes it an unfair practice for a labor organization or its agents

"to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other things of value, in the nature of an exaction, for services which are not performed or not to be performed."

This provision was submitted to Congress as having been designed to apply to industry generally a policy similar to that which Congress had adopted with respect to the broadcasting industry in the Lea Act.<sup>83</sup>

<sup>81</sup> See note 78 *supra*. The *Elgin* opinions clearly indicate that the union can acquire the exclusive right to process grievances by acquiescence, usage or the terms of the union by-laws, as effectively as by individual powers of attorney. In *NLRB v. North American Aviation, Inc.*, 136 F. 2d 898 (C. C. A. 9th 1943), the court noted that it was not required to pass on the question of whether the employee can effectively divest himself of the right to present his own grievance.

<sup>82</sup> See Katz, *supra* note 72, at 254; H. R. REP. No. 245, 80th Cong., 1st Sess. 85 (1947).

<sup>83</sup> 60 STAT. 89 (1946), 47 U. S. C. A. §506 (Supp. 1946); see H. R. REP. No. 245, 80th Cong., 1st Sess. 25 (1947).

The latter statute, whose effectiveness remains undetermined, undertook to eliminate various practices attributed to the American Federation of Musicians, such as compelling an employer to pay for stand-by musicians whom he did not need.<sup>84</sup>

The problem is that the words of Section 8(b) (6) might be applied literally to prohibit payments for various types of non-productive activity which have come to be regarded in some areas as sound business practice. Thus there may be called into question the validity of contract provisions—and the use of economic pressure to obtain or enforce them—for compensation of such “non-working” time as rest periods, lunch periods, breakdown time, make-ready time, on-call time, travel time, vacations, sick-leave, holidays, spell-periods and grievance-presentation time. Other contract items which might be affected are call-in pay, severance pay, back-pay for improper discharge, stand-by pay for emergency crews, work-distribution plans, and guaranteed minimum wages on a weekly, annual or other basis.<sup>85</sup>

It seems safe to assume the Congress did not intend to forbid demands for compensation in all of these instances,<sup>86</sup> and that there is a dividing line somewhere between, say, insistence on waiting-time pay on the one hand and “extortion” of pay for employees whom the employer does not want, on the other. Obviously, any such distinction is more one of degree than of kind, however, and the Act is barren of any express standard whereby the dichotomy can be charted. Such charting will inevitably, it seems, be a long, contorted and contradictory process, reflecting in large degree the economic and social predilections of the particular administrative or judicial tribunal to which a given state of facts is presented.

### B. *Jurisdiction of Work*

Section 8(b) (4) (D), originally drawn to prohibit only the jurisdictional strike where two or more unions were involved,<sup>87</sup> provides as enacted that it shall be an unfair labor practice to strike or boycott to require an employer to assign work to one union, *trade, craft* or *class* as against any other, unless the employer is failing to conform with a Board order or certification relative thereto. From the standpoint of the union, this provision will make it highly important to define the

<sup>84</sup> *United States v. Petrillo*, 67 Sup. Ct. 1538 (1947). The Supreme Court reversed on technical grounds a decision that the Lea Act was unconstitutional, and remanded for further consideration the issue of its validity as applied.

<sup>85</sup> Labor is here caught between two fires. Compensation for many of these items will not be recoverable unless expressly provided for in the contract, by reason of the Portal to Portal Act of 1947, Pub. L. No. 49, 80th Cong., 1st Sess. §4 (May 14, 1947); and yet even a demand for such contract provisions may be an “attempt to cause an employer to pay” in violation of §8(b) (6).

<sup>86</sup> See, e.g., 93 CONG. REC. 6603 (June 5, 1947).

<sup>87</sup> 93 CONG. REC. 7002 (June 12, 1947).



coverage of the union contract with considerable specificity. If the definition of jobs covered is ambiguous, the employer may be in a position to use the familiar weapon of shifting the work to other groups, while self-help in defense is forbidden to the union.<sup>88</sup> Careful definition will also be important to the employer if he wishes to avoid NLRB interference with work assignment.

Moreover, it should be noted that the NLRB is expressly authorized to arbitrate such disputes only after a strike or boycott has actually occurred.<sup>89</sup> Consequently, it may be desirable, in the interests of uninterrupted production, to provide in the contract for arbitration or an umpire to resolve any disagreement as to jurisdiction of work.

### C. "Hot Goods" and Other Boycotts

Agreements that non-union materials and services shall not be used in the business, that employees shall not be required to work on projects where union standards are not observed nor to engage in "strike-breaking" activities, and the like, have come into fairly general use—for reasons recognized at least as early as 1921 by Chief Justice Taft.<sup>90</sup> The development of such contract clauses has been encouraged by a growing trend in the last two decades toward legislative and judicial recognition that legitimate interests of organized employees may in at least some instances extend beyond their own plant.<sup>91</sup> The Taft-Hartley Act undertakes to reverse that trend by prohibiting not only secondary strikes and boycotts generally but even certain types of primary boycott.<sup>92</sup>

The variety of "hot-goods" and related clauses in use, and the statutory repudiation of recent precedent do not encourage generalizations as to the legal validity of such provisions under the new Act. The language of the statute is certainly broad enough to lend color to the view that it outlaws the making of most such agreements as well as the use of self-help to obtain or enforce them.<sup>93</sup> It is perhaps more realistic

<sup>88</sup> Although the union might have a theoretical remedy against the employer for work discrimination, it would seem difficult in such cases to meet the new standards of proof prescribed. §§8(a)(3), 10(b), 10(c). But if the union attempts to fight fire with fire, it will subject itself not only to unfair practice proceedings, but also to NLRB suit for injunction and to liability in damages. §§10(1), 303.

<sup>89</sup> §10(k). A narrow interpretation of this section may be indicated by the Board's long-standing reluctance to become involved in the explosive jurisdictional dispute problems. See 2 NLRB ANN. REP. 119-122 (1937).

<sup>90</sup> "Union was essential to give laborers opportunity to deal on equality with their employer. . . . To render this combination at all effective, employees must make their combination extend beyond one shop." *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 209 (1921).

<sup>91</sup> See GREGORY, *LABOR AND THE LAW* 132 *et seq.*, 191 (1946); 1 TELLER, *LABOR DISPUTES AND COLLECTIVE BARGAINING* §§103, 145 (1940), and authorities there collected.

<sup>92</sup> §§8(b)(4), 303. See 93 CONG. REC. 4155, 4156 (April 25, 1947); 93 *id.* at 4261 (April 28, 1947); 93 *id.* at 4321-4324 (April 29, 1941).

<sup>93</sup> A "concerted refusal" to handle goods or render services suffices to contravene §§8(b)(4) and 303. The vice of the boycott has generally been deemed its interference with a free market. See 1 TELLER, *op. cit. supra* note 91, §142. That

to estimate the effects not so much in terms of technical legality as of the practical probability that the younger unions will no longer be able to negotiate such clauses, while well-entrenched organizations may prefer to rely upon tacit understandings and subsurface pressures rather than expose themselves to litigation over express boycott agreements.<sup>94</sup>

#### D. Welfare Fund Clauses

The restriction of welfare fund clauses is another example of issues which the Act removes from the area of private bargaining and subjects to government control. Many employers were thoroughly alarmed by what they saw as potential war chests which a steadily increasing number of unions were building up under the banner of sound social planning.<sup>95</sup> Their *bête noir* was the United Mineworkers' demand for a welfare fund levy of ten cents per ton of production.<sup>96</sup> The speed with which welfare fund plans were spreading<sup>97</sup> left Congress unwilling to defer regulation of the practice pending the thorough study which was urged. Electing to pounce promptly and look later, Congress imposed extensive restrictions upon welfare funds and at the same time put them on the agenda of the Joint Committee on Labor-Management Relations for further consideration.<sup>98</sup> Consequently, amendatory legislation seems probable though its direction is debatable.

Meanwhile, welfare fund agreements must conform to statutory provisions which limit the permissible objects of such funds, provide certain standards of administration including compulsory participation by the employer, and make an exception of certain pre-existing funds designed to appease the most vocal objectors to regulation.<sup>99</sup> Failure to meet the statutory requirements will subject both employer and union to criminal prosecution.

In this connection, it should be noted that, subject only to the express exceptions of the statute, as in the case of permitted forms of welfare fund and check-off, any payment whatever by employer to union is made

vice is no whit lessened by the fact that the immediate employer is willing to include a "hot-goods" or similar clause in the collective agreement.

<sup>94</sup> Since "whoever shall be injured in his business or property" can sue for damages under §303, reducing any such boycott arrangement to writing may involve a considerable risk.

<sup>95</sup> For a recent discussion of the social and economic implications of the welfare-fund movement, see Tannenbaum, *The Social Function of Trade Unionism*, 62 *POL. SCI. Q.* 161, 187-189 (1947).

<sup>96</sup> See *SEN. REP.* No. 105, 80th Cong., 1st Sess. 52 (1947); 93 *CONG. REC.* 4805-4807 (May 7, 1947); 93 *id.* at 4876-4883 (May 8, 1947).

<sup>97</sup> An estimated 600,000 workers covered by such plans in 1945 had increased to 1,250,000 in 1946. *B. L. S. BULL.* No. 841, *Health Benefit Programs Established through Collective Bargaining 2* (U. S. Dept. Labor 1945); 64 *MO. LAB. REV.* 191 (1947).

<sup>98</sup> §§302(c)(5), 402(5).

<sup>99</sup> §302(g). For example, an exception was made to take care of the I. L. G. W. U. pooled vacation benefit plan. 93 *CONG. REC.* 4881 (May 8, 1947).

a criminal act.<sup>100</sup> Various contract clauses may be affected. Thus, employers desirous of avoiding complications of apportionment have sometimes arranged to pay miscellaneous benefits to the union for distribution to the employees it represents. Any such arrangements would now appear to involve fines up to \$10,000 and imprisonment for as much as a year for the employer, the union and their respective agents.

### E. Supervisors

Although a major incentive to recent labor legislation was the growing tendency to absorb supervisory personnel into labor organizations, the Act does not prohibit continuance of the practice so long as it can be achieved without government assistance. The recent decision of the Supreme Court in *Packard Motor Car Co. v. NLRB*<sup>101</sup> is vitiated by expressly excluding supervisors from the definition of employee<sup>102</sup> and thereby from protection against discrimination, refusal to bargain and other unfair labor practices. However, the Act disclaims any intent to forbid supervisors to join labor organizations;<sup>103</sup> and supervisors apparently can be covered in the same contract which applies to rank and file employees without penalty, if the union is able to negotiate such coverage.

On the other hand, while the employer is not required by the Act to bargain with any representative with respect to supervisors, if the supervisors are strong enough as a unit to insist upon a separate contract, it will apparently be free from the restrictions imposed upon other collective bargaining agreements. So far as the Act is concerned, it could lawfully provide for such things as a closed shop, boycott of non-union customers and suppliers, and unrestricted union welfare funds.

### F. Modification or Termination

The Act in effect writes into every collective agreement, irrespective of its express terms, a requirement that at least 60-days notice be given before either party can modify or terminate it. During this period, unless another union is certified, there are imposed the further obligations to negotiate with respect to amendments or a new contract, to notify the appropriate conciliation or mediation agencies if no agreement has been reached within 30 days, and to continue the existing contract in effect without strike or lockout until its expiration or for 60 days, whichever period is longer.<sup>104</sup> Not only are employer and union subject to unfair practice charges for failure to observe these automatic extension provisions; employees who strike during the period lose all

<sup>100</sup> §302(d). This also appears to be the one situation in which the Act undertakes to authorize private injunction suits. §302(e).

<sup>101</sup> 330 U. S. 485 (1947).

<sup>102</sup> §§2(3), 501(3); see note 66 *supra*.

<sup>103</sup> §14(a).

<sup>104</sup> §8(d).

voting and reinstatement rights with respect to the employer engaged in the dispute, unless and until they are reemployed.<sup>105</sup>

The foregoing requirements are subject to the express qualification that neither party is required to negotiate for modification of any provision of the contract where such modification is to be effective before the contract permits reopening of such provision.

In appropriate cases, these statutory controls may make it important not only to provide in the agreement what if any contract terms may be reopened and when, but also to indicate specifically whether any items have been deliberately omitted from the agreement with the intention of continuing negotiations.

## VII

### FUTURE OF THE COLLECTIVE AGREEMENT

It is virtually a foregone conclusion that the Taft-Hartley Act will be amended. Even its sponsors apparently concede that legislation on so broad a scale was experimental, and that trial has already disclosed error.<sup>106</sup> When, how and in what degree the statute will be modified is, however, less obvious.

As suggested at the beginning, the Act provides no substitute for collective bargaining as the basic machinery for industrial peace, although it does proscribe certain ends and means which Congress deemed to be the subject of abuse. In particular, unions are subjected to sanctions which at least in form parallel those to which management was subjected by the Wagner Act. There are those who contend that there is no adequate analogy, and that the new remedies prescribed are more vicious than the abuses found. There are others who insist that the Act does not go far enough—that government regulation is required on issues yet untouched. Which argument will prevail in shaping the course of future legislation largely depends upon whether the practice of voluntarism matures, and justifies the faith which it has thus far been able to command.

<sup>105</sup> The minority report of the Senate committee was highly critical of the inequality of this provision: "Under this section an employer desirous of ridding himself either of the employees or their representative can engage in the most provocative conduct without fear of redress except by way of a lengthy hearing before the Board and a subsequent admonition to thereafter 'cease and desist' from such practices. In striking contrast to the relatively delicate treatment provided for such action by an employer, employees unwilling idly to countenance abuse . . . are removed from the protection of the statute and lose 'employee' status." SEN. REP. No. 105, Pt. 2, 80th Cong., 1st Sess. 21, 22 (1947).

<sup>106</sup> Senator Taft is reportedly receptive to several proposed amendments, including authorization of the closed shop when approved by a majority of the employees. *Time*, Sept. 22, 1947, p. 24, col. 3; 1 P-H LAB. EQUIP. ¶4.2 (1947). A Gallup survey indicates that 45 per cent of the voters who had heard of the Act favored revision or repeal, 28 per cent desired no change and 27 per cent had no opinion. *Durham (N. C.) Morning Herald*, Oct. 2, 1947, §1, p. 10, col. 1.

Assuredly collective bargaining has not been an unqualified success. To critics who point out that strike-losses have increased since Congress adopted the policy of encouraging collective bargaining, answer can appropriately be made that such losses are more closely related to the economic and emotional disruptions of the past decade than to the Wagner Act, that that statute has almost wholly eliminated the strikes for recognition which comprised about half of pre-war work stoppages,<sup>107</sup> that recent strikes have infrequently been characterized by the crime and violence which threatened to get beyond control in the '30s, and that most strikes have occurred in industries where collective bargaining is still adolescent and unfamiliar.<sup>108</sup> These, however, are strictly defensive arguments. Unless the public is presented with more positive proof of the capacity of collective bargaining to minimize the damage incident to labor disputes, we are likely to see far more government intervention than the Taft-Hartley Act contemplates. The vision and skill of those who negotiate and draft the collective agreement will be a substantial factor in defining the measure of freedom which will be left to the process.

<sup>107</sup> According to Bureau of Labor Statistics compilations. 63 Mo. LAB. REV. 886 (1946); 54 *id.* at 1125 (1942).

<sup>108</sup> See B. L. S. Bull. No. 878, *Work Stoppages Caused by Labor-Management Disputes*, Table 4 (U. S. Dept. Labor 1946).